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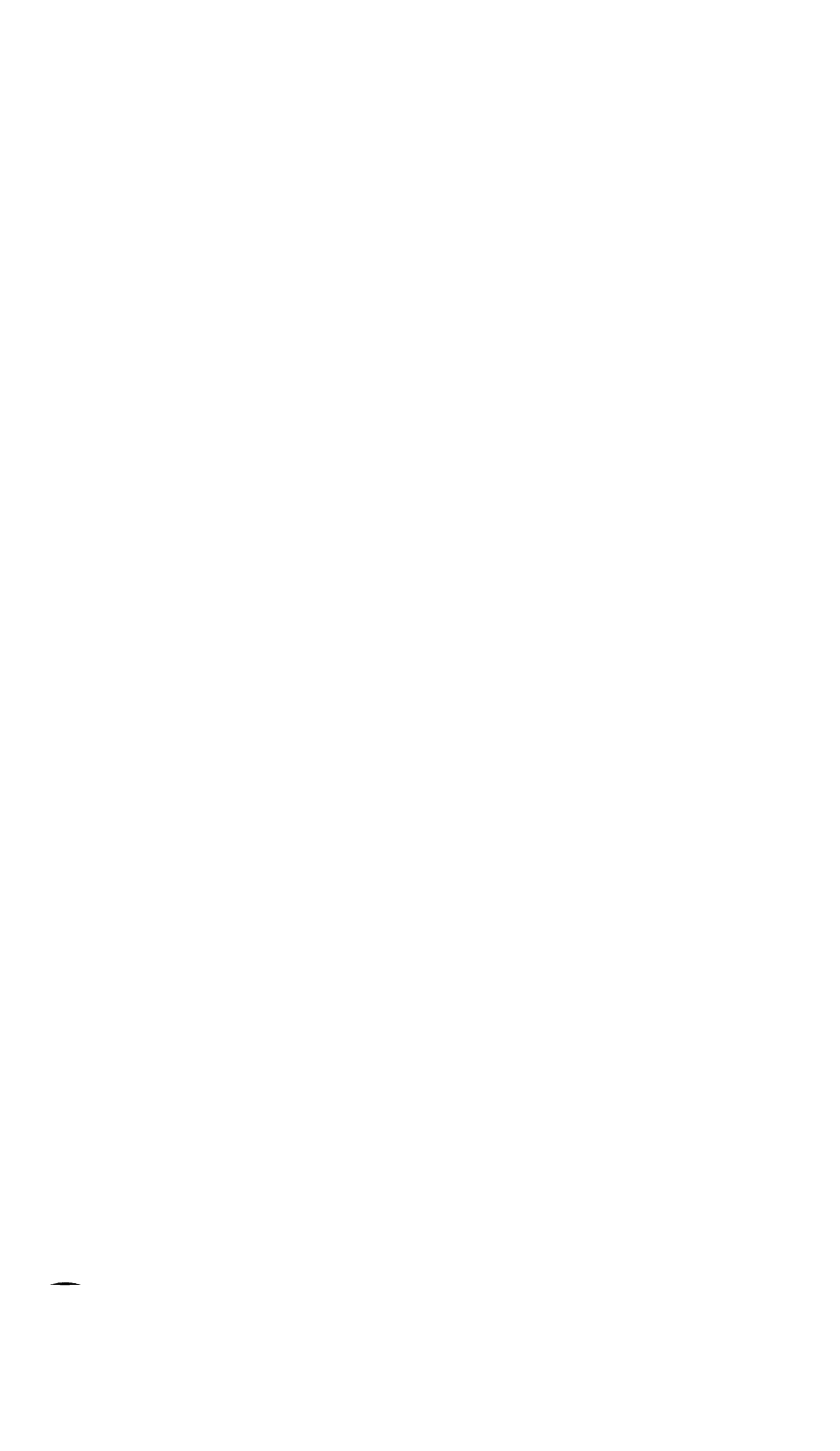
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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

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By A. C. FREEMAN.

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CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

HOOKER v. BURR.

[137 Cal. 663, 70 Pac. 778.]

A CONVEYANCE Absolute in Form, but Intended to Secure the Payment of Debts Due to the Grantee is a mortgage, and, subject thereto, the title of the grantor is affected by the lien of a judgment subsequently entered against him. (p. 19.)

EXECUTION SALE, Redemption Therefrom—Authority of the Sheriff.—The sheriff is made the agent of the purchaser at an execution sale for the purpose of receiving the payment of money necessary to effect redemption therefrom. (p. 21.)

EXECUTION SALE, Redemption from by a Check.—If a sheriff receives as redemption from an execution sale the check of a third person acting as agent of the redemptioner, and such check is paid when presented, though this is long after the time for redemption has passed, the conditional payment effected by the check becomes absolute, and relates to the date of its delivery. Especially is this true when the redemptioner offered to pay in money, but substituted the check at the request of the sheriff. (pp. 21, 22.)

EXECUTION SALE, Redemption, Change in Statute Regarding the Amount to be Paid.—Though after the execution of a mortgage or the creation of a debt, the statute fixing the amount necessary to be paid to redeem from an execution sale is amended, such amendment operates upon any sale subsequently made under execution for the enforcement of the mortgage or debt. The obligation of the contract of the mortgagee or other creditor is not thereby impaired, and the purchaser at the sale cannot complain if the amount required for redemption is not changed after his purchase. (p. 24.)

J. S. Chapman, for the appellant.

E. C. Bower and Anderson & Anderson, for the respondents.

664 HENSHAW, J. Plaintiff Hooker was the purchaser at foreclosure sale of land which had been mortgaged by the Spencers. Defendant Rhodes, by assignment, had become the

owner of a judgment which one Nicholls had recovered against Anna T. Spencer (in whom the legal title to the mortgaged property stood). Nicholls' judgment was docketed in October, 1897. The mortgaged property was sold upon the 13th of June, 1898. Rhodes, as substituted judgment creditor under the Nicholls' judgment, claimed his rights as redemptioner, and, by payment to the sheriff, effected a redemption of the mortgaged property, in due time receiving the sheriff's deed therefor. Thereafter Hooker commenced this action, making defendants Rhodes and the two sheriffs of Los Angeles county, the one with whom Rhodes' redemption had been effected, and the other by whom the deed had been executed.

The facts are not in serious dispute. The controversies between the parties turn rather upon the legal consequences and effects of their admitted acts and transactions. Plaintiff for relief asked the cancellation of the deed made to Rhodes, that Rhodes be restrained from interfering with, or disposing of, the property, and that the sheriff be compelled to make proper conveyance to him. The court found that the mortgagor Spencer at the time of the docketing of the Nicholls' judgment retained and had an interest in the property; that Rhodes was a redemptioner, and had duly redeemed, and gave judgment in accordance with these findings.

Appellant's contention is, that the Nicholls' judgment never became a lien upon the property, because upon the 10th of June, 1897, Mrs. Spencer had conveyed all her right, title and interest in and to the property to Orange E. Dickey. Orange E. Dickey upon the same day conveyed the property to Charles J. Shepherd. It is contended by appellant that these deeds were absolute and stripped Mrs. Spencer of the last vestige of title to the property in controversy. The court, however, found that at the date of the execution of the deeds, ⁹⁸⁵ and thereafter, Mrs. Spencer was indebted to Charles J. Shepherd in the sum of about two thousand five hundred dollars, and that the deed to Dickey (proved to have been without consideration, excepting such as flowed to his grantee Shepherd) and the deed from Dickey to Shepherd were executed for the purpose of, and intended as, security to Charles J. Shepherd for the debt which Anna Spencer then owed him, and for future advances contemplated to be made to her and for her account, and that these deeds did not divest Anna Spencer of her title to the property. This finding, we think, is abundantly supported by the evidence. Mrs. Spencer had become involved—she owed

Shepherd; she experienced great difficulty by reason of lawsuits in retaining the property which she then owned; she was in debt and in litigation, and finally, through her attorney, as he testified, "the scheme was concocted" and carried into effect by which the deeds in question were made. Her attorney thus testified: "The purpose of making the deed was, that the property should be put in the name of Mr. Shepherd for the purpose of taking it and securing all the moneys that he had advanced, and if it became necessary for him to mortgage it, to do so, and that there should be no agreement back of it that anybody could dig up, and—for the purpose of interfering—we had been handicapped in every way wherever we had gone to arrange for money, we had been told inside of twenty-four hours that somebody had been there making dire threats about what they were going to do with reference to ripping up any arrangements that we had made, because of the fact that Mrs. Spencer was involved." The alternative conclusion is forced therefore, from this and other like evidence, that the deed was absolutely void, as being in fraud of the creditors, or else that it was a legitimate transaction, by way of mortgage, to secure Shepherd in his pre-existing debt, and in such other advances as he might make in the preservation of Mrs. Spencer's property. The court adopted the latter view, and, without elaborating upon the additional evidence in support of it, it is sufficient to say that the finding is fully sustained.

The effect of this finding is to establish Rhodes' position as a recognized redemptioner, and the remaining questions touch the matter of his redemption. The pertinent facts are the following: About the twelfth day of December, 1898, ~~see~~ Rhodes called up Hooker on the telephone and told him that he intended to redeem the Broadway property bought by him, and made an engagement to meet him at his place of business that day at 2 o'clock in the afternoon. Rhodes went to Hooker's place, and Hooker failed to meet his engagement. That evening, about 6 o'clock, Rhodes, accompanied by Mr. Anderson, drove to Hooker's residence, carried with him the notice required by law to make the redemption, and also carried ten thousand five hundred dollars in gold coin, to pay Hooker the necessary amount to effect the redemption. The servant who answered the bell said that Mr. Hooker was in. Mr. Rhodes and Mr. Anderson requested her to tell Mr. Hooker that they wished to see him. Upon her return she said that Mr. Hooker was not in. They placed the money that night in a drawer

of the First National Bank for safekeeping, but did not make a deposit of it. The next morning Clark and Rhodes went to the sheriff's office, saw the sheriff, told him that Rhodes was going to make a redemption, stated that Rhodes had the gold coin on hand with which to make the payment, and they would bring up the gold coin from the bank for that purpose. The sheriff responded that he would rather have a certified check than the money, and to bring up a certified check. The ten thousand five hundred dollars in gold was then placed in the First National Bank, and Mr. Clark took out his certified check for ten thousand and seventy dollars and delivered it to the sheriff for Rhodes in redemption payment. The sheriff accepted the check, and upon the same day notified Mr. Hooker that he had his money upon the redemption of the property. Hooker declined to accept the money from the sheriff. The sheriff, in fact, had not cashed the check, nor did he cash it until some eleven months later, after this suit was commenced. The check was then actually cashed, and the money upon it received in gold coin. The check could have been cashed in gold coin upon any banking day prior thereto. Mr. Hooker did not know that the redemption had been effected by check until after the commencement of his action, when his pleading was amended to cover this point. He did, however, believe that the money had been paid, and had, as has been stated, refused to accept it. At the time this mortgage was executed, to make redemption it was necessary to pay the amount of the purchase money, with two per cent per month up to the time of redemption. In 1897 the code ⁶⁶⁷ provision was changed, and it now requires from the redemptioner the purchase money with one per cent per month from the date of the sale: Code Civ. Proc., sec. 702. It is admitted that the amount actually paid—ten thousand and seventy dollars—was the amount of the purchase money, with one per cent per month added.

Upon these facts various propositions are advanced and argued.

1. That the check was the check of Clark, and that Clark was admittedly not a redemptioner, and that therefore there was no redemption. But Clark, it affirmatively appears, was acting as the agent of Rhodes and had declared himself to be so acting and when the sheriff accepted the check he accepted it on behalf of Rhodes, and for the purpose of effecting the Rhodes' redemption. If under all the circumstances of the case,

which are to be considered hereinafter, the reception of this check amounted to payment, in proper amount and of proper money, appellant may not here be heard to complain that the check was not actually the check of Rhodes.

2. The same may be said of the further objection, that the judgment called for satisfaction in gold coin of the United States, and that the check was not in terms made payable in gold coin. But the check in fact was paid with gold coin, and if in other respects the transaction was regular, appellant has received precisely what the law entitled him to receive, and has not been injured.

3. It is said that the tender and acceptance of the check constituted no payment whatsoever. Herein reliance is placed upon the case of *Thorne v. San Francisco* (*People v. Hays*), 4 Cal. 127, where redemption was effected by the mayor of San Francisco, acting on behalf of the city, by giving to the sheriff his personal certified check. The check was received and the next day was cashed. Upon this it was said: "Such pretended payment was made by delivering private checks of such individuals to the sheriff. This was no payment under our laws. The constitution forbids it. This is emphatically a hard-money state." But *Thorne v. San Francisco*, 4 Cal. 127, was decided by a divided court, and since then has been distinctly overruled upon other matters, and upon this particular question has never been followed. The later doctrine and ~~our~~ rule of decisions in cases such as this, as will be seen from the authorities hereinafter cited, is exactly the opposite.

The sheriff is made the agent of the purchaser for the purpose of receiving payment. It is true that his agency is a limited agency, and that his act does not bind the purchaser upon any matters outside of the payment, and only upon those when, in compliance with the law, payment in money sufficient in amount and kind has been made. In general mercantile and commercial transactions a check, after all, is but a convenient form of transferring money, and operates either as payment absolute or payment conditional, as the parties themselves intend: *Savings etc. Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Comptoir etc. v. Dresbach*, 78 Cal. 15, 20 Pac. 28. But in all such transactions where a check is received as conditional payment the payment becomes absolute and relates to the date of the delivery of the check when its recipient actually cashes it. There is, of course, a broad distinction between tender and absolute or conditional payment. The redemptioner might tender

anything he chose by way of payment to the purchaser, and the purchaser might accept the money or article tendered, or the purchaser might waive any and every objection to the tender—its time, amount, nature—and if he did so the tender, however inadequate in fact, would thus become sufficient in law. Upon the other hand, the purchaser might reject a tendered check, simple or certified, and his rejection would be valid, because a tender made by check is not legal and cannot, therefore, be enforced. The position of the sheriff, acting under his limited agency, is, however, markedly different. He is the agent merely for the purpose of receiving payment, and that payment to bind his principal, must be made in the amount and kind of money to which the principal is entitled. He, too, of course, could refuse the tender of a check; but if in a bona fide transaction he accepts a check as conditional payment, and that check is regularly paid, his principal has suffered no detriment, and the transaction under modern business methods has come to be regarded as perfectly legitimate and quite within the scope of the agent's authority. Thus in *Jessup v. Carey*, 61 Ind. 584, Walton gave his check for the amount of redemption to the clerk who was authorized by statute to receive money upon redemption. The clerk ~~ess~~ deposited the check, and the contention was made there, as here, that the check was not payment, and that there had been no redemption. But the court said: "It was not an improper nor illegal mode of payment, for the appellant, Walton, gave his check on a bank in this state for the amount of the redemption money to the clerk of the court, who was willing to receive the check as so much money. If the appellant, Walton, had the money to his credit in bank subject to his check, and the clerk of the court was willing to and did receive his check as so much money, the transaction was fully sanctioned by the ordinary usages of business, and was certainly not an illegal payment, if it culminated in the actual payment of the amount of the check upon presentation therefor." In *Webb v. Watson*, 18 Iowa, 537, the fact that the mere presentation of the check does not constitute absolute payment, but is conditional merely, becoming absolute upon the cashing of the check, is pointed out, and it is added: "And if in good faith the defendant pays and the clerk receives the ordinary banker's check, and especially of a banker resident in the place where the business is transacted, upon which he realizes the money when demanded, though after the expiration of the time, having the same ready to pay to the holder

of the certificate promptly and without trouble to him, it seems to us that it would not be difficult upon principle to uphold the redemption, and to hold that the creditor or purchaser was bound to take the money and surrender his claim to the land." In *Carter v. Lewis*, 27 Mich. 241, the syllabus accurately states the opinion and decision of the court in the following language: "Where the register of deeds has no authority under the statute to receive anything but money in redemption of a foreclosed mortgage, yet when one desiring to redeem goes to the register prepared to pay the money and offers to pay it, and the register knowing the amount, but being too busy to count the money, requests him to place the money in a bank and give a check for the amount, and he does so, and the register after the expiration of the time for redemption receives for the check a certificate of deposit in his own name for the amount, it cannot be said that this is not such a payment of the money to the register as operates under the statute to redeem the mortgage." And so likewise the United States circuit court, in *Buford v. Henzler*, 970 8 Biss. 177, held, under similar facts, that if the amount necessary to redeem from a sheriff's sale is paid to the proper officer in a bank draft, which is accepted by the officer, but not actually collected until after the expiration of the time for redemption, the redemption is nevertheless complete. It is not essential that the payment be made in money, unless so required by the officer.

In the case at bar it was wholly for the convenience and at the request of the sheriff that the certified check was substituted for the gold coin which was offered to be paid, and in seasonable time the check was cashed in gold coin and the actual money taken into the custody of the sheriff. The redemption in this respect was certainly sufficient.

4. It is next contended that the redemption was insufficient for the amount; that the law at the time of the making of the mortgage entered into and became a part of the contract; that by that law the redemptioner was required to pay two per cent per month in addition to the purchase money, while it is an admitted fact in this case that but one per cent was paid. In brief, it is contended that to permit section 702 of the Code of Civil Procedure, as amended in 1897, to operate upon the contract is to impair its obligation. Herein especial reliance is had upon the case of *Barnitz v. Beverley*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, which is said to be conclusive upon the

question. In the earlier case of *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. Rep. 236, that same august tribunal, having under consideration a case identical in principle to the one here in question, wherein the rights of the purchaser were involved, held that a law passed subsequent to the mortgage, and reducing the interest to be paid to a purchaser at such sale, was operative and did not interfere with the rights of the purchaser, whose contract did not exist until the time of the sale, and was governed by the laws in force at such time. Much nice reasoning is indulged in here to show that the principle declared in the *Cushman* case has been overruled in the later case upon which appellant relies. But upon that question the supreme court of the United States has itself spoken in *Barnitz v. Beverley*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, and has said: "The case of *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. Rep. 236, does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay,⁶⁷¹ nor affect the time of the payment, nor affect any remedy which the mortgagee had by existing law for the enforcement of his contract." This determination of the supreme court of the United States upon one of its own decisions is, of course, absolutely binding upon this court. The essential distinction seems to be that if the party complaining of the operation of the law is himself not injured by it, if the obligations of his contract are not impaired, he cannot be heard to complain, nor will the law be held as to him to violate any of his rights. It may be added that since the decision in the case of *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515, where this question first arose with us, and where the same conclusion was reached and expressed as by the United States supreme court in the *Cushman* case, the rule in this state has always been the contrary of that contended for by appellant.

This concludes a review of the principal points argued upon these appeals. Certain errors of the trial court in the admission and rejection of evidence are also presented. They have been examined, but we do not find that in any of them appellant has suffered injury.

The judgment and order appealed from are therefore affirmed.

McFarland, J., and Temple, J., concurred.

Hearing in Bank denied.

The Judgment in the Principal Case was affirmed by the supreme court of the United States in 194 U. S. 415, 24 Sup. Ct. Rep. 707. Its opinion in affirmance is as follows:

"The plaintiff in error contends that the several alterations of the law as it existed at the time when this mortgage was executed, regarding the time of redemption and the amount of interest payable to the purchaser at the foreclosure sale in order to redeem the land sold, impair the obligation of a contract as to all the mortgages in existence before the alterations were made.

"The first inquiry is, Whose contract was impaired by the alteration of the law? It is seen that the amount due on the mortgage in question at the time of the sale upon foreclosure was six thousand seven hundred and eighty-two dollars and forty-nine cents, and that the property sold for nine thousand five hundred dollars. That amount was paid by the purchaser to the sheriff, and it resulted in the payment of the mortgage debt, principal and interest, and the release of the land from the lien of the mortgage. Subsequently to that payment the mortgagee had no interest in further proceedings. Neither the mortgagee nor his assignee was the purchaser at the sale, and neither was in any manner injured by the alterations of the law in the respects mentioned. If, therefore, there was by this legislation an impairment of the obligation of a contract between the mortgagor and the mortgagee, which the latter could have taken advantage of if injured thereby, it is perfectly clear that he is not in the least injured when, by the sale under his mortgage, he realizes the full amount of his debt, principal, interest, and costs. What can he complain of under such circumstances, even conceding an abstract impairment of the obligation of his contract? Having realized and been paid in full the entire amount of money called for by his mortgage, he surely cannot be heard to complain that, nevertheless, the obligation of his contract was impaired. If not injured to the extent of a penny thereby, his abstract rights are unimportant.

"We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law, before the courts will listen to his complaint: *Tyler v. Registration Judges*, 179 U. S. 405, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon*, 187 U. S. 51, 60, 74, 23 Sup. Ct. Rep. 20. If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot, of course, ask the interference of the court. Therefore, if the mortgagee, or his assignee, were himself the plaintiff, and complaining that the obligation of his contract had been impaired by subsequent legislation, it is plain his complaint would be dismissed when it appeared that, notwithstanding the alleged subsequent illegal legislation, he suffered no injury, because he had proceeded with the foreclosure of his mortgage, and had been paid the full amount of his contract debt, interest, and

costs. Under such circumstances the question becomes a moot one, and courts do not sit to decide that character of question: *American Book Co. v. Kansas*, 193 U. S. 49, 24 Sup. Ct. Rep. 394; *Jones v. Montague*, decided April 25, 1904, 194 U. S. 147, 24 Sup. Ct. Rep. 611.

"The question of the impairment of the mortgage contract, therefore, is not before us as between mortgagor and mortgagee.

"We are of opinion that, as to the plaintiff in error, an independent purchaser at the foreclosure sale, having no connection whatever with the original contract between the mortgagor and mortgagee, his rights are to be determined by the law as it existed at the time he became a purchaser, unless, upon action taken by the mortgagee, the property had been sold under a decree providing that it should be sold without regard to the subsequent legislation which impaired his contract. The purchaser bought at the time when the law, as altered, was in operation, and, so far as he was concerned, it was a valid law; his contract was made under that law, and it is no business of his whether the original contract between the mortgagor and mortgagee was impaired or not by the subsequent legislation. He cannot be heard to contend that the original law applies to him, because a subsequent statute might be void as to some one else. The some one else might waive its illegality, or consent to its enforcement, or the question might have no importance because the property sold for enough to pay the debt, even though there was an abstract impairment of the obligation of his contract.

"The purchaser must found his rights upon the law as it existed when he purchased. An alteration after he had purchased, to his prejudice, would be a different thing: *Cooley's Constitutional Limitations*, 4th ed., 356. We agree that the law existing when a mortgage is made enters into, and becomes a part of, the contract; but that contract has nothing to do, so far as this question is concerned, with the contract of a purchaser at a foreclosure sale, having no other connection with the mortgage than that of a purchaser at such sale. His rights regarding matters of redemption are to be determined as we have stated.

"It has been so decided in the case of *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. Rep. 236. There the property was sold at foreclosure sale for enough to pay the mortgage debt (108 U. S. 56, 2 Sup. Ct. Rep. 241), and the reduction of the rate of interest which was payable to the purchaser at the foreclosure sale, upon a redemption (which reduction was made by the legislature prior to the sale, although subsequently to the mortgage), was held valid. The company, as purchaser at the foreclosure sale, bid enough to pay the principal and interest of its debt, and after the purchase it contended that the attempted redemption was insufficient because the interest upon the amount it had bid upon the sale had been computed at eight per cent, and the rate of interest allowed by

law at the time of the sale, instead of ten per cent, the rate existing at the time of the execution of the mortgage. It was held that, as to the purchaser, the rate existing at the time of the sale was the legal rate, and the redemption at that rate was valid. The principle of that case decides the one at bar.

"It is asserted, however, on the part of the plaintiff in error, that *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, has in effect overruled the former case, and that upon the principle decided in the *Barnitz* case, the plaintiff in error herein is entitled to a reversal of the judgment. We are not of that opinion.

"In the first place, it was distinctly stated in *Barnitz v. Beverly* 163 U. S. 118, 16 Sup. Ct. Rep. 1042, that was not inconsistent with, and did not overrule, the former case, and its facts show a clear distinction between the two cases. The sum bid at the foreclosure sale did not pay the amount due on the mortgage, and the whole case shows that, although the mortgagee became purchaser, the debt of the mortgagor was not thereby paid, and it was the mortgagee's rights under her contract, as contained in the mortgage, and not her rights as a purchaser at the foreclosure sale, that were in controversy.

"In the *Cushman* case, on the contrary, the amount bid at the foreclosure sale paid the mortgage debt, and the subsequent position of the mortgagee was as a purchaser only. The *Barnitz* case was decided distinctly upon the ground that, by the subsequent legislation, there was an impairment of the obligation of the contract between the mortgagor and the mortgagee, and it was her rights as mortgagee that were passed upon and recognized by the court. This is plain from a perusal of the opinion, especially at pages 130 and 131 of 163 U. S., 16 Sup. Ct. Rep. 1046, 1047.

"Attention is also called by plaintiff in error to a portion of the opinion in which it is stated that. 'Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.' And it is asserted that such a case is now before the court.

"These remarks must be interpreted in the light of the facts of the case, and must be limited in their application to the parties to the mortgage contract whose rights are impaired by subsequent legislation. If the mortgage had been foreclosed, and the mortgagee had thereby realized his debt, principal and interest, in full, upon the sale, there can be no doubt that he would not have been heard to assert the invalidity of the subsequent legislation, nor would an independent purchaser at the sale have been heard to make the same complaint. Of course, this does not include the case of a mortgagee who purchases at the foreclosure sale, and bids a price sufficient to pay his mortgage debt in full with interest, and an action thereafter commenced against him to set aside the sale because it was

made in violation of legislation subsequent to the mortgage. In such case we suppose there can be no doubt of the right of the mortgagee to assert, as a defense to the action, the unconstitutionality of the subsequent legislation as an impairment of his contract contained in the mortgage. But it may be said that where the legal or equitable rights of a party are not in any way touched, and he is in no way injured, he cannot be heard to complain of the impairment of the obligation of his contract, as a mere abstract proposition.

"Many of the earlier cases declare the invalidity of subsequent laws in regard to redemption of land sold under execution, which altered the law existing when a mortgage was made, and some of them, it would seem, have declared the laws unconstitutional, even at the suit of a purchaser at the sale. The leading case on the subject of redemption decides nothing as to the rights of a purchaser. It is that of *Bronson v. Kinzie*, 1 How. 311. In that case the subsequent legislation which was held to be invalid gave twelve months after sale in which to redeem, and provide that the property should not be sold under the foreclosure decree unless two-thirds of the amount which had previously been established by appraisers as the value of the property should be bid at the sale. The case came before the court upon a division of opinion. *Bronson*, the mortgagee, filed his bill to foreclose the mortgage, and asked for a decree that the mortgaged premises should be sold to the highest bidder without being subject to the rule established by the subsequent legislation. The motion was resisted on the part of the defendants, who moved that the decree should direct the sale according to the subsequent legislation and the judges were opposed in opinion as to the sale of the premises without regard to the subsequent law. This court held that the subsequent law was plainly one which impaired the obligation of the contract between the mortgagor and the mortgagee and, at the request of the mortgagee, and to prevent the impairment of the obligation of his contract, the court decreed that the sale should be made without reference to the law passed subsequently to the time of the execution of the mortgage contract.

"*McCracken v. Hayward*, 2 How. 608, arose in the same way and was decided substantially upon the authority of the last case. The mortgagee made the same request, that the marshal should sell the property without regard to the statute of Illinois passed subsequently to the execution of the mortgage, and it was held that his motion should be granted, because the subsequent legislation impaired his contract as mortgagee with the mortgagor.

"In *Gantly v. Ewing*, 3 How. 707, after the mortgage had been executed, the legislature passed an act which required, on sales upon execution issued upon a judgment that the property should first be appraised, and should not thereafter be sold on execution for a sum less than one-half the appraised value. The mortgagee foreclosed the mortgage, and upon the sale the premises were sold to the de-

indents for seventy-six dollars—not a tenth part of the mortgage debt. The property had not been valued prior to the sale, as required by the statute. An act had, however, been passed prior to the execution of the mortgage, requiring the sheriff on such sales to first offer the rents and profits of the real estate for a term of seven years and if the same did not bring enough to satisfy the execution, then the fee simple was to be offered for sale, and sold. This offer to sell the rents and profits was not in fact made. There were two questions upon which the judges were opposed: the one as to the effect of the failure to make the offer to sell the rents and profits, and the other regarding the effect of the failure to make the appraisal. A certificate of division of opinion was sent to this court. The action was, as stated in the opinion, one of ejectment, the defendants setting up and claiming under the sheriff's deed, and the plaintiff, the mortgagee, asking the court to instruct the jury that the deed was void because the rents and profits had not been offered for sale before the fee simple was sold, and also because the land had not been valued, as required by the statute, before the sale was made. That mortgagee was thus the party claiming that the sale under his own foreclosure was void because of the failure to comply with the subsequent legislation of Indiana, while the defendants who bid at the sale and became the purchasers of the land insisted that the act (existing when they purchased) was unconstitutional, because it altered the law as it existed when the mortgage was made, and required that the land should not be sold until it had been appraised, and then only after at least one-half of the value so appraised had been bid. This court held that the offer to sell the rents and profits for seven years, as provided for by the statute existing prior to the execution of the mortgage, should have been made, and that the sale, such offer not having been made, was void; but it held that the condition provided for in the later statute, of not selling unless the appraisal had taken place and more than one-half such appraised value had thereafter been bid, was void as an impairment of the obligation of the contract between the mortgagor and the mortgagee, and the deed of the sheriff could not, so far as that ground was concerned, be avoided, although no valuation of the property was made before the sale. The case was decided, as the opinion shows, entirely upon the authority of *Bronson v. Kinzie*, 1 How. 311, which, as we have seen, was not a case of a purchaser, and was decided upon the prayer of the mortgagee, who contended that his contract contained in his mortgage would be impaired by the subsequent law if the court should permit it to be enforced.

“The question again arose in *Howard v. Bugbee*, 24 How. 461, and that case was also decided upon the authority of *Bronson v. Kinzie*, 1 How. 311. In the statement of fact by Mr. Justice Nelson, it appears that the mortgage by Parsons to Tait was executed in 1836, and in a subsequent year (1842) the law regarding redemp-

tion was altered, and a right was given to a judgment creditor to redeem for two years after a sale under a mortgage. The mortgage was foreclosed in 1848, and Howard, the appellant, became the purchaser of the premises at the sale under the decree of foreclosure, and obtained a deed of the same, duly executed by the proper officer. Bugbee, the appellee, the plaintiff in the court below, recovered judgment against the estate of the mortgagor in 1843, and thereafter, pursuant to the altered law, tendered the purchase money, interest, and charges to Howard, the purchaser, and asked for a deed of the land, which was refused. A bill was filed in the court of chancery in Alabama by Bugbee to compel Howard to receive the money in redemption of the sale, and execute a deed. The defense was that the mortgage from Parsons, under which the defendant derived title as purchaser at the foreclosure sale, having been executed before the passage of the act providing for the redemption, the act, as respects this debt, was inoperative and void, as impairing the obligation of a contract. Now, here was a case where the purchase was made at the foreclosure sale six years after the law had been enacted providing for redemption, and the question was raised, not by the mortgagor or the mortgagee, but by the purchaser at the sale. The Alabama court of chancery held that complainant was not entitled to the relief asked, and dismissed the bill; but the supreme court of that state, upon appeal, reversed the decree of the court of chancery, and entered a decree for the complainant. Upon writ of error from this court it was here decided that the act of the legislature was invalid as an impairment of the mortgage contract, upon the authority of *Bronson v. Kinzie*, 1 How. 311, which had never decided the particular question.

"Upon principle, we cannot see how an independent purchaser, having no connection whatever with the mortgage, excepting as he becomes such purchaser at the foreclosure sale, can raise the question in his own behalf in relation to the validity of legislation as to redemption and rate of interest which existed at the time he made his purchase; and this question, we think, has been clearly determined against the purchaser in the case of *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. Rep. 236.

"We have no disposition to revise the decision in that case, which, we think, was correct and stands upon a firm foundation. The later case of *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, when the facts therein are regarded, does not militate against the soundness of the views expressed in the *Cushman* case, and in addition to that it was distinctly so stated in the opinion of the court. If a sale be made under a decree directing that it be without regard to the subsequent legislation as in *Bronson v. Kinzie*, 1 How. 311, then the purchaser, buying under the decree with those specific directions, takes his rights thereunder. But in that case

the decree is obtained in the interest, and at the request of, the mortgagee, and to save the impairment of his contract.

"In our view, this independent purchaser must, under the facts herein, abide by the law as it stood at the time of his purchase.

"A further question is made by the plaintiff in error that there was no proper tender made.

"Holding the views we do in regard to the main question, it follows that the amount of the bid made by the purchaser carried interest at the rate of one per cent per month only. If that amount, at that rate of interest, was tendered the sheriff, it was sufficient. The state court has found that such amount was paid to the sheriff by a check which was subsequently paid. Whether the defendant Rhodes fully complied with the requirements of the state statutes in order to make a complete tender is not a federal question.

"The judgment of the supreme court of California is affirmed."

PATERSON v. OGDEN.

[141 Cal. 43, 74 Pac. 443.]

PUBLIC LANDS, Patent to, Effect of Issuing.—The issuing of a United States patent for land as agricultural in character is a judgment of the tribunal having jurisdiction that such is the character of the land, which cannot afterward be collaterally attacked. (p. 32.)

PUBLIC LANDS—Patent, Reservation of Mineral Lands in.—The words in an agricultural patent "subject to the right of the proprietor of a vein or lode to abstract or remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted" leaves the patentee subject only to the right of the proprietor of a vein or lode the top or apex of which lies outside of the lands patented, but which penetrates into such land in its dip or downward course, to abstract and remove his ore therefrom. It does not give any right to enter and mine on the surface of the patented land. (p. 32.)

F. W. Street, for the appellants.

J. P. O'Brien, for the respondents.

44 McFARLAND, J. This is an action to quiet title to an alleged quartz mining claim called the Gem Mine. Judgment was for defendants, and plaintiffs appealed from the judgment and from an order denying their motion for a new trial.

The contest is only about that part of the alleged Gem Mine which lies in the west half of the southwest quarter of section 3, township 2 north, range 14 east, M. D. M. On November

2, 1881, respondents' predecessor in interest, John McNamee, made homestead entry as agricultural land at the United States land office at Stockton, California, of land which includes the west half of the southwest quarter above mentioned. On February 5, 1889, he commuted the said ⁴⁵ homestead entry to cash entry No. 9753, and paid the United States government therefor; and on November 24, 1890, the government issued to him a patent for said land. After the said homestead entry, and after the land had been returned by the United States surveyor general as agricultural land, J. N. Paterson, appellants' predecessor in interest, located what is called the Gem Mine. At the time when McNamee made his final proofs no protest or adverse claim was made by Paterson, or any other person.

It is well settled that issuance of a United States patent for land as agricultural in character is a judgment by a tribunal having jurisdiction that such is the character of the land, which cannot afterward be collaterally attacked: *Gale v. Best*, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550; *Saunders v. La Purissima Gold Mining Co.*, 125 Cal. 159, 57 Pac. 656, and the authorities cited in those two cases; also, *Richards v. Wolfing*, 98 Cal. 195, 32 Pac. 971; *Wight v. Dubois*, 21 Fed. 695. The patent therefore, conveyed the land to McNamee, and was an adverse adjudication of any asserted right of appellants' grantor to the land as a mining claim. In the case at bar the patent to McNamee contained the following clause: "Subject to the right of a proprietor of a vein or lode to abstract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law." We have not been referred to any law authorizing the insertion of this clause; and it was held in *Cowell v. Lammers*, 10 Saw. 246, 21 Fed. 200, that a reservation of mineral land in an agricultural patent is void. But waiving that question, the court below in the case at bar correctly construed the clause as only subjecting the patented land "to the right of the proprietor of a vein or lode, the top or apex of which lies outside of the west half of the southwest quarter of section 3 aforesaid, but which penetrates into the land on its dip or downward course, to abstract and remove his ore therefrom as provided by law." It does not give any right to enter and mine upon the surface within the patented lands. These views make it unnecessary to consider the express finding that at the time of the patent no part of the lands was "known valuable mineral land, but, on the contrary,

all of the ⁴⁶ lands embraced within the west half of the south-west quarter of said section 3 were at that time, and now are, agricultural lands."

In answer to the claim by appellants of title under the statute of limitations by adverse possession since the date of the patent, the court finds expressly that there was no such adverse possession; and the evidence is clearly sufficient to support that finding, irrespective of the further finding that appellants had not paid any of the taxes levied on any part of said land. The above views dispose of the controlling questions in the case adversely to appellants' contention; and there are no other points necessary to be noticed.

The judgment and order appealed from are affirmed.

Lorigan, J., and Henshaw, J., concurred.

A Decision of the Land Department as to whether land is agricultural or mineral, or as to whether it is swamp or upland, determines the character of the land: German Ins. Co. v. Hayden, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453; Gale v. Best, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550; Diana Shooting Club v. Lamoreux, 114 Wis. 44, 91 Am. St. Rep. 898, 89 N. W. 880.

McCLOSKEY v. TIERNEY.

[141 Cal. 101, 74 Pac. 699.]

WILL OR ASSIGNMENT.—A writing that for services rendered the writer leaves Mrs. McC. the balance of an account with a designated savings bank is not a will but an assignment of the moneys represented by the account. (p. 34.)

Finlay Cook, for the appellants.

Sullivan & Sullivan and R. F. Mogan, for the respondent.

¹⁰² SMITH, C. This suit was brought against the German Savings and Loan Society to recover a balance of seven hundred and thirty-eight dollars and eighty-five cents, alleged to be due to the defendant's testator, and to have been by him assigned to the plaintiff, Ann McCloskey. The money was paid into court by the bank, and upon its application, under section 386 of the Code of Civil Procedure, the present defendant was substituted for it.

The main question in the case turns upon the construction of the written instrument offered by the plaintiff in proof of

the alleged assignment, and executed by the court, which is as follows:

"San Francisco, February 4, 1901.

"For services rendered, I, the undersigned, leave to Mrs McCloskey the balance of my account with the German Savings and Loan Society, which amounts to date to \$789.85 (seven hundred eighty-nine dollars and eighty-five cents).

"NICHOLAS MURPHY."

This instrument was duly executed by Murphy a few days before his death, and, with the bank-book showing the account referred to, delivered by him to the plaintiff, Mrs. McCloskey. It was excluded from evidence by the court on the ground that it was not a present assignment of the claim, but a disposition of it to take effect on the death of Murphy, and therefore of a testamentary nature. But we do not think this view of the case can be sustained. The language of the instrument imports a present disposition of the property for valuable consideration, and this construction is confirmed by the concurrent delivery of the bank-book showing the account. The words used ("I . . . leave to Mrs. McCloskey," etc.) are not, indeed, the aptest to express the idea of an assignment; but in view of the impending death of the assignor, and the resulting sense of immediate or speedy departure under which he must have acted, they were not altogether inappropriate, and we do not think that the intention to assign can be doubted. The instrument must therefore be construed as a present assignment of the claim: Civ. Code, secs. 1636, 1637, 1643, 1654, 3541, and note to last section in Pomeroy's edition. See Broom's *Legal Maxims*, 521, 657; *Sprague v. Edwards*, 48 Cal. 240.

¹⁰³ It follows that the judgment and order appealed from should be reversed, and we so advise.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Van Dyke, J., Angellotti, J., Shaw, J.

Wills.—As to what instruments are testamentary and what are not, see *Ferris v. Neville*, 127 Mich. 444, 86 N. W. 960, 89 Am. St. Rep. 480, and the monographic note thereto.

KATZ v. WALKINSHAW.

[141 Cal. 116, 70 Pac. 663, 74 Pac. 766.]

COMMON LAW, What Part of not Adopted.—The adoption of the common law extends only to such provisions of it as are adapted to our condition or local situation. (p. 38.)

COMMON LAW, Variability and Flexibility of.—The true doctrine is that the common law by its own principles adapts itself to conditions and modifies its own rules so as to serve the end of justice under different circumstances. (p. 39.)

COMMON LAW, When Inapplicable.—Whenever it is found that, owing to the physical features of this state and the peculiarity of its climate, soil and productions, the application of any given common-law rule tends constantly to cause injustice and wrong, rather than justice and right, then a different rule should be adopted—one calculated to secure persons in their property and possessions and preserve for them the fruits of their labors and expenditures. (p. 40.)

WATER, Percolating, Appropriation of.—The principles which in California, before the adoption of its Civil Code, applied to protect appropriation and possessory rights in visible streams will, in general, be applicable to the appropriation of percolating water either for public or private use on distant lands, and will suffice for the protection of such waters against other appropriators; and in ordinary cases of this character the law of prescriptive titles and rights and the statute of limitations will apply. (p. 50.)

WATER, Percolating, Prior Right of Land Owner.—In a controversy between an appropriator of percolating waters for use on distant lands and those who own the land overlying the water-bearing strata, those who have used the water on their land before the attempt to appropriate it have rights paramount to the rights of such appropriator, but the land owner's right extends only to the quantity of water necessary for use on his land, and the appropriator may take the surplus. (p. 50.)

PRELIMINARY INJUNCTIONS Involving Rights to Percolating Waters must be granted, if at all, only upon the clearest showing that there is immediate danger of irreparable and substantial injury and that the diversion complained of is the real cause. (p. 51.)

INJUNCTIONS Involving Rights to Percolating Waters will be refused if the complainant has stood by while the development was made for public use and has suffered it to proceed at large expenditure to successful operation, having reasonable cause to believe it would affect his own water supply. (p. 51.)

AN INJUNCTION Against the Use of Percolating Waters will be Denied if the complainant makes no use of the water on his own land or elsewhere. (p. 51.)

WATER, Difficulty of Apportioning.—The difficulty of apportioning an insufficient supply of water in extreme cases will not deter the court from declaring the rule that it believes to be the only just one for protecting the rights of land owners in percolating waters. (p. 51.)

PERCOLATING WATER, Right of Land Owner to Divert for Use or Sale Elsewhere.—A land owner in an artesian belt of percolating waters has no right to sink wells on his land and draw off

such waters from the land of his neighbors for sale or use elsewhere, if thereby like wells on their lands are made to cease their flow, and their growing trees, vines and other plants are caused to perish. (pp. 63, 64.)

C. C. Haskell, Rolfe & Rolfe and H. C. Rolfe, for the appellants. G. H. Gould, *amicus curiae*, also for the appellants.

Byron Waters, for respondent; R. E. Houghton, for Riverside Water Company; E. W. Freeman, for Temescal Water Company; John E. Daly and Henry J. Stevens, for Glendora-Azusa Water Company; Lucius K. Chase, for Corona City Water Company; Henry J. Stevens, for Citrus Belt Water Company; C. H. Wilson, for Corona Irrigation Company; M. B. Kellogg, for Gage Canal Company; Page, McClutchen, Harding & Knight, for Contra Costa Water Company; Houghton & Houghton, for Miller & Lux and Frederick Cox; Frank H. Short, Otis & Gregg, Howard Surr, Platt & Bayne and Henley C. Booth, city attorney of Santa Barbara, *amici curiae*, also for respondent.

¹²⁰ SHAW, J. A rehearing was granted in this case for the purpose of considering more fully, and by the aid of such additional arguments as might be presented by persons not parties to the action, but vitally interested in the principle involved, a question that is novel and of the utmost importance to the application to useful purposes of the waters which may be found in the soil.

Petitions for rehearing were presented not only in behalf of the defendant, but also on behalf of a number of corporations engaged in the business of obtaining water from wells and distributing the same for public and private use within this state, and particularly in the southern part thereof. Able and exhaustive briefs have been filed on the hearing. The principle decided by the late Justice Temple in the former opinion, and the course of reasoning by which he arrived at the conclusion, have been attacked in these several briefs and petitions with much learning and acumen. It is proper that we should here notice some of the objections thus presented.

It is urged, in the first place, that the decision goes beyond the case that was before the court; that the pleadings stated a cause of action solely for the diversion of water from an alleged underground stream, and that, therefore, there was no occasion for a discussion of the principles governing the rights to waters of the class usually denominated percolating waters. The proposition is not tenable. The complaint, in substance,

¹²¹ states that the plaintiffs had wells upon their respective tracts of land, from which water flowed to the surface of the ground; that the water was necessary for domestic use and irrigation on the lands on which they were situate; that the defendant, by means of other wells and excavations upon another tract of land in the vicinity prevented any water from flowing through the plaintiffs' wells to their premises, and that this was done by drawing off the water through the wells of the defendant, taking it to a distant tract and there using it. If the principle is correct that the defendant cannot thus, and for this purpose, take from the plaintiffs' wells the percolating waters from which they are supplied, then no further allegations were necessary, and the averment that the water constituted part of an underground stream may be regarded as surplusage. The complaint was thus treated in the opinion of Justice Temple, and he properly considered the question whether or not, eliminating the surplus allegation that there was an underground stream, the complaint stated a cause of action which was sustained by the evidence. The fact that the court below supposed that the existence of a stream of water was necessary to make the diversion of the water an actionable wrong does not limit this court to the same view, if it be erroneous. If enough of the facts which are set forth in the complaint are established by the evidence, without substantial conflict, to constitute a good cause of action, then the nonsuit should not have been granted, although other allegations are proven.

Many arguments, objections, and criticisms are presented in opposition to the rules and reasoning of the former opinion. It is contended that the rule that each land owner owns absolutely the percolating waters in his land, with the right to extract, sell, and dispose of them as he chooses, regardless of the results to his neighbor, is part of the common law, and as such has been adopted in this state as the law of the land by the statute of April 13, 1850 (Stats. 1850, 219), and by section 4468 of the Political Code, and that, consequently, it is beyond the power of this court to abrogate or change it; that the question comes clearly within the doctrine of stare decisis; that the rule above stated has become a rule of property in this state upon the faith of which enormous investments have been made, and that it should not now be departed ¹²² from, even if erroneous; that even if the question were an open one, the adoption of the doctrine of correlative rights in percolating waters would

hinder or prevent all further developments or use of underground waters, and endanger or destroy developments already made, thus largely restricting the productive capacity and growth of the state, and that, therefore, a sound public policy and regard for the general welfare demand the opposite rule; that the doctrine of reasonable use of percolating waters would require an equitable distribution thereof among the different land owners and claimants who might have rights therein, that this would throw upon the courts the duty and burden of regulating the use of such waters and the flow of the wells or tunnels which would prove a duty impossible of performance; and finally, that if this rule is the law as to percolating waters, it must for the same reason be the law with regard to the extraction of petroleum from the ground, and, if so, it would entirely destroy the oil development and production of this state, and for that reason also that it is against public policy and injurious to the general welfare.

The idea that the doctrine contended for by the defendant is a part of the common law adopted by our statute, and beyond the power of the court to change or modify, is founded upon misconception of the extent to which the common law is adopted by such statutory provisions, and a failure to observe some of the rules and principles of the common law itself. In *Crandall v. Woods*, 8 Cal. 143, the court approved the following rule, quoting from the dissenting opinion of Bronson, J., in *Starr v. Child*, 20 Wend. 159: "I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails." This quotation was subsequently approved by the New York court of appeals in *People v. Appraisers*, 33 N. Y. 461. The same doctrine was followed in ¹²⁸ the case of *English v. Johnson*, 17 Cal. 116, 7 Am. Dec. 574. In Pennsylvania and West Virginia, under similar statutes, it was held that only such parts of the common law as were applicable to the local situation of the particular state were in force (*Carson v. Blazer*, 2 Binn. 484, 4 Am. Dec. 463; *Powell v. Sims*, 5 W. Va. 4, 13 Am. Rep. 629), and th

is the rule in all the states upon the question, irrespective of statutory adoption: *Commonwealth v. Knowlton*, 2 Mass. 534; *State v. Rollins*, 8 N. H. 560; *Pierce v. State*, 13 N. H. 542; *Currier v. Perley*, 24 N. H. 223; *Dennett v. Dennett*, 43 N. H. 499; *Van Ness v. Pacard*, 2 Pet. 144; *Wheaton v. Peters*, 8 Pet. 659; *Bloom v. Richards*, 2 Ohio St. 391.

The true doctrine is, that the common law by its own principles adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under the different circumstances, a principle adopted into our code by section 3510 of the Civil Code: "When the reason of a rule ceases, so should the rule itself." This is well stated in *Morgan v. King*, 30 Barb. 16; "We are not bound to follow the letter of the common law, forgetful of its spirit; its rule instead of its principle. A rule of law applicable to the fresh-water streams of England may be wholly inapplicable to fresh-water streams in this country of the same nature and character, because of different capacity, or because the adjoining country may furnish a commerce for them unknown in England, and yet be subject to the same principle. If so, the common law modifies its rules upon its own principles, and conforms them to the wants of the community, the nature, character, and capacity of the subject to which they are to be applied." In *Beardsley v. Hartford*, 50 Conn. 542, 47 Am. Rep. 677, the court says: "It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim: '*Cessante ratione, cessat ipsa lex.*' This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which, in the progress of society, gain controlling force, the old law, though still good as an abstract principle, ¹²⁴ and good in its application to some circumstances, must cease to apply or to be a controlling principle to the new circumstances." Accordingly, in many instances in this country, in states where the common law is held to be in force, some of its rules are held to be not applicable to the conditions different from the place of its origin: *Connolly v. Goodwin*, 5 Cal. 221; *Ricketts v. Johnson*, 8 Cal. 36; *United States v. McCarthy*, 18 Fed. 89, 21 Blatchf. 469; *Bovard v. Kettering*, 101 Pa. St. 185; *Haywood v. Shreve*, 44 N. J. L. 96; *Green v. Lister*, 8 Cranch, 249; *Cole v. Lake*, 54 N. H. 286; *Pettingill v. Rideout*, 6 N. H. 454, 25 Am. Dec. 473; *Boston and W. R. C. v.*

Dana, 1 Gray, 97; Lindsley v. Coats, 1 Ohio, 243; Stoever v. Whitman, 6 Binn. 420; Dawson v. Coffman, 28 Ind. 223; Wagner v. Bissell, 3 Iowa, 496; Reaume v. Chambers, 22 Mo. 54; Seeley v. Peters, 10 Ill. 130; Collins v. Chartiers V. G. Co., 131 Pa. St. 143, 17 Am. St. Rep. 791, 18 Atl. 1012, in which case this same doctrine of the absolute ownership in percolating water was modified; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325, and Wiggins v. Muscupiabe Co., 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, in which last-mentioned cases the common law respecting riparian rights was said to have been modified in this state to suit our peculiar conditions. Whenever it is found that, owing to the physical features and character of this state, and the peculiarities of its climate, soil, and productions, the application of a given common-law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, require that a different rule should be adopted, one which is calculated to secure persons in their property and possessions, and to preserve for them the fruits of their labors and expenditures. The question whether or not the rule contended for is a part of the common law applicable to this state depends on whether it is suitable to our conditions under the rule just stated.

It is necessary, therefore, to state the conditions existing in many parts of this state which are different from those existing where the rule had its origin.

¹²⁶ In a large part of the state, and in almost all of the southern half of it, particularly south of the Tehachapi range of mountains, aside from grains, grasses, and some scant pasturage, there is practically no production by agriculture except by means of artificial irrigation. In a few places favored by nature crops are nourished by natural irrigation, due to the existence underneath the ordinary soil of a saturated layer of sand or gravel, but these places are so few that they are of no consequence in any general view of the situation. Irrigation in these regions has always been customary, and under the Spanish and Mexican governments it was fostered and encouraged. Even in the earlier periods of the settlement of the country, after its acquisition by the United States, and while the population was sparse and scattered compared to the present time, the natural supply of water from the sur-

face streams, as diverted and applied by the crude and wasteful methods then used, was not considered more than was necessary. As the population increased, better methods of diversion, distribution, and application were adopted, and the streams were made to irrigate a very much larger area of land. While this process was going on a series of wet years augmented the streams, and still more land was put under the irrigating systems. Recently there has followed another series of very dry years, which has correspondingly diminished the flow of the streams. After this period began it was soon found that the natural streams were insufficient. The situation became critical, and heavy loss and destruction from drought was imminent. Still the population continued to increase, and with it the demand for more water to irrigate more land. Recourse was then had to the underground waters. Tunnels were constructed, more artesian wells bored, and finally pumps driven by electric or steam power were put into general use to obtain sufficient water to keep alive and productive the valuable orchards planted at the time when water was supposed to be more abundant. The geological history and formation of the country is peculiar. Deep borings have shown that almost all of the valleys and other places where water is found abundantly in percolation were formerly deep canyons or basins, at the bottoms of which anciently there were surface streams or lakes. Gravel, boulders, and occasionally ¹²⁶ pieces of driftwood have been found near the coast far below tide level, showing that these sunken stream-beds were once high enough to discharge water by gravity into the sea. These valleys and basins are bordered by high mountains, upon which there falls the more abundant rain. The deep canyons or basins in course of ages have become filled with the washings from the mountains, largely composed of sand and gravel, and into this porous material the water now running down from the mountains rapidly sinks and slowly moves through the lands by the process usually termed percolation, forming what are practically underground reservoirs. It is the water thus held or stored that is now being taken to eke out the supply from the natural streams. In almost every instance of a water supply from the so-called percolating water, the location of the well or tunnel by which it is collected is in one of these ancient canyons or lake basins. Outside of these there is no percolating water in sufficient quantity to be of much importance in the development of the country or of

sufficient value to cause serious litigation. It is usual to speak of the extraction of this water from the ground as a development of a hitherto unused supply. But it is not yet demonstrated that the process is not in fact, for the most part, an exhaustion of the underground sources from which the surface streams and other supplies previously used have been fed and supported. In some cases this has been proven by the event. The danger of exhaustion in this way threatens surface streams as well as underground percolations and reservoirs. Many water companies, anticipating such an attack on their water supply, have felt compelled to purchase, and have purchased, at great expense, the lands immediately surrounding the stream or source of supply, in order to be able to protect and secure the percolations from which the source was fed. Owing to the uncertainty in the law, and the absence of legal protection, there has been no security in titles to water rights. So great is the scarcity of water under the present demands and conditions that one who is deprived of water which he has been using has usually no other source at hand from which he can obtain another supply.

The water thus obtained from all these sources is now used with the utmost economy, and is devoted to the production of ¹²⁷ citrus and other extremely valuable orchard and vineyard crops. The water itself, owing to the tremendous need, the valuable results from its application, and the constant effort to plant more orchards and vineyards to share in the great profits realized therefrom, has become very valuable. In some instances it has been known to sell at the rate of fifty thousand dollars for a stream flowing at the rate of one cubic foot per second. Notwithstanding the great drain on the water supply, the economy in the distribution and application, and the much larger area of land thereby brought under irrigation, there still remain large areas of rich soil which are dry and waste for want of water. This abundance of land, with the scarcity and high price of water, furnish a constant stimulus to the further exhaustion of the limited amount of underground water, and a constant temptation to invade sources already appropriated. The charms of the climate have drawn, and will continue to draw, immigrants from the better classes of the eastern states, composed largely of men of experience and means, energetic, enterprising, and resourceful. With an increasing population of this character, it is manifest that nothing that is possible to be done to secure success will be left

undone, and that there must ensue in years to come a fierce strife, first to acquire and then to hold every available supply of water.

It is scarcely necessary to state the conditions existing in other countries referred to, to show that they are vastly different from those above stated. There the rainfall is abundant, and water, instead of being of almost priceless value, is a substance that in many instances is to be gotten rid of rather than preserved. Drainage is there an important process in the development of the productive capacity of the land, and irrigation is unknown. The lands that from their situation in this country are classed as damp lands would in those countries be either covered by lakes or would be swamps and bogs. If one is deprived of water in those regions, there is usually little difficulty in obtaining a sufficient supply near by, and at small expense. The country is interlaced with streams of all sizes from the smallest brooklet up to large navigable rivers, and the question of the water supply has but little to do with the progress or prosperity of the country.

¹²⁸ It is clear also that the difficulties arising from the scarcity of water in this country are by no means ended, but, on the contrary, are probably just beginning. The application of the rule contended for by the defendants will tend to aggravate these difficulties rather than solve them. Traced to its true foundation, the rule is simply this: That owing to the difficulties the courts will meet in securing persons from the infliction of great wrong and injustice by the diversion of percolating water, if any property right in such water is recognized, the task must be abandoned as impossible, and those who have valuable property acquired by and dependent on the use of such water must be left to their own resources to secure protection for their property from the attacks of their more powerful neighbors, and failing in this, must suffer irretrievable loss; that might is the only protection.

"The good old rule

Sufficeth them, the simple plan,

That they should take who have the power,

And they should keep who can."

The field is open for exploitation to every man who covets the possessions of another or the water which sustains and preserves them, and he is at liberty to take that water if he has the means to do so, and no law will prevent or interfere with him or preserve his victim from the attack. The difficulties

to be encountered must be insurmountable to justify the adoption or continuance of a rule which brings about such consequences.

The claim that the doctrine stated by Mr. Justice Temple is contrary to all the decisions of this court is not sustained by an examination of the cases. The decisions have not been harmonious, and in many of them what is said on this subject is mere dictum. A brief review of the cases will demonstrate this to be true. In *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299—the first case on the subject—it was not necessary for the court to say anything at all with respect to the right of a land owner to complain of a diversion of percolating waters. McCue's predecessor had made a ditch leading from a spring on his land across a tract of land belonging to Hanson's predecessor, and terminating upon another tract, also owned by McCue's predecessor, ¹²⁰ through which ditch he conducted water from the spring across the Hanson tract to his other land. This ditch in its course over Hanson's land leaked water in such quantities that it collected into a stream, which Hanson used for irrigation. This was the only foundation for the right which Hanson had or claimed to the water. The court properly held that he had no right to the waste water and that McCue was not bound to continue to maintain the artificial stream for Hanson's benefit, but could by any means he chose change the use of the spring and the course of the ditch. The fact that the change was made by intercepting the percolating water which fed the stream was not material to the case, and all that is said as to the right to do so is dictum. The opinion, however, does, though unnecessarily, announce and approve the doctrine contended for by the respondent here. *Huston v. Leach*, 53 Cal. 262, decides only that the phrase "waters of said springs," in the decree of the court meant defined streams running into or issuing from the springs, and did not include the percolations which fed the springs. *Hale v. McLea*, 53 Cal. 578, referred to a well-defined, though very small, underground stream, flowing through fissures in the rocks, and has no relation to ordinary percolating water. The court held that the defendant could not cut off the entire stream, and at most could only use a reasonable portion thereof as an upper riparian owner. In *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409, the court in its opinion, again by way of dictum, announces the doctrine that the owner of the soil is the absolute owner of the percolating water therein; but the decision is against this doctrine. It is a case of the court announcing

one doctrine and deciding the contrary. The plaintiff, through a grant from defendant's predecessor, owned a right to take water on defendant's mining claim by means of a tunnel which served to collect the percolating water into a small stream of two miner's inches, which flowed out of the tunnel and was conducted by pipes to plaintiff's premises. This court decided that the defendant had no right to cut off the percolations which fed the stream issuing from the tunnel, although this was done in the legitimate work of mining his own land. The decision is in direct conflict with the dictum ¹³⁰ in *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, and is in accord with the principles laid down by Justice Temple. It can only be distinguished upon the ground that the defendant was estopped by the grant of his predecessor to use the land so as to destroy the water right granted—a distinction which is not mentioned or referred to in the opinion. The distinction made in the opinion, and upon which the decision in *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 13 Pac. 409, is based, is, that when percolating waters are gathered into a defined stream by means of a tunnel, the stream is property, and as such it is protected by law from injury or destruction by the diversion of such percolating water before it reaches the tunnel. There can be no distinction in law or reason between a stream consisting of percolating waters gathered together by means of a tunnel and one gathered by means of an artesian well. Therefore, the case supports Justice Temple's conclusion. The only point bearing upon the case at bar that was decided in *Painter v. Pasadena Land etc. Co.*, 91 Cal. 74, 27 Pac. 539, is, that the right of the owner of land to the water percolating therein may be reserved in a grant of the land, and that this right to such reserved water may subsequently be transferred. It does not touch the question of the extent of the right of the land owner to such water, as against the adjoining proprietors or others claiming rights in it. In *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 616, 30 Pac. 783, the decision was put upon the ground that the excavation of defendant, which caused the diversion of percolating water of which plaintiff complained, was made upon defendant's own land for the purpose of obtaining the water for the better use of the land, which it was held he had a right to do, although it destroyed the spring or stream claimed by the plaintiff. The dictum of *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, was approved. The decision seems to be in conflict with *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 13 Pac. 409, although the latter case is

not mentioned. In *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319, the court below found that the tunnel complained of gathered and discharged a stream of water of which all except one and forty-three hundredths miner's inches was gathered from percolating waters in the sandstone, ¹³¹ which did not come from the channel of the natural stream. It was this excess only which was in issue. The finding that it was percolating water was held to be conclusive upon the appellate court. It appeared that some of the percolating water thus developed would, if not interrupted, have reached the natural stream. The court adopts and approves the dictum of *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, and holds that the plaintiff had no legal right to enjoin a diminution of the natural stream caused by a diversion of percolating water before it reached the channel. In *Los Angeles v. Pomeroy*, 124 Cal. 622, 57 Pac. 585, an instruction of the court below stating the dictum of *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, was criticised by the appellants, not for the reason that it restated that doctrine, but upon the ground that it did not class as percolating waters all such water as might be found in the sand or soil underneath the bed of a stream or adjacent thereto. So far as it restated the doctrine of *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, it was favorable to the appellants, and therefore they did not object to that part of it. The court held that it was not subject to criticism on the ground that it did not properly define percolating waters. The decision, however, cannot be taken as an approval of the doctrine of *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299. In so far as that doctrine was stated, it being favorable to appellants, it was not presented for consideration to the appellate court. The objection of the appellants, and the point considered by the appellate court was that the instruction departed from the rule quoted in *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299. Inasmuch as the writer of this opinion was also the writer of the instruction under consideration, it may be proper to say that he did not give the instruction because he approved that part of it restating the doctrine of *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299. The instruction was given because an instruction embodying that doctrine had been requested by the appellants in the case, and the respondents, the plaintiffs, believing that it would not materially affect the verdict, consented that that part should be given in substance, rather than take the chances of a reversal of the case, should the supreme court hold its refusal to be erroneous. The remarks of the court in *Vineland Dist. v. Azusa Dist.*, 126 Cal. 494, 58

Pac. 1057, giving the ordinary definition of percolating waters, and stating the rule contended for by the defendant as applying ¹³² thereto, call for no discussion. The court was referring to this solely for the purpose of giving the proper meaning to the word "percolating" as used in the findings, and to show that the word was not there used to designate waters which were not a part of the subterranean stream under consideration. In *Bartlett v. O'Connor* (Cal.), 36 Pac. 513, the defendants, with the intent to injure the plaintiff, attempted to reclaim their lands by drawing off the percolating water through an artificial ditch away from the natural stream. It appeared that this could have been done as well by deepening the natural channel of the stream. It was held to be an unlawful diversion. This comprises all the cases on the subject.

Excluding the cases in which the statement of the doctrine of absolute ownership is dictum, and looking to what has been actually decided, we have remaining only *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409, holding that the owner of a mining claim, whose predecessor had granted a stream made up of percolating water collected by means of a tunnel, could not, even in the ordinary mining of his own land, interfere with the flow of the percolating water to the tunnel; *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 616, 20 Pac. 783, holding that a land owner can divert, for use on his own land, percolating water which feeds a spring rising on the land and flowing to an adjoining owner, although the diversion destroys the spring; *Bartlett v. O'Connor* (Cal.), 36 Pac. 513, holding that such a diversion cannot be made in the process of draining the land for reclamation, where the draining and reclamation can be accomplished by another mode without diminishing the stream, and the mode used is adopted with the intention to injure the lower proprietor; and *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319, declaring, in effect, that percolating water may be prevented from reaching a natural stream to the injury of a riparian owner, although the percolations are neither taken for use on the land where the diversion is made, nor in the use or reclamation of the land, but for use on other land distant from both the stream and the percolations. In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ¹³³ ownership is well established in this state. It is proper to state that in all the opinions which have so readily quoted and approved the supposed common-law rule, that in-

juries from interference with percolating waters were too obscure in origin and cause, too trifling in extent, and relatively of too little importance, as compared to mining industries and the wants of large cities, to justify or require the recognition by the courts of any correlative rights in such waters, or the redress of such injuries, there has been no notice at all taken of the conditions existing here, so radically opposite to those prevailing where the doctrine arose. It is also to be observed that in some instances in the eastern states, mentioned in the former opinion in this case, the injustice from the diversion of percolating waters has been so glaring and so extensive that the court there was compelled to depart from its previously decided cases and recognize the rights of adjoining owners.

We do not see how the doctrine contended for by defendant could ever become a rule of property of any value. Its distinctive feature is the proposition that no property rights exist in such waters except while they remain in the soil of the land owner; that he has no right either to have them continue to pass into his land, as they would under natural conditions, or to prevent them from being drawn out of his land by an interference with natural conditions on neighboring land. Such right as he has is therefore one which he cannot protect or enforce by a resort to legal means, and one which he cannot depend on to continue permanently or for any definite period.

It is apparent that the parties who have asked for a reconsideration of this case, and other persons of the same class, if the rule for which they contend is the law, or no law, of the land, will be constantly threatened with danger of utter destruction of the valuable enterprises and systems of waterworks which they control, and that all new enterprises of the same sort will be subject to the same peril. They will have absolutely no protection in law against others having stronger pumps, deeper wells, or a more favorable situation, who can thereby take from them unlimited quantities of the water, reaching to the entire supply, and without regard to the place
134 of use. We cannot perceive how a doctrine offering so little protection to the investments in and product of such enterprises, and offering so much temptation to others to capture the water on which they depend, can tend to promote developments in the future or preserve those already made, and, therefore, we do not believe that public policy or a regard for the general welfare demands the doctrine. An ordinary difference in the conditions would scarcely justify the refusal

to adopt a rule of the common law, or one which has been so generally supposed to exist; but where the differences are so radical as in this case, and would tend to cause so great a subversion of justice, a different rule is imperative.

The doctrine of reasonable use, on the other hand, affords some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. If, as is claimed in the argument, such water-bearing land is generally worthless except for the water which it contains, then the quantity that could be used on the land would be nominal, and injunctions could not be obtained, or substantial damages awarded, against those who carry it to distant lands. So far as the active interference of others is concerned, therefore, the danger to such undertakings is much less, and the incentive to development much greater, from the doctrine of reasonable use than from the contrary rule. No doubt there will be inconvenience from attacks on the title to waters appropriated for use on distant lands made by persons who claim the right to the reasonable use of such waters on their own lands. Similar difficulties have arisen and now exist with respect to rights in surface streams, and must always be expected to attend claim to rights in a substance so movable as water. But the courts can protect this particular species of property in water as effectually as water rights of any other description.

It may, indeed, become necessary to make new applications of old principles to the new conditions, and possibly to modify some existing rules, in their application to this class of property rights; and in view of the novelty of the doctrine and the scope of argument, it is not out of place to indicate to some extent how it should be done, although otherwise it would not ¹³⁵ be necessary to the decision of the case. The controversies arising will naturally divide into classes.

There will be disputes between persons or corporations claiming rights to take such waters from the same strata or source for use on distant lands. There is no statute on this subject, as there now is concerning appropriations of surface streams, but the case is not without precedent. When the pioneers of 1849 reached this state they found no laws in force governing rights to take waters from surface streams for use on nonriparian lands. Yet it was found that the principles of the common

law, although not previously applied to such cases, could be adapted thereto, and were sufficient to define and protect such rights under the new conditions. The same condition existed with respect to rights to mine on public land, and a similar solution was found: *Kelly v. Natoma W. Co.*, 6 Cal. 108; *Conger v. Weaver*, 6 Cal. 557, 65 Am. Dec. 528; *Eddy v. Simpson*, 3 Cal. 253, 58 Am. Dec. 408; *Hill v. Newman*, 5 Cal. 446, 63 Am. Dec. 140; *McDonald v. Bear River etc. Co.*, 13 Cal. 233. The principles which, before the adoption of the Civil Code, were applied to protect appropriations and possessory rights in visible streams will, in general, be found applicable to such appropriations of percolating waters, either for public or private use, on distant lands, and will suffice for their protection as against other appropriators. Such rights are usufructuary only, and the first taker who with diligence puts the water in use will have the better right. And in ordinary cases of this character the law of prescriptive titles and rights and the statute of limitations will apply.

In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such land owners; those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterward to do so. Under the decision in this case the rights of the first class of land owners are paramount to that of one who takes the water to distant land; but the land owner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator ¹³⁶ may take the surplus. As to those land owners who begin the use after the appropriation, and who, in order to obtain the water, must restrict or restrain the diversion to distant lands or places, it is perhaps best not to state a positive rule until a case arises. Such rights are limited at most to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators.

Disputes between overlying land owners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. The parties interested in the question are not before us.

In addition, there are some general rules to be applied. In cases involving any class of rights in such waters, preliminary injunctions must be granted, if at all, only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause. Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused and the party left to his action for such damages as he can prove: *Fresno etc. Co. v. Southern Pacific Co.*, 135 Cal. 202, 67 Pac. 773; *Southern California Ry. Co. v. Slauson*, 138 Cal. 342, 94 Am. St. Rep. 58; 71 Pac. 352. If a party makes no use of the water on his own land, or elsewhere, he should not be allowed to enjoin its use by another who draws it out or intercepts it, or to whom it may go by percolation, although perhaps he may have the right to a decree settling his right to use it when necessary on his own land, if a proper case is made.

The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if ¹²⁷ the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law.

It does not necessarily follow that a rule for the government of rights in percolating water must also be followed as to underground seepages or percolations of mineral oil. Oil is not extracted for use in agriculture, or upon the land from which it is taken, but solely for sale as an article of merchandise, and for use in commerce and manufactures. The conditions under which oil is found and taken from the earth in this state are in no important particulars different from those present in other countries where it is produced. There is no necessary parallel between the conditions respecting the use and development of water and those affecting the production of oil. Whether in a contest between two oil-producers concerning the drawing out by one of the oil from under the land of the other we should follow the rule adopted by the courts of other oil-producing states, or apply a rule better calculated to protect oil not actually

developed, is a question not before us and which need not be considered.

With regard to the doctrine of reasonable use of percolating waters, we adhere to the views expressed in the former opinion.

The judgment of the court below is reversed and a new trial ordered.

McFarland, J., Van Dyke, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

ANGELLOTTI, J., concurring. I concur in the judgment and in the views expressed in the opinion of Mr. Justice Temple on the former decision of this case as to the application of the doctrine of reasonable use to percolating waters. When properly applied, it appears clear to me that such doctrine will serve to protect the rights of the owner of realty rather than impair them.

I also concur generally in the views expressed by Mr. Justice Shaw in the majority opinion as to the same subject matter, but several important questions are discussed that ¹³⁸are not necessary to a decision of this case, and as to which the opinion herein cannot hereafter be considered as authority. As to such matters I refrain from expressing any opinion.

The following is the opinion of the court rendered in Bank on the former hearing, per Temple, J., November 7, 1902, referred to in the above opinion on rehearing:

TEMPLE, J. This appeal is taken from a judgment of nonsuit, entered against plaintiffs on motion of defendant.

The action was brought to enjoin defendant from drawing off and diverting water from an artesian belt, which is in part on or under the premises of plaintiffs, and to the water of which they have sunk wells, thereby causing the water to rise and flow upon the premises of plaintiffs, and which they aver had constantly so flowed for twenty years before the wrong complained of was committed by defendant. The water is necessary for domestic purposes and for irrigating the lands of plaintiffs, upon which there are growing trees, vines, shrubbery, and other plants, which are of great value to plaintiffs. All of said plants will perish, and plaintiffs will be greatly and irreparably injured if the defendant is allowed to divert the water.

These facts are admitted, and further, that defendant is diverting the water for sale, to be used on lands of others dis-

tant from the saturated belt from which the artesian water is derived.

The plaintiffs contend that this subsurface water constitutes an underground stream, and that plaintiffs are riparian thereto, and as such riparian owners they are seeking relief in this case.

The defendant denies that she is taking or diverting water from an underground stream or watercourse, and alleges that all the water which arises in the artesian wells on her premises, and which she is selling, is percolating water, and is parcel of her premises, and her property.

In effect, therefore, while denying that she is doing any act of which plaintiffs can complain, she really only denies that she is diverting water from an underground watercourse, and asserts her right to dispose of the water in the manner alleged, ¹³⁹ because it is percolating water, not confined to a definite watercourse.

The court sustained that proposition, and for that reason granted defendant's motion for nonsuit.

The so-called artesian belt includes several square miles of territory. It is a large accumulation of earth upon the base of very high mountains, and is composed of detritus of varying quantity and material with no regular stratification. Wells have been sunk at least to the depth of seven hundred and fifty feet, but no bedrock has been found. It has quite an incline from the mountain, and is from seven hundred to fifteen hundred feet above sea level. Mr. F. C. Finkle, a civil engineer, was the chief witness for the plaintiffs, and testified both as to facts palpable to the senses and as an expert. He says the saturated land is fed, first, by the underflow from the numerous ravines, canyons, and streams which enter the valley from the mountains; and secondly, by the rain and flood-water upon, and absorbed upon the slope and between the artesian belt and the mountains. This water percolating down into the soil, and constantly pressed forward by water accumulating, finally gets under partially impervious earth, where it is held under sufficient pressure to create the artesian belt. The banks of this supposed subsurface stream, the witness thought, were on the west, "a cemented dyke which runs through the valley, and the eastern boundary of it is the clay bank or dyke at the south side of the Santa Ana river." Within these limits many ravines enter from the mountains, some of them carry-

ing at times great quantities of water, much of which had been appropriated and carried off in pipes or cemented aqueducts.

It is evident that if there is any flow to this underground body of water thus held under pressure, it is by percolation. The witness stated that the process was the same the world over. The lower lands are saturated from above. "It is done by saturation from the rainfalls and the floods, and percolation through voids in the soil."

It is quite manifest that this body (if it can be so styled) of percolating water cannot be called an underground watercourse to which riparian rights can attach, unless we are prepared to abolish all distinction between percolating water and ¹⁴⁰ the water flowing in streams with known or ascertainable banks which confine the water to definite channels. All rain-water which falls upon the hills and mountain-sides which does not flow off at once as surface water is absorbed and percolates down in the same way to the valley below. No doubt limits can be found to every such flow, as in this case. The distinction is well established, and, in some respects, different rules of law applied to the two cases. The plaintiffs, therefore, cannot establish their claims upon the theory of an underground watercourse to which they are riparian.

But appellants contend that though they are not riparian to an underground watercourse, and although the saturated belt carries only percolating water, still they are entitled to the injunction prayed for.

The defense, conceding that the water held in the earth is percolating water, relies upon certain decisions, which assert and apply literally the maxim, "*Cujus est solum ejus est usque ad inferos.*" And that water percolating in the ground, or held there in saturation, belongs to the land owners as completely as do the rocks, ground, and other material of which the land is composed, and therefore he may remove it and sell it, or do what he pleases with it. He cites as authority for the proposition, *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 616, 30 Pac. 783, *Gould v. Eaton*, 111 Cal. 641, 52 Am. St. Rep. 201, 44 Pac. 319, and *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

It is obvious at once that the analogy between the right to remove sand and gravel from the land for sale and to remove and sell percolating water is not perfect. If we suppose a saturated plain, one may remove and sell the sand and gravel

from his land without affecting or diminishing the sand and gravel on the lands of his neighbors. If the water on his lands is his property, then the water in the soil of his neighbors is their property. But when he drains out and sells the water on his land, he draws to his land, and also sells, water which is the property of his neighbor. And the effect is similar in other respects. By pumping out the water from his lands he can perhaps deprive his neighbors of water for domestic uses, and, in fact, render their land valueless. In ¹⁴¹ short the members of the community, in the case supposed, have a common interest in the water. It is necessary for all, and it is an anomaly in the law if one person can for his individual profit destroy the community and render the neighborhood uninhabitable.

We have derived our law, in respect to subterranean waters, as in other respects, mostly from England, but in regard to this matter the first class are quite modern. Even yet the textbooks on water rights have but little to say upon the subject of percolating water. Such law as has been made upon the subject comes from countries and climates where water is abundant, and its conservation and economical use of little consequence as compared with a climate like southern California. The learned counsel for appellants state in their brief that water at San Bernardino is worth one thousand dollars per inch of flow. Percolating water, or water held in the earth, is the main source of supply for domestic uses, and for irrigation, without which most lands are unproductive. It is also stated that speculators are seeking to appropriate the percolating water, by getting title to some part of a watershed or slope, and by running canals and tunnels, and by sinking, to obtain water for sale. It is asserted that the lands naturally made moist by percolating water are very productive, and were first settled upon, and have been most highly improved; and he asks whether these lands are to be converted into deserts because speculators may pump and carry away to some distant locality the subsurface waters which rendered the land fertile. Certainly no such case as this has come before a court, or could well exist in England, or in the eastern states.

It is often asserted that *Acton v. Blundell*, 12 Mees. & W. 324, decided in exchequer chamber, in 1843, was the first case in England in regard to percolating water. This shows how unimportant, relatively, the subject is in England. It was an

action for damages occasioned by working a coal mine on adjoining land, which interfered with water which was flowing underground to plaintiff's spring. The court instructed the jury "that if the defendants had proceeded and acted in the usual and proper manner in the land for the purpose of working and mining a coal mine therein, they might lawfully ¹⁴² do so." This instruction was held to be correct, and that is the real force and effect of the decision. But the chief justice pointed out some respects in which the right of water flowing in an open visible stream differs from an underground flow by percolation. The main difference, so far as concerns the question under consideration, was, that percolation was occult, the regulation of which was a difficult matter. One who disturbed the course of percolating water by digging upon his own land could not tell whether he would drain his neighbor's well, nor could the person injured demonstrate that such was the cause of the injury. So, too, when one diverts water from a visible stream, the fact and the effect are at once known, while as to percolating water its course may be obstructed or changed without the intent to do so, and without knowing that such would be the effect of what was done. His lordship, the case being one of first impression, quotes a passage from a civil-law writer to the effect that when one digging upon his own land drains his neighbor's well, such neighbor has no cause of action: *Si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit*. His lordship, however, although the case did not require it, disregarded the qualifications found in the civil law, and held that the case was not governed by law which applies to flowing streams, "but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or pervious ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of this right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action."

This statement has been frequently quoted, both in England and in this country, and has been generally adopted as a correct statement of the law upon the subject. In *Acton*

v. Blundell, 12 Mees. & W. 324, as has been said, the working of a mine upon an adjoining estate drained certain springs¹⁴² on plaintiff's land. It would have been sufficient to defeat plaintiff's action to have said that the working of a coal mine in a proper manner is a reasonable use of land, and that it was without malice or an intent to injure plaintiff. It is a general rule—in fact a universal principle of law—that one may make reasonable use of his own property, although such use results in injury to another. But the maxim, "*Cujus est solum, ejus est usque ad inferos*," furnishes a rule of easy application, and saves a world of judicial worry in many cases. And perhaps in England and in our eastern states a more thorough and minute consideration of the equities of parties may not often be required. The case is very different, however, in an arid country, like southern California, where the relative importance of percolating water and water flowing in definite watercourses is greatly changed.

And it seems to me a great mistake is made in supposing that if the plenary property of a land owner in percolating water is denied, the alternative is to apply to such water all the rules which apply to the use of water flowing in watercourses having defined channels. The entire argument for what may be called the *cujus est solum* doctrine consists in showing that some recognized regulation of riparian rights would be inapplicable. It is said, for instance, that the law of riparian rights requires each proprietor to permit the water to flow as it was accustomed to flow. Apply this rule to subsurface water, and no one could drain his land, for he thereby prevents the water from flowing as it was accustomed to flow by percolation to his neighbor. The common-law method in the supposed case would be to apply the principle to the new case, although some judge-made rule as to how it shall be applied might stand in the way. The principle is clearly applicable. A riparian owner may not divert the water because he would thereby injure his neighbors who have equal rights in the stream. Still he may take a reasonable amount from the stream for domestic purposes, and that may equal the entire flow, although he thereby injures his neighbors. It is a question of reasonable use, and that applies both to the land of the person disturbing the percolation and to adjoining land. He may cultivate his land, and for that purpose¹⁴⁴ ordinarily may drain it, and plow it, or clear it from forests, although all these operations may affect the flow of water to the lower proprie-

tor, both in the watercourse and by percolation. He was allowed to become the owner for those purposes, and with the understanding that all other proprietors have the same right to use their land. The maxim, "Sic utere," etc., plainly applies as between such proprietors, very much as it does between different riparian proprietors upon the same stream.

The title to all land is held subject to this maxim. Such ownership is "but an aggregation of qualified principles the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest use of land by the entire community of proprietors": *Thompson v. Androscoggin etc. Co.*, 54 N. H. 545.

Proprietary rights are limited by the common interests of others—that is, to a reasonable use—and such use one may make of his land, though it injures others. This proposition is generally recognized, but for some reason has not always been recognized by the courts when considering the subject of percolating water, although all rights in respect to water are peculiarly within its province.

This rule of reasonable use answers most effectually the main argument against recognizing any modification of the *cujus est solum* doctrine as applied to percolating water, although in a majority of the cases which are claimed as authority against the rule of reasonable use the court takes pains to note that the act which disturbs the percolating water was in using the land in the usual manner and without the intent of injuring a neighbor.

Among the English cases, *Chasemore v. Richards* was most carefully considered. The village of Croydon was situated upon an extensive plain near the headwaters of the river *Waundale*, and a goodly portion of the permanent flow of the river came by percolation from this plain.

The village had caused a large well to be dug about a quarter of a mile from the river, and was pumping from it five or six hundred thousand gallons of water daily for the use of the town. Plaintiff was a riparian proprietor upon the river below, and had a mill which was operated by the waters¹⁴⁵ of the river. The pumping naturally diminished the flow and prevented the use of the mill as efficiently as before. All the facts were admitted or found to exist.

The case was first decided in exchequer chambers in favor of the defendant, Mr. Justice Coleridge dissenting: 2 Hurl.

& N. 168. The dissenting opinion presents the doctrine of reasonable use.

The case was taken to the house of lords: 7 H. L. Cas. 349. There the case was most elaborately and ably argued, and the view in regard to reasonable use was fully presented. A case was made and the opinion of the judges was solicited. The judges held unanimously for the defendant, sustaining fully the *cujus est solum* doctrine without qualification, and this was affirmed by the house. The matter mainly discussed, however, was the plaintiff's claim that he had a prescriptive right to the water. The court held that riparian rights are not derived by prescription, but the right to the water is *ex jure naturae*. This settled the main contention, and little more was said, except to refer to the cases in which the rights to percolating waters are discussed. Lord Wensleydale, however, who had doubts, pronounced an opinion which seems to me in accord with the views I am trying to express.

The doctrine of reasonable use has been recognized in many cases in the United States—impliedly in most, as I have stated, but expressly in some.

Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721, and note, is one of these, and is remarkable in that the court states as strongly as possible, and with approbation, the *cujus est solum* doctrine. It is even said that the opposite doctrine (applying to such water the rule as to riparian rights) would amount to total abrogation of the rights of property. It is said one could not clear or cultivate his land or build a house without interfering with percolating water; and even if rights were admitted to exist, the difficulty of enforcing them would be insurmountable. I think I have shown that the admitted right to a reasonable use of the land and of the water answers all these objections. To my mind this is so obvious that I can but wonder that such objections have ever troubled the judiciary. And yet, notwithstanding this insistence upon the rule ¹⁴⁶ which apparently ignores all equities of others than the owner of the soil in which the water is found, the court felt obliged to, and did, in unequivocal words, declare that the use of it must be reasonable. The proprietor may make a reasonable use of his own land, although in so doing he obstructs or changes the percolation of water to or from his neighbor's land.

But by far the most satisfactory case upon the subject is *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179. That was a most elaborately considered case, and this precise

question is discussed with a fullness and ability which I am not so vain as to think I could improve upon. I would like to transcribe the entire argument, but as it is accessible to the profession, I need only say I adopt it in full. The decision was approved in *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276, and note.

Smith v. City of Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141, was in some ways a counterpart of *Chasemore v. Richards*. The city of Brooklyn constructed in Queens county culverts, aqueducts, reservoirs, and conduits, and dug deep trenches to intercept percolating waters, and further sunk in the process earth-wells, and put in pumps to obtain the water with which the soil, which it owned, was saturated. It thus procured for the use of the city a large amount of water. Plaintiff owned a farm distant from these waterworks about twenty-four hundred feet. Upon the land was a small brook, in which he had placed a dam, which he used for purposes of boat-building and for cutting ice. The brook had carried water all the year round. The operations of the defendant rendered this brook entirely dry, and deprived the plaintiff of his income.

Here is a case like that of the village of Croydon. Defendant intercepted percolating water upon its own land before it had reached a watercourse. It did not drain water from a defined stream, but the water was prevented from reaching the stream, which was thereby as effectually destroyed as it could have been by draining the water from it.

Judge Hatch, who wrote the opinion in the appellate division of the supreme court, begins by quoting the prevailing doctrine in regard to percolating water, from *Pixley v. Clark*, 147 35 N. Y. 520, 91 Am. Dec. 72: "An owner of the soil may divert percolating water, consume or cut it off with impunity. It is the same as land, and cannot be distinguished in law from land." He says this proposition must be admitted, but nevertheless a case cannot be found in this country "where the right has been upheld in the owner of land to destroy a stream, a spring, or a well upon his neighbor's land, by cutting off the source of its supply, *except it was done in the exercise of a legal right to improve the land, or make some use of it in connection with the enjoyment of the land itself.*" I have italicized the last clause, as it contains the qualification found in the civil law, upon which the English rule is professedly based, and expresses the principle for which I contend. The learned judge

admits that the English cases go further, but says that the American cases have not gone further.

The learned court gives a concise statement of the reasons given by the English courts for not applying to percolating water the same principle which governs the right of riparian proprietors, and agrees with Justice Coleridge and Lord Wensleydale that they are insufficient. The court recognized the right of the land owner to percolating water, but says the right must be exercised with reference to the equal right of others in their land. He says one may as well claim the right to tunnel into his neighbor's land and take out valuable minerals, as to drain from it water which is also parcel of it, for sale. The peculiar nature of the property which enables one to take it by drainage does not justify the taking save in the usual and reasonable use of his own land—in other words, for the proper use and betterment of his own property.

Allusion is made in the opinion to the rule, inconsistent with the *cujus est solum* doctrine, that you cannot do anything on your land which will drain water from a visible stream or natural pond upon the land of another. In *Canal Co. v. Shugaer*, L. R. 6 Ch. App. Cas. 483, Lord Hatherley said: "You have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water ¹⁴⁸ without touching the water in a defined surface channel, I think you cannot get at it at all." It is well said that this decision cannot stand with *Chasemore v. Richards*, even though the court may say that it can.

If a land owner owns the water percolating in his soil, as he does the rock, minerals, and earth, why may he not take it in such a case? And what difference is there in destroying a stream or natural pond by drawing water from it through percolation or by preventing it from flowing into the stream? The effect is the same, and knowledge of the inevitable effect of the act is the same. And this rule would prevent a land owner from draining a marsh, or even from clearing or cultivating his land, when these operations would tend to increase the percolation from a stream or natural pond upon a neighbor's land. This is one of the main arguments in support of the doctrine of *Acton v. Blundell*, 12 Mees. & W. 324. It seems here strangely to lose its force, as does also

another reason for that rule, that when doing such acts the land owner could not reasonably anticipate the injury as probable.

The court expressly applies the doctrine *sic utere tuo* to the case and affirms the judgment against the city.

In the appellate court this judgment was affirmed: *Smith v. City of Brooklyn*, 160 N. Y. 357, 54 N. E. 787. It is there treated, however, as a draining of water from plaintiff's brook and pond. Judge Hatch, in the supreme court, expressly states that defendant simply prevented the water from reaching the brook on plaintiff's farm. Perhaps either view may be taken of the facts. There was an immense saturated plain composed of porous earth. Defendant's wells extended lower down than the bottom of the pond. The stream and pond, and all the springs, wells, and streams in the neighborhood, have been dry ever since the operations of the defendant. Since the water was first drained out, surely there has been no percolation from the stream. This circumstance makes the case more like that in hand. Here was a vast quantity of water held in the soil, which constituted the common supply of many people. The defendant, pumping from wells on its own land, and taking only percolating water, exhausted this common supply. The court held that it could not be. The reasons¹⁴⁹ would have been much more forceful had the case risen in an arid climate like San Bernardino.

But this question was completely put at rest, so far as the state of New York is concerned, by the case of *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644. It was a suit by another plaintiff to restrain the same operations considered in *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141. Here there was no visible stream or pond on plaintiff's land. His injury was merely that the level of the water held in the soil was lowered to his injury. In stating the case the court said: "The city makes merchandises of the large quantities of water which it draws from the wells that it has sunk on its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his land is thereby affected, but does complain and the courts below have found that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is pe-

cularly adapted, or destroys such crops after they are grown or partly grown." This statement shows a striking similarity of the issues made in that case to those involved here.

The court proceeds to state the usual doctrine in regard to percolating water and approves the doctrine for the cases in which it is properly applicable. No doubt the land proprietor owns the water which is parcel of his land, and may use it as he pleases, regard being had to the rights of others. It is not unreasonable that he should dig wells in order to have the fullest enjoyment and usefulness of his estate, or for pleasure, trade, or whatever else the land as land may serve. "But to fit it up with wells and pumps of such persuasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff, and others whose lands are thus clandestinely sapped and their value impaired."

Counsel for the plaintiff in that case contended that since ¹⁵⁰ plaintiff owned the percolating water in his own soil, the unlawful draining of it away by the defendant was a trespass committed on his land. This contention was sustained, both in the supreme court and in the court of appeals. The court further indorsed the opinion of Judge Hatch in *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, from which I have made quotations.

If the principle announced in these cases prevails here, the order granting a nonsuit and the judgment entered thereon must be reversed. It does not require a reversal of the rule laid down in *Acton v. Blundell*, 12 Mees. & W. 324, which has been so often cited and indorsed, but only a holding that in certain cases there should be added the element of reasonable use, having reference both to the land belonging to the party who has disturbed the movement of percolating water and to adjoining land, and to land sensibly affected by such acts. Whatever the English rule may be the American cases either recognize the application of the rule of *sic utere tuo* to the subject, or they are cases in which it was wholly unnecessary to consider that subject. Such are the California cases. In the case of *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585, the question might have been raised, and in the trial court, it may be, was, and in some of the instructions the rule laid

down in *Acton v. Blundell*, 12 Mees. & W. 324, is asserted without qualification. Still this court was not called upon, and did not consider any such question. I think it clear that the American cases do not require us to hold that the maxim, "*Sic utere tuo*," does not limit the right of the land owner to the use of the subsurface water, but, on the contrary, all the cases in which the question has been discussed held, or admit, that such maxim should limit such right where justice requires it. Such, I think, is the proper rule.

It follows that the court erred in granting the nonsuit, and the judgment is therefore reversed and a new trial ordered.

Beatty, C. J., McFarland, J., Van Dyke, J., Harrison, J., and Henshaw, J., concurred.

Rehearing denied.

The Case of *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. 849, differed from the principal case only in the fact that the percolating waters collected by the plaintiff by means of a tunnel and carried thence to lands which did not belong to him came from, or had been, a part of, a stream which flowed through the defendants' land. The plaintiff sought to quiet his title to waters so appropriated, while the defendants by their cross-complaint, asked that plaintiff be enjoined from continuing to gather and divert water by means of his tunnel. In the trial court judgment was given in favor of plaintiff, and the defendants moved for a new trial, which was denied. The supreme court, in reversing the order denying a new trial, first determined that the evidence, together with the typography and situation of San Jose creek, showed that the waters were a part of an underground flow which formed a part of the bed of that stream; that the excavation of the plaintiff commenced at the bed of the stream at about the level thereof, and for a distance of about four hundred feet ran nearly parallel with the stream and not more than fifty feet distant therefrom; that, however, it was not necessary to determine whether the trial court was wrong in refusing to characterize the flow of underground water which the plaintiff took by means of his tunnel as a part of the stream, because the decision in the principal case established "a rule with respect to waters percolating in the soil, which makes it to a large extent immaterial whether the waters in this land were or were not a part of an underground stream, provided the fact be established that their extraction from the ground diminished to that extent, or to some substantial extent, the waters flowing in the stream"; that by the principles established in that case it is "not lawful for one owning land bordering upon or adjacent to a stream to make

an excavation on his land in order to intercept and obtain the percolating water and apply such water to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream and causes damage to parties having rights in the water there flowing." Further proceeding, the court said:

"The court below manifestly did not consider that this question was of any consequence, and, having concluded that the water was not a part of the stream, it conceived the idea that it was not water to which the defendants were entitled in law, and that, consequently, its abstraction did not take any of the flow of the stream to which the defendants were entitled. And this would have been correct if the principle had not been established in *Katz v. Walkinshaw*, 141 Cal. 43, ante, p. 35, 70 Pac. 663, 74 Pac. 766, as stated. It is quite clear from the evidence that the court erred in finding that the stream was not diminished by the abstraction of the water by the plaintiff by means of the excavation and tunnel. Three hydraulic engineers testified on behalf of defendants, and each, after describing the condition and character of the material composing the bed of the creek and the bottom of the tunnel, stated that, in his opinion, necessarily, whatever water was taken from the excavation and tunnel diminished by that much the amount flowing in the stream below. There was no evidence to the contrary. One engineer was examined on behalf of the plaintiff in rebuttal, but he was not asked whether or not, in his opinion, the percolating waters gathered by the tunnel would eventually reach the stream, nor whether or not the waters in the tunnel came from the stream through the permeable material. There is no conflict in the direct evidence on this question, and the circumstances, generally, tend to confirm the opinion of the engineers. The court should have found from the evidence that there was a diminution of the stream caused by the taking out of the water through the excavation and tunnel. Having found this fact, it would then be the duty of the court to ascertain and state the amount of the diminution. The plaintiff has no right to a decree declaring him to be the absolute owner of water thus taken from the creek, or quieting his title thereto. His rights therein are no greater than they would be if he had taken the water directly from the stream.

"There is no finding upon the allegation that the plaintiff was taking this water to distant and nonriparian lands. The court below probably deemed this immaterial, after having found that the water taken was no part of the waters of the creek, and did not reduce the quantity there flowing. The evidence shows clearly that the water in question was taken beyond the boundaries of the land described in the complaint, but it does not show to what use it was put by the plaintiff. He had no right, however, to take it beyond the lines of the land from which it was taken and divert it from the stream, either to let it go to waste or to use it on other lands. The motion for a new trial should have been granted."

LAND OWNERS' RIGHTS IN PERCOLATING WATERS.

- I. Decisions Holding that Percolating Waters Belong Absolutely to the Owner of the Soil.**
- II. Interferences and Diminutions to Which Land Owner Must Submit.**
- III. Interferences and Diminutions to Which Land Owner Need not Submit.**
- I. Decisions Holding that Percolating Waters Belong Absolutely to the Owner of the Soil.**

In our note to *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659, 40 Atl. 41, we treated only the question of what waters are percolating, perhaps under the impression, which the later and best considered cases do not sustain, that when this question was solved and the answer reached that the waters in question were percolating, no other inquiry need be made except to ascertain on whose lands they were found when used, appropriated, or otherwise interfered with. This impression that percolating waters were but a part of the lands into which they came through the operation of natural laws, and hence belonged to the land owner, and that his ownership was as complete as in other parts of his land, including the right of use, disposition, and, if he chose, of waste, resulted from language to be found in the opinion of many courts, both English and American, though doubtless in some instances the expressions of the courts were mere dicta, or, at least, should be construed in connection with the circumstances to which they were addressed. Thus, in *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62, it was held that "the use of surface water flowing regularly in well-defined banks is about as well settled as any legal principle can be, and the current of authorities also seems to be as well settled that subsurface water which, without any distinct channel, percolates in veins, oozes and filters from the land of one proprietor into that of another gives the latter no rights thereto which the law recognizes." "Water which is the result of natural or ordinary percolation through the soil is a part of the land itself and belongs absolutely to the owner of the land, and in the absence of any grant, he may intercept and impede such underground percolations, though the result be to interfere with the sources of supply of springs and wells on adjacent lands": *Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176. So, in *Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433, Judge Finch, speaking of such waters, said that they belonged to the owner of the land "as much as the earth and the minerals beneath the surface; and none of the rules relating to watercourses and their diversion apply. The only exceptions established by the authorities is that of certain underground streams and rivers which are known and notorious, and flow in a natural channel between defined banks. A few such exceptions are admitted to exist, and others may occur; but outside of these, subsurface currents or percolations are not governed by the rules and regulations respecting the use and diversion

of watercourses, and they may be intercepted and diverted by the owner of the land for any purpose of his own." Many other American cases might be cited in which opinions were written containing statements of similar import, among which are *Frazier v. Brown*, 12 Ohio St. 294; *Westmoreland etc. Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. 724; *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. Rep. 746, 65 N. W. 911; *Crescent etc. Co. v. Silver King etc. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; *Willow Creek etc. Co. v. Michaelson*, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943; *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659, 40 Atl. 41. All of the cases heretofore cited, however, were, in their results, perfectly reconcilable with what is everywhere conceded to be the law upon the subject, and merely sustain land owners in making a natural and ordinary use and improvement of their property which incidentally tend to interfere with the flow of percolating waters to or from the lands of another. This cannot be affirmed of *Chatfield v. Wilson*, 28 Vt. 49, and *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, both of which affirm the absolute right of land owners to deal with percolating waters as their interest, caprice, or malice may suggest, though thereby the property of adjacent owners is substantially or wantonly injured, and the later case even maintains that this right of the landlord is a vested right which the legislature cannot impair to the extent of prohibiting him from the needless discharge of waters from artesian wells on his lands, though such waters are percolating and such discharge draws them from the lands of his neighbor in greater quantities than they would flow but for such wells. We shall not here state the facts of this case, because it is reported in this series, but will quote the following announcement or conclusion of the court for the purpose of showing the extreme views which are promulgated by it: "It seems clear that it must be held that the appellant had a clear right at common law, resulting from his ownership of the land, to sink a well thereon and use the water therefrom as he chose or allow it to flow away, regardless of the effect of such use upon his neighbors' wells, and that such right is not affected by a malicious intent. Whether this right results from the absolute ownership of the water itself, as stated in some of the authorities, or from a mere right to use and divert the water while percolating through the soil, is a question of no materiality in the present discussion. In either event it is a property right arising out of his ownership of the land, and is protected by the common law as such." From these decisions two results inevitably flow: 1. Whoever finds percolating water upon his land may do with it whatsoever he pleases, though thereby the owners of adjacent lands are seriously, and even irreparably, injured with the exception that ordinarily he cannot collect it in a body or artificial channel and discharge it upon such lands to their injury; and 2. He may be despoiled of such waters by the owners of adjacent

lands and others whenever it is possible for them to so despoil him without entering upon his land. We believe that the more carefully considered decisions do not permit either result, and that, as intimated by Judge Shaw in *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. 847, the principal case and others establish a rule with respect to waters percolating in the soil which makes it to a large extent immaterial whether they are or are not part of an underground stream.

II. Interferences and Diminutions to Which Land Owner Must Submit.

As to the extent to which a land owner must submit to the diminution of supply of waters percolating through the soil of his land, it will be found, we think, that the rules applicable to surface waters are substantially applicable to percolating. He cannot, by his insistence of his rights to percolating waters, deprive his neighbors of rights which naturally accrue to them as the owners of lands adjacent to his. The rights of each land owner are obviously to some extent modified by the rights of the owners of adjacent lands. His rights are not more sacred than theirs, and they need not yield theirs to enable him to have a more extended or valuable use of his. Each may employ his lands for the ordinary purposes of cultivation, and improve them, though thereby the lands of others are rendered somewhat less valuable. Each must submit to the carrying on of the ordinary processes of husbandry in the ordinary manner on the lands of his neighbor, and no exception is permitted to this rule when waters percolating through the soil are by such processes diverted therefrom or carried off more rapidly than they otherwise would be, or intercepted before their entry therein. The use of one's land otherwise lawful is not made unlawful by the fact that it prevents water from percolating to the lands of another or hastens or increases its departure therefrom: *New Albany etc. R. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *Mosier v. Caldwell*, 7 Nev. 363; *Frazier v. Brown*, 12 Ohio St. 294; *Buffum v. Harris*, 5 R. I. 243; *Herriman etc. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719. Thus, each land owner has the right to have wells upon his premises at least for domestic purposes, and he who first obtains such wells cannot prevent his neighbors from doing likewise on the ground that the sinking of their wells diminished or wholly prevents the flow of water in his: *Roach v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Greenleaf v. Francis*, 18 Pick. 117; *Ocean G. C. M. A. v. Ashbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Crescent etc. Co. v. Silver King etc. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; nor does the grant of an easement to draw water from a well by a pipe laid in the ground and used at the time of the grant preclude the grantor or his successors in interest from digging another well or reservoir on this land, though the effect may be to destroy the value of the easement by diverting

the water which otherwise percolated into the well: *Davis v. Spaulding*, 157 Mass. 431, 32 N. E. 650. A spring fed by percolating waters is subject to the same rule as a well. Hence there is no remedy where waters are prevented from reaching the spring, or from percolating away from it, by wells dug on the adjacent lands or by other operations there conducted in the ordinary manner and which the land owner is entitled to conduct by virtue of his ownership of the soil: *Herriman etc. Co. v. Keel*, 25 Utah, 96, 69 Pac. 619; *Miller v. Black Rock Springs etc. Co.*, 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27. So a landlord may construct and maintain trenches and ditches at the boundaries of his land or elsewhere thereon, though thereby springs and wells on the lands of the neighbor are made less valuable: *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783. Probably he may even construct and maintain extensive tunnels on his land, though they result in like injury to his neighbors: *Williams v. Ladew*, 161 Pa. St. 283, 41 Am. St. Rep. 891, 29 Atl. 54; *Herriman etc. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719. Streets and sewers may also be maintained, notwithstanding their interference with percolating waters: *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274. If lands are used for mining purposes, as where the right to carry on a mine has been granted, the ownership of the surface of the land still remaining in the grantor or his successors in interest, it constitutes no valid objection to the mining operations that they interfere with percolating waters to the injury of the owner of the surface: *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Coleman v. Chadwick*, 80 Pa. St. 81, 21 Am. Rep. 93; *Trout v. McDonald*, 83 Pa. St. 144. Where, however, this question arises between the owner of a mine and owners of adjacent lands who have not by grant or other act on their part conferred any right or interest upon him, it would seem to be more difficult of solution. It may well be argued that mining operations differ from the ordinary processes of husbandry, especially when by tunnels or otherwise they necessarily deplete the adjacent lands of their percolating waters or prevent such waters from entering therein. Nevertheless, the only decision on this subject coming within our observation maintains that for injuries thus sustained by reason of such mining operations the owner of the adjacent lands is without remedy: *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721.

In the cases referred to, the acts permitted, though they to some extent incidentally affected the land owner's enjoyment of percolating waters, were not done for this purpose nor from a malicious desire to injure him or with a view of taking water which was his as part of his land and adding it to the lands of another for the purpose of profit. Every ordinary operation of husbandry, though innocent in many circumstances, may be so carried on as to manifestly involve injury to the proprietor of adjacent lands to an ex-

tent to which it is inequitable to require him to submit. Thus, for the purposes of irrigation, each land owner may undoubtedly use to some extent any water, whether surface or subterranean, upon or forming a part of his land, but while the extent is not, we believe, well settled judicially, it should stop short of depriving his neighbors entirely of their rights otherwise existing to so use like water for a like purpose. In many localities the construction of artificial ditches along the side or near lands will draw off the waters percolating to them to the extent of rendering them substantially less productive and prove not less damaging than the removal of the soil itself, and the water may be thus drawn off for the purpose of using it to irrigate the adjacent premises. Whether this may be done and the result still be held *damnum absque injuria* we cannot state, but to us it appears that there may be cases in which the courts must interpose, on the ground that the one land owner has in effect taken the property of another and added it to his own; and that if percolating waters be a part of the land, there is no more right to take them than there is to take the other elements which, together with the water, make up the whole land, every part of which is equally the property of the land owner. Each land owner may, in the exercise of the ordinary rights of ownership and in the ordinary course of business and husbandry, incidentally affect the rights of the neighboring land owner but this is far from affirming that either may conduct operations, the chief, or perhaps the only, object of which is to obtain the lands of his neighbor or some part thereof, and add them to his own. Upon this subject we invite consideration to what was thus said in *Bassett v. Salisbury* etc. Co., 43 N. H. 569, 82 Am. Dec. 179: "No land owner has an absolute and unqualified right to the unaltered natural drainage or percolation to or from his neighbor's land. In general, it would be impossible for a land owner to avoid disturbing the natural percolation or drainage, without a practical abandonment of all improvement or beneficial enjoyment of his land. Any doctrine that would forbid all action of a land owner, affecting the relations as to percolation or drainage between his own and his neighbors' lands, would in effect deprive him of his property; and so far from being an application of the maxim, '*Cujus est solum*,' etc., would work a general denial of effect to it. If A has the absolute and unqualified right to receive from and discharge into the adjoining land of B all the drainage and percolation, as they naturally flow between that land and his own, this is substantially a right to a use of B's land, practically depriving the latter of all beneficial enjoyment of his property, and in effect amounting to an appropriation of it; and as B and the other neighboring land owners must have similar rights, the improvement, or beneficial occupation of land, becomes in fact impossible, and property in the soil for nearly all useful purposes is annihilated. But we do not think it follows

from this, as some recent cases have held, that a land owner has the full and unlimited ownership, and the absolute and unqualified right of control of all water in or upon his land, not gathered into natural watercourses; for the nonexistence of an absolute right does not conclusively disprove the existence of a qualified right. Nor do we think that the maxim cited can be applied to establish an unqualified ownership of such waters in all cases, any more properly than it can be relied on to prove an absolute property in all the air within one's bounds. If the land owner has the absolute and unqualified ownership of all such water in or upon his land, his neighbor, by digging or otherwise, has no more right to take away his property water than his property sand. If, as respects the soil, he may dig as he pleases, he is still in general, limited by the rule that in digging he must not take away his neighbor's soil, by effectually removing its natural supports. If a natural pond, of uniform depth, is equally divided between two land owners, or if they have dug a well, half on the land of each, it perhaps would not be claimed that one may pump his half of the pond or well dry, without regard to the half of his neighbor. But however this may be, if the water, not gathered into natural courses, belongs absolutely to the owner of the land, because it is part of the soil, and for that reason only, it must be subject to the same law as the other components of the soil—the sand, loam, and rock—which may not ordinarily be removed by an adjacent owner, by the withdrawal of their natural supports; for the maxim from which such ownership is deduced, when applied without qualification, as it must be to lead to this conclusion, allows no sound distinction." These views were reiterated in *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. In neither case were they necessary to the decision of the question before the court but they are entitled to much higher rank than ordinary dicta, because in both cases they manifestly resulted from a mature consideration of the principles affirmed.

III. Interferences and Diminutions to Which Land Owner Need not Submit:

The very decided weight of authority supports the proposition that a land owner has no right by anything done on his land to waste, whether through malice or indifference, the percolating waters there found or which he therein develops or brings to the surface by means of ditches or wells, with or without pumping apparatus, if by such waste the neighboring land owner is deprived of percolating waters which otherwise would be within his land and which he there has a necessity for using: *Barclay v. Abraham* (Iowa), 96 N. W. 1080; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Stillwater W. Co. v. Farmer*, 89 Minn. 58, post, p. 541; 93 N. W. 907; *Springfield W. W. Co. v. Jenkins*, 62 Mo. App. 74; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511; contra, *Huber v. Merkel*, 117

Wis. 555, 98 Am. St. Rep. 933, 94 N. W. 354. This rule is inconsistent with the theory that a land owner has an exclusive, irresponsible ownership of whatever percolating waters he may find in his land. If such waters are property in the sense that are other parts of the land, his neighbors can have no equity to prevent him from wasting them if he chooses, even though it resulted, and was intended to result in an incidental damage to them. The decisions must therefore be supported, as well they may be, on the assumption that his ownership is not absolute, but is qualified by the ownership in the proprietors of adjacent land, and exists only, as in the case of a running stream, to the extent of allowing him the use of the water for the purposes of husbandry and for the carrying on of some other business in a prudent, rational manner, and without any unnecessary or unusual impairment of the interests of neighboring land holders.

It is perfectly possible, as in the principal case, by the boring of wells on one's premises, with and sometimes without the aid of pumping operations, to draw off waters which percolate through the lands of one's neighbors, and thereby make such lands barren where otherwise they would be highly productive, and the purpose of such wells and operations may be to sell the water thereby developed, or to make some use of them commercial in its nature and not capable of being ranked as an ordinary process of husbandry, or a process to which one land owner is ordinarily required to submit at the will of another. The process, if continued, may, and generally must, result in the drawing to the wells and trenches of all the percolating waters within a wide area and in rendering the adjacent lands partially or wholly barren. Generally, we think, this must be regarded as such an invasion of the rights of the proprietors whose lands are thus injured that it ought not to be allowed. Certainly, there are decisions not in conformity with our views. Besides the cases to which we have referred, practically affirming that a man may do as he pleases with any percolating waters which he may be able to find on his lands, there is *Clark County v. Mississippi etc. Co.*, 80 Miss. 535, 31 South. 905. In that case it appeared that in a neighborhood in which were several artesian wells, a lumber company bored four more and placed in one a pipe into which was forced compressed air of such power as to greatly increase the natural flow of the water and to diminish the supply of plaintiff and of all private wells situate in the same town. The purpose of thus doing was to supply a pond for logs for a saw-mill operated by the company. It appeared, however, that the acts of the defendant were done in good faith and without any desire to injure anyone, and these circumstances were thought sufficient to justify the defendant in what he did and to warrant the refusing of an injunction sought on behalf of the county whose pre-existing well had been greatly diminished in flow and value. The

court said: "The right to bore for water to be used on the land for the business uses of the owner of the land is fully recognized." As a general rule, this may be conceded, but that it is applicable when all other neighboring land owners must necessarily lose their right to use for business or other purposes the water percolating through their lands may well be doubted. Possibly the case cited may be defensible, but it is certainly questionable, because it sustains the right of one land owner to percolating waters to the extent of destroying like rights of other land owners whose equities are as apparent and as persuasive as his.

The owner of land sunk a well and secured a flow of water therefrom rising several feet above the surface of the ground. She then erected a bathhouse, and pumped water from the well into the house and the bathtubs therein, and built up a large and profitable business. Subsequently other wells were sunk in the same neighborhood, whereby the flow of the water in her wells was somewhat diminished. Subsequently, the city sunk wells on its premises and erected waterworks and pumping machinery, and pumped therefrom such quantities as were needed for the city supply, and thereby caused the flow in the other well to entirely cease at such times as the pumping operations were being carried on. She brought an action against the city to recover compensation for damages claimed to have resulted from its act in diverting the water from her well, and claimed that if the city had exercised care to avoid wasting the water, and used such only as was necessary, no injury would have resulted to the plaintiff. A verdict was returned and a judgment entered in her favor. It was held to be clear "that for any damage done by defendant to plaintiff in depriving her of the free and accustomed use of the water in her well for the usual domestic purposes, the city would be liable, because in any event its use of the water was for extraordinary and artificial purposes"; and that "whether defendant would be liable for using its well in the supplying of water to the inhabitants of the city, thereby at times interfering with the plaintiff's supply of water for the purpose of operating her bathhouse, depends on the reasonableness of defendant's use of its wells"; and that "the reasonableness of the use is not to be measured by the wants or necessities of the defendant, but it is to be determined in view of all the facts and circumstances and in view of the number and wants of other wells on the stream"; and that "each party, for artificial purposes, had the right to use the water, and each was bound to so exercise that right as to cause the other the least inconvenience and damage. From the nature of the case, neither of the parties being able to return the water to the stream whence it came, the reasonableness of the use is to be determined in view of that as well as other facts. Both having an equal right to the water for artificial uses, neither can so exercise that right as to wholly deprive the other of its use at any

time": *Willis v. City of Perry*, 92 Iowa, 297, 60 N. W. 727. A like conclusion was reached in somewhat similar circumstances in *Smith v. City of Brooklyn*, 46 N. Y. Supp. 141, 18 App. Div. 340, *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, though in that, as well as in the Iowa case, the assumption seems to have been made that the waters in question were from well-defined subterranean streams, rather than from percolating. The rule was, however, applied by the courts of New York to waters of this class in *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, a case wherein it appeared that the defendant sank wells upon his land, drew water therefrom for the purpose of merchandise, and thereby deprived the plaintiff of his supply of underground water. In sustaining a judgment in favor of the plaintiff, the court of appeals said: "In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and others whose lands are thus clandestinely sapped, and their value impaired. The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass can be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of the case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us."

A railroad company sank a large well on its own land, which was fed by percolating waters, and drew therefrom twenty-five thousand gallons of water per day, which was used in its locomotives and machine-shops, and thereby destroyed a well previously existing on adjacent lands and there used for domestic purposes.

The owner of the latter well brought an action against the railroad company for the damages which he claimed resulted from this obstruction of his well. A verdict and judgment having been entered against him, he appealed to the court of civil appeals, where the judgment was reversed upon the authority of the case last cited, and the views expressed in the quotation made therefrom by us were approved: *East v. Houston etc. R. Co.* (Tex. Civ. App.), 77 S. W. 646.

No case in its contribution to the law upon this subject exceeds in value the principal case, though to some extent that value may be diminished by its reliance upon the peculiar and exceptional circumstances there detailed. These, we believe, might safely have been omitted from consideration, and the doctrines of the case promulgated as applicable to every part of the Union where it may happen that percolating waters exist, but in such limited quantities that an act done by one land owner is in the nature of, or results in, an extraordinary or artificial use of such water to the detriment of an owner of adjacent lands.

CURTIN v. SALMON RIVER HYDRAULIC GOLD MINING AND DITCH COMPANY.

[141 Cal. 308, 74 Pac. 851.]

CORPORATIONS.—Oral Authority is Sufficient to Authorize the Agent of a Corporation to execute a promissory note. (p. 77.)

CORPORATION, Ratification by of an Unauthorized Note.—If a note purporting to be the note of a corporation is executed without authority and the transaction is fully entered upon its books, and it retains the consideration of the transaction and accepts all its benefits, it must be held to have ratified the execution of the note; or perhaps it is more accurate to say that an estoppel is raised by the conduct of the corporation precluding it from resisting the enforcement of the note. (p. 77.)

CORPORATION—Promissory Note Secured by a Void Mortgage.—Though a note and mortgage purporting to be executed by a corporation are void because not authorized at a meeting of the board of directors assembled as required by statute, and the mortgage is never ratified in writing as required by law, yet the note may be ratified by the acquiescence of the corporation or the retention by it of the consideration, and when so ratified, may be enforced. (p. 77.)

RES JUDICATA.—A Judgment Denying the Right to Foreclose a Mortgage against a corporation on the ground that its execution was not authorized or ratified in the manner prescribed by statute is not an adjudication that the plaintiff is not entitled to enforce the promissory note to secure which the mortgage purports to be given. Hence, an action may subsequently be maintained on such note. (p. 78.)

J. P. O'Brien, for the appellant.

J. B. Curtin, for the respondent.

⁸¹⁰ HENSHAW, J. This was an action upon a promissory note executed by the corporation to Thomas W. Wells, one of its directors, and by him assigned after maturity to plaintiff herein. An action was prosecuted by this plaintiff to foreclose a mortgage given by the corporation to secure the note. The decision of this court upon that action will be found reported in the 130th volume of our reports, at page 345. That opinion contains all of the facts pertinent to the present consideration. It was there held that the mortgage was void. But while the note and the attempted mortgage were executed at the same meeting of the board of directors, and were thus both voidable at the election of the corporation, the requirements of the law for validating such an instrument as a mortgage are essentially different from those pertaining to the like validation of a promissory note. Thus, in *Curtin v. Salmon River etc. Co.*, 130 Cal. 345, 80 Am. Rep. 132, 62 Pac. 552, above quoted, it is pointed out that a mortgage to be effective must be made by the board of directors. But, under the provisions of the act of 1880, the consent of two-thirds of the stockholders is requisite to its validity. The stockholders are thus made a component part of the power to make a mortgage effective, but cannot by any act of their own make a mortgage or validate one that has ⁸¹¹ not been previously authorized and executed by the board of directors. The authorization to execute a mortgage must be in writing (Civ. Code, sec. 2309), while authority to execute a note may be oral: 1 *Daniel on Negotiable Instruments*, sec. 274. The law touching the validation of a promissory note irregularly issued by a corporation, and invalid in its execution, is set forth in *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749, a case in principle almost identical with the one under consideration. There, as here, the action was upon a promissory note invalid in its execution; there, as here, the plaintiff claimed a ratification; there, as here, the corporation received the benefits of the loan evidenced by the note; there, as here, with knowledge, and by long-continued silence, acquiesced in the contract, and never attempted or offered to rescind; and there, as here, there is in the answer of the corporation no offer to restore the consideration. This court, in holding that the corporation was bound by its specific contract under the doc-

trine of ratification, said: "Nor will the result be changed if we assume that there was no authority originally for the execution of the note. An agency may be created by subsequent ratification, as well as by precedent authority (Civ. Code, sec. 2307); and where an oral authorization would suffice for conferring an agency, it will be ratified by accepting or retaining the benefit of the act with notice thereof: Civ. Code, sec. 2310. The case here comes clearly within these provisions. Oral authority is sufficient to create an agent to execute a note or notes (1 Daniel on Negotiable Instruments, sec. 274); and this is equally true in the case of corporations as of natural persons: Waterman on Corporations, sec. 30; Greig v. Riordan, 99 Cal. 322, 33 Pac. 913; Crowley v. Genesee Co., 55 Cal. 273. The transaction in this case was fully entered in the books of the defendant, and notice thus imparted to it: 1 Waterman on Corporations, 480; Holden v. Hoyt, 134 Mass. 184. After such notice it retained the consideration of the transaction, and thus accepted its benefits. It must therefore be held to have ratified the transaction."

This language, *mutatis mutandis*, is directly applicable to the case at bar. It would, perhaps, be more technically accurate to say that an estoppel in pais was raised by the conduct ³¹² of the corporation against the enforcement of the note, rather than that it had formally ratified it: Blood v. La Serena Land etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252. But as the legal effect is the same, it can here matter but little by what name it be called.

Except for this ratification or for this estoppel, it is unquestionably true that plaintiff could not enforce the contract evidenced by the promissory note, since it would in no sense have been the contract of the corporation. And in such cases, as the authorities all hold, the recovery of the plaintiff must be, not on the express contract, which is invalid or void, but for money had and received, *quantum meruit*, *quantum valebat*, or *indebitatus assumpsit*, as the facts may warrant. But here the cause of action is directly upon the promissory note originally invalid, but made valid by the conduct of the corporation. Such an action is itself sustainable under all of the authorities dealing with like facts. We have already cited Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749, as being directly in point. There may be added from our own state, Underhill v. Santa Barbara, 93 Cal. 306, 28 Pac. 1049; San Diego v. Pacific Beach Co., 112 Cal. 61, 44 Pac. 333; Illi-

nois Trust etc. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197; Gribble v. Columbus Brewing Co., 100 Cal. 71, 34 Pac. 527; and Blood v. La Serena Land etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; and elsewhere reference may be made to Besiek v. Thomas, 66 Fed. 104; Witter v. Grand Rapids Flour Mill Co., 78 Wis. 543, 47 N. W. 729; Hotel Co. v. Wade, 97 U. S. 13; Union Pac. Ry. Co. v. Chicago etc., 51 Fed. 326.

It is further contended that by reason of plaintiff's former action to foreclose the mortgage, and his failure therein, by reason of the decision against the validity of the mortgage, he is estopped from prosecuting this action, and that the former judgment is a bar. It is to be noticed, however, that the decision itself in the former case limits its applicability strictly to the question of the mortgage lien, saying: "Whether the defendant would be estopped from contesting the claim of the plaintiff to recover the moneys advanced to it by him is not here involved. The plaintiff seeks by this action the sale of the defendant's property in payment of the note held by him, but unless the defendant has created a lien upon the property, the plaintiff cannot maintain the present action ³¹² for compelling its sale." The question there presented was one addressed to equity for the foreclosure of an alleged lien created upon real property. In an action to foreclose a mortgage the mortgaged premises constitute the primary fund out of which the debt is to be paid, and a personal judgment can only follow after the exhaustion of the security. The effect of that decision is, that there was not, and never had been, any security for the promissory note. In the present action the plaintiff seeks enforcement of the contract evidenced by a promissory note which is not, and never was, secured. That he is entitled to prosecute such an action, even though an abortive attempt was made to give security, is decided in *Powell v. Patterson*, 100 Cal. 236, 34 Pac. 677, where the plaintiff brought suit to foreclose a mortgage which was void. There was pretended security, but in fact no security at all, and this court held that as the mortgage sought to be foreclosed was void and of no effect, the plaintiff was entitled to a personal judgment upon the note. If in that case it was permissible for the court, in an action brought specifically to foreclose a mortgage, to declare the security void and still render a personal judgment for the amount of the note, no reason can be perceived why a plaintiff in a separate action at law upon the note alone should not be entitled to his recovery.

In conclusion, it may be said that if the ruling of the court in refusing to strike out certain parts of plaintiff's complaint was technically erroneous, it worked no possible injury to the defendant. The evidence was sufficient to establish knowledge and acquiescence upon the part of the corporation and its members.

The judgment and order appealed from are affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

A Corporation, by receiving the benefits from the performance of a contract, may be estopped to set up the defense of ultra vires: *Vought v. Eastern Bldg. etc. Assn.*, 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496; *Wuerfler v. Trustees of Grand Grove*, 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; *White v. Commercial etc. Bank*, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94. And a corporation may ratify the unauthorized acts of its agents: *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Sherman Center etc. Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569. See, however, *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954. Thus, where a mortgage is signed by its president and secretary without authorization by resolution, but the corporation receives the benefits of the mortgage, the defects in its execution will be deemed cured by acquiescence and ratification: *Dexter-Horton & Co. v. Long*, 2 Wash. 435, 26 Am. St. Rep. 867, 27 Pac. 271; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907. But see *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 389, 10 S. E. 1017. Ratification, however, cannot give effect to an unauthorized act, unless the person or corporation making the ratification could in the first instance have authorized the act: *Curtin v. Salmon River etc. Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552. See, too, *Lyndon Mill Co. v. Lyndon Literary etc. Inst.*, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

ESTATE OF McKEAG.

[141 Cal. 403, 74 Pac. 1039.]

PARENT AND CHILD—Adoption Proceedings.—The fact that the father of the child adopted appeared before the judge is sufficiently established, on a collateral attack on the adoption, by the statement in the order, that the petitioner and the minor child, and all persons whose consent is necessary have appeared herein as provided by law. (p. 83.)

PARENT AND CHILD—Adoption Proceedings, Construction of.—While proceedings under the statute for the adoption of a minor child are not strictly judicial, they call for the exercise of judicial functions, and in construing them such a reasonable construction should be given as will sustain, rather than defeat, the object they have in view. (p. 84.)

PARENT AND CHILD—Adoption Proceedings.—Failure of the Court to Examine the Child or its Parents or the Persons Purporting to Adopt it is an error of procedure which cannot affect the validity of the adoption, where the court had obtained jurisdiction of all the parties. (p. 85.)

PARENT AND CHILD—Adoption Proceedings—Estoppel.—One Claiming Under a Deceased Adopting Parent is estopped from questioning the validity of the adoption, if such parent, in his lifetime, was so estopped. (p. 85.)

PARENT AND CHILD—Adoption Proceedings—Estoppel.—An Adopting Parent with Whom an Adopted Child Lives is estopped from questioning the validity of the adoption proceedings on the ground of mere irregularities not involving the jurisdiction of the judge. (p. 85.)

PARENT AND CHILD.—An Adopted Child has the Right to Nominate an Administrator of the Deceased Adopting Parent where, as such, she is sole heir of his estate. (p. 87.)

W. M. Cannon and Frank Freeman, for the appellant.

McCoy & Gans, for the respondents.

405 LORIGAN, J. This is an appeal from an order of the superior court of Shasta county, refusing to revoke letters of administration in the above estate, and the real point involved is as to the validity of certain adoption proceedings.

The respondent Charles J. Teass is the husband of Helen McKeag-Teass, and was appointed administrator of said estate upon the request of his wife, who claimed to be the adopted daughter, and, as such, sole heir of deceased. At the time of the alleged adoption, Mrs. Teass, then Helen Skeels, was a minor, over the age of twelve years, and the daughter of Spencer L. and Anna E. Skeels.

On December 2, 1895, William McKeag and the deceased, Cora V. McKeag, his wife, jointly applied to the judge of the

superior court of Shasta county for an order of adoption by them of said child, and filed therewith their written agreement of adoption required by law. The written consent of said minor was likewise filed, together with that of her father and mother consenting to and authorizing the making of such order of adoption.

Thereafter the judge of said superior court made and filed an order for the adoption by said William and Cora V. McKeag of said minor, which order recited, among other things: "That the petitioners and said minor child, and all persons whose consent is necessary, have appeared herein as provided by law, and . . . it is hereby ordered that said petitioners William McKeag and Cora V. McKeag, his wife, adopt said minor child . . . and said minor child shall be treated by them in all respects as their own lawful child should be treated, including the right of inheritance, . . . and shall bear to each other and toward each other the relation and relations of parents . . . and child."

Prior to said adoption said minor had, for some six or seven years, been living with said William and Cora McKeag, and after said adoption continued to live with them until their death—William McKeag dying a couple of years before his wife. William and Cora V. McKeag had no other children, ⁴⁰⁰ and a strong feeling of parental love and affection existed at all times between the adoptive parents and said child, and so continued to the death of the former.

Said Cora V. McKeag died intestate in Shasta county in July, 1901, and after the issuance of letters of administration to said respondent, the appellant, a sister of said deceased, claiming to be one of the heirs at law, petitioned to have the letters issued to respondent revoked, and letters issued to herself, which petition was denied.

Upon the hearing in the lower court, the validity of the adoption proceedings was the sole point in issue, as it is the sole question for determination here.

The appellant claims: 1. That the judge before whom the adoption proceedings were had, acquired no jurisdiction to make the order of adoption, because the father of the minor child did not appear personally before him during any part of the proceedings; and 2. That neither the adopting parents nor the father of the minor, nor the minor herself, were examined by the judge on the hearing, either separately, or at all.

Upon the first point it is insisted that it is not enough for the adoption proceedings to show that the father consented in writing to the adoption of his child, but that the order of adoption should affirmatively show that he was actually present at the hearing upon the petition. We think, however, on this collateral attack, that the fact does sufficiently appear upon the face of the order from the recital therein "that the petitioner and said minor child, and all persons whose consent is necessary, have appeared herein as provided by law."

In *Estate of Camp*, 131 Cal. 470, 82 Am. St. Rep. 371, 63 Pac. 736, it is said: "While the proceedings for the adoption of a minor child do not constitute judicial proceedings, and the order of the judge therein is not the judgment of a court, yet under section 227 of the Civil Code, the judge of the superior court has been designated as a tribunal for that purpose, and in the performance of his duties thereunder exercises judicial functions. It is a well-settled rule that when the jurisdiction of an inferior or special tribunal, or its power to act in any particular ⁴⁰⁷ case, depends upon the existence of a fact which is to be established before it by extrinsic evidence, the determination of that fact by the tribunal cannot be questioned in a collateral attack upon its order. . . . Whether the children had been abandoned by their parents was a jurisdictional fact to be determined by the judge upon the evidence presented to him before he was authorized to entertain the petition for their adoption, and the recital in his order that it appeared to his satisfaction that they had been abandoned by their parents was a determination of this fact which cannot be questioned in a collateral attack upon the order. Otherwise, the existence of this fact and the status of the children would be always uncertain, since the evidence might not be the same at all investigations, and might be regarded with different effect by different tribunals, and the adoption be held by one court to have been valid, while another court would hold it to have been of no avail. Whether the parents of the child, in a direct proceeding against the adopting person for the recovery of the persons of the children, would be bound by the determination of the judge, is not involved herein."

So, in the case at bar, it was a jurisdictional fact, to be determined by the judge from extrinsic evidence, whether the consent of the father was necessary to the adoption, and,

if so, to require his presence before him at the hearing. While the general rule is, that a child cannot be adopted without the consent of its parents, there are several exceptions to the rule; as, for instance, if either parent has been deprived of civil rights, or adjudged guilty of cruelty or adultery, and for that reason divorced, or adjudged an habitual drunkard, or has abandoned the child. In any of these cases the consent or presence of such parent is unnecessary. Otherwise it is. Upon the appearance before the judge of the persons seeking to adopt the child and the child, he acquires jurisdiction to entertain the petition for adoption, but at this point it is only jurisdiction to preliminarily investigate and determine whether the presence at the hearing of the parents of the minor child is necessary or not.

One parent being present and consenting, it is still incumbent upon the judge to ascertain whether the consent and presence of that parent alone is necessary to the relinquishment ⁴⁰⁸ of the child, and to confer full jurisdiction to proceed with the hearing and make the order of adoption.

If it should be ascertained upon such inquiry that the child has another parent living who possesses a right to its care, custody or control, it is the duty of the judge to decline to proceed with the hearing on the petition until the consent and presence of such parent are had; on the other hand, should the inquiry disclose that such parent, if living, comes within any of the exceptions of the statute, the consent or presence of such parent is unnecessary. In all cases it becomes necessary to determine this jurisdictional fact. In the case at bar it must be presumed that the judge properly discharged his official duty, and, in the absence of any express finding that the presence of the father was unnecessary, by reason of coming within any of the exceptions (and the presumption is in favor of the general rule, not of the exception), determined that his presence was necessary, and required it, and in harmony with his written consent the father actually appeared at the hearing, and that the fact of such actual presence is embraced in the finding "that all persons whose consent is necessary have appeared herein as provided by law."

The finding, it is true, is somewhat open to the objection that it is equivocal and uncertain in its language. It might have been more definite. In fact, in the various cases affecting adoption proceedings which have required the attention

of this court, much of the difficulty in considering them has arisen from the apparent inattention to the plain provisions of the statute; these provisions are so simple, and so much depends upon substantial compliance with them, particularly as to the future interests of the child, that the simplicity of the one and the paramount interest of the other should command more attention at the hands of the judge called upon to act. While proceedings under the statute are not strictly judicial, they call for the exercise by the judge of judicial functions, and in construing them such a reasonable construction should be given them as will sustain rather than defeat the object they have in view.

There is nothing that can be said against the policy of adoption laws; there is everything that can be said in their ~~400~~ favor. Under them, innocent, parentless and abandoned children are withdrawn from the charity of public institutions, and provided with comfortable homes and affectionate foster parents.

Unfortunate children, whose parents, through overwhelming adversity, or the infirmities of their nature, are unable to care and provide for them, are placed in cheerful homes, under the care and control of adoptive parents willing and able to provide for their protection and comfort.

Under the beneficent provisions of these statutes, such children are accorded advantages and opportunities for better moral, intellectual, and material advancement; a measure of happiness is secured to the adoptive parents and the child adopted, under the reciprocal influences of filial and parental affection, and inasmuch as the development of the child into a valuable member of society and an upright citizen depends upon healthy, moral home influences and parental solicitude, to that all-important extent, then, under these laws, are the best interests of society and the state conserved.

Recognizing these good results, courts are more and more inclined to an abandonment of the old rule of strict construction and to place a fair and reasonable construction upon proceedings under the statute, with a view of sustaining the assumed relationship, particularly against a collateral attack by strangers to the proceedings, whose only interest is to defeat the relations which the adoptive parents always recognized and never questioned, so that they may succeed to an estate from which, by the very fact of adoption, the adoptive

parents intended they should be excluded in favor of the adopted child.

As to the second point urged by counsel for appellant, that neither the adoptive parents, nor the father of the minor, nor the minor, were examined at the hearing, we think it is without merit.

The court, having obtained jurisdiction of the parties, the failure of the judge to examine these parties was an error of procedure which cannot affect the validity of the adoption: *In re Johnson*, 98 Cal. 542, 33 Pac. 463. While it was especially held that the examination of a child under twelve years of age was discretionary with the judge, the trend of the decision ⁴¹⁰ is to hold that the examination of the other persons appearing before the judge is not absolutely necessary to give effect to the order of adoption. The court there says: "The essential foundation of the proceeding is the consent of the persons named in the statute, and when this has been given in the presence of the proper judge, and manifested in writing and by the order of such judge, the contract cannot be declared invalid because of some merely technical objection to the manner in which the judge who signed the order of adoption may have discharged his duty in the premises."

Without, however, discussing this point further, we are satisfied that appellant claiming under *Cora V. McKeag*, the adoptive mother, is estopped as effectually as she would be in her lifetime from questioning the validity of the adoption proceedings—certainly, at least, to the extent that any irregularities in the method of procedure are invoked to disturb them. The deceased in her lifetime could not have questioned them, and appellant stands in no better right to attack them than the deceased would have had.

In *In re Williams*, 102 Cal. 81, 41 Am. St. Rep. 163, 36 Pac. 409, this court says: "Undoubtedly, the judge ought, in the orderly and proper discharge of his duty, to conform to this direction of the law (examination of all parties), but his omission to do so would not render the contract absolutely void. The deceased voluntarily entered into the contract of adoption under consideration here, and received in his lifetime the benefits resulting from the relation thus created—the society, affection, and devotion of an adopted daughter—and no principle of law or equity will permit the appellants claiming under him to avail themselves of this technical departure from the direc-

tion of the statute, to defeat the rights of respondent growing out of the contract, the validity of which was never disputed by the deceased, and which has been fully performed by all the parties to it."

In *In re Evans*, 106 Cal. 565, 39 Pac. 861, the court expresses the same view in the following language: "Various irregularities in the proceedings are urged, but, after these papers were executed before the judge, and this man and this child lived together as father and daughter for ten years and down to ⁴¹¹ the day of his death, it requires more than mere irregularities to brush aside and annul a relationship entered into with all honesty of purpose, lived up to for many years, and only severed by the hand of death." To the same effect are *In re Johnson*, 98 Cal. 545, 33 Pac. 460; *Estate of Camp*, 131 Cal. 471, 82 Am. St. Rep. 371, 63 Pac. 736; *Van Fleet on Collateral Attack*, sec. 408; *Sewall v. Robert*, 115 Mass. 276; *Parsons v. Parsons*, 101 Wis. 83, 70 Am. St. Rep. 894, 77 N. W. 147; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628; *Nugent v. Powell*, 4 Wyo. 201, 62 Am. St. Rep. 17, 33 Pac. 23; and *Appeal of Wolf (Pa.)*, 13 Atl. 764.

In *Nugent v. Powell*, 4 Wyo. 201, 62 Am. St. Rep. 17, 33 Pac. 23, it is said: "Notwithstanding these proceedings in adoption, the father might at any time since they took place have brought an action for the possession or custody of the child, and no one will contend, or perhaps can successfully contend, that in such case these adoption proceedings would constitute a bar to the father's action, or that they were conclusive upon him. But it does not follow that because the adoption proceedings were not conclusive upon the father, they were not conclusive upon the parties to the proceedings and their privies; on the contrary, we think they are, and so hold."

In the last case above cited—*Appeal of Wolf*—the doctrine is clearly stated as follows, and we set it forth somewhat at length as directly applicable to the case at bar: "Nearly nine years after the decree was entered, and more than one year after the death of her adopted father, his administrator and collateral heirs come into court and ask that this decree of adoption be vacated. They are not here in the interest or on behalf of the innocent subject of adoption, but decidedly against the same. They are either strangers to the adoption, and, therefore, have no standing in court, or they are privies in blood, or in law, and stand in the shoes of Samuel Sankey, through and under whom they claim. Surely, Samuel Sankey,

if living, could not be heard in this court questioning its decree made at his solicitation. He invoked the jurisdiction of the court; he asked that the decree of adoption should be made; he got what he desired; and he should not now be allowed to question the means he set in motion. If any wrong was done, ⁴¹² Samuel Sankey did it, and neither he nor those who claim under him can be permitted to take advantage of his wrong to the prejudice of an innocent party. On the argument many cases are cited where decrees of distribution have been set aside at the instance or in the interest of the adopted child. But none were cited, nor will any likely ever be found, where such decrees were revoked at the instance of the party who invoked the power of the court and sought and obtained the decree, when such revocation would be to the prejudice of the innocent child."

For the reasons that we have given, and in harmony with the authorities cited, we are satisfied that the finding of the lower court that the adoption proceedings were valid is correct, and that the respondent, as nominee of his wife, the adopted daughter of deceased, was entitled to administer upon the estate, and that the order denying the application of appellant for a revocation of his letters should be, and is, affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

The Adoption by one person of the children of another is the subject of a monographic note to Van Matre v. Sankey, 39 Am. St. Rep. 210-231. Adoption proceedings must be in substantial, though perhaps not in strict, compliance with the statute: Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 98 Am. St. Rep. 201, and cases cited in the cross-reference note thereto. The failure of the petition to state the place of residence of the parents, where their written consent is filed with the petition in which their residence is stated, does not avoid the adoption: Flannigan v. Howard, 200 Ill. 396, 98 Am. St. Rep. 201, 65 N. E. 782. And a decree of adoption is not necessarily invalid because it does not recite, nor the petition allege, the assent of the parents or facts excusing their assent: Wilson v. Otis, 71 N. H. 483, 93 Am. St. Rep. 564, 53 Atl. 439. But see Watts v. Dull, 184 Ill. 86, 75 Am. St. Rep. 141, 56 N. E. 303. See, generally, as to the necessity of obtaining the consent of parents, Clarkson v. Hatton, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761; Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23; Parsons v. Parsons, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147. Neither an adopting parent nor his heirs or representatives after his death can question the adoption of a child procured at his instance and with his consent: Van Matre v. Sankey, 148 Ill. 536, 39 Am.

St. Rep. 196, 36 N. E. 628. See, too, *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407. As to whether proceedings for the adoption of a child are judicial, see *Estate of Camp*, 131 Cal. 469, 82 Am. St. Rep. 871, 63 Pac. 736; *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; note to *Van Matre v. Sankey*, 39 Am. St. Rep. 211.

PEOPLE v. CHEW LAN ONG.

[141 Cal. 550, 75 Pac. 186.]

CONSTITUTIONAL LAW.—A Statute Authorizing the Court to Determine the Degree of Crime on a plea of guilty of murder is constitutional. (p. 89.)

CONSTITUTIONAL LAW—Jurisdiction, Failure to Specify the Mode of Exercising.—A statute authorizing the court to determine the degree of crime on a plea of guilty of murder is not unconstitutional because it fails to specify the manner in which the court is to reach its determination. Where power is conferred on a court of general jurisdiction to determine a question, and no specified mode for that determination is pointed out, the jurisdiction conferred implies authority in the court to call to its assistance in determining the question the same aid usually employed by it in reaching a judicial determination in other cases. (p. 90.)

JURISDICTION to Determine a Question Involves the Power to Determine It by the Aid of Competent Evidence, because this is the only means by which a judicial determination can be had. (p. 90.)

CRIMINAL LAW.—An Erroneous Insertion in a Warrant of Execution of a direction that the warden of the state prison execute the defendant does not render the warrant void, where the law provides the sentence of the court shall be executed by him. (p. 91.)

CRIMINAL LAW.—A Warrant of Execution Becomes Functus Officio after the lapse of the time at which it was directed to be executed, and an order therein is not afterward material. (p. 91.)

H. H. McCloskey and Barnes & Farquar, for the appellant.

Tirey L. Ford, attorney general, and A. A. Moore, Jr., deputy attorney general, for the respondent.

551 LORIGAN, J. An information was filed against the defendant in the superior court of the city and county of San Francisco, charging him with the crime of murder.

Upon arraignment he pleaded "Not guilty," but subsequently withdrew this plea and entered one of "Guilty."

When this latter plea was received by the court, it was conceded by the attorney for the defendant that the duty devolved upon the court of determining, and fixing, under section 1192 of the Penal Code, the degree of crime, before

passing sentence, and it was stipulated that the testimony taken at the preliminary examination of the defendant be introduced in evidence and used by the court for that purpose.

Thereafter, on March 10, 1902, the court determined from such evidence, that the crime was murder of the first degree, and adjudged that the defendant suffer the penalty of death, and on March 12, 1902, the judge of said court signed and issued a warrant of execution, directing the warden of the state prison, at San Quentin, to execute the judgment of death against said defendant on the sixth day of June, 1902.

The defendant appeals from said judgment and the order of execution, and contends: 1. That the court had no authority ^{see} to determine the degree of the crime; and 2. That the judgment and order of execution are void, because the court had no power to direct the warden of the state prison to execute the defendant.

In their briefs, counsel for appellant, upon the first point urge that the power attempted to be conferred on the court by said section 1192, to determine the degree of crime upon the plea of guilty before passing sentence, is violative of that provision of both the state and federal constitutions providing that the trial of all crimes shall be by jury.

This is no new point. The same contention was made in this court forty years ago, and decided adversely to appellant's claim.

In *People v. Noll*, 20 Cal. 164, this court said: "The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the constitution which prevents a defendant from pleading guilty (to the indictment) instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury."

People v. Lennox, 67 Cal. 115, 7 Pac. 260, is to the same effect, and in *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. Rep. 105, the supreme court of the United States declare that a statutory provision conferring power on the court under such a plea, to determine the degree of crime violates no provision of the constitution of the United States.

On the oral argument counsel made an additional point not presented in their brief, that this section is unconstitu-

tional, because it does not provide any manner, or mode whereby the court is to reach its determination as to the degree of crime; that it does not provide for the taking of evidence on the subject.

Jurisdiction to determine the matter is, however, expressly conferred on the court by the section. This means that there shall be a judicial determination, and where power is especially conferred upon a court of general jurisdiction to determine a particular question, and no special mode for that ⁵⁵³ determination is pointed out, the jurisdiction conferred necessarily implies authority in such court to call to its assistance in determining the particular question, the same aid as is usually employed by it in reaching a judicial determination in other cases.

The universal aid is evidence. This was the means employed by the lower court in determining the degree of crime in the case at bar. It is the only means by which a judicial determination can be had, and was the means which it was contemplated by the legislature should be invoked by the court.

If there could be any doubt of this general rule, we are satisfied that the course pursued by the lower court is provided for and sanctioned by section 187 of the Code of Civil Procedure, which declares that: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

The method adopted by the lower court was entirely conformable to that spirit which provides for a judgment upon a conviction or plea of guilty of crime. If appellant's contention could prevail, a plea of guilty, generally, in those cases where the crime is divided into degrees—murder, burglary, arson—would be tantamount to immunity from punishment, because, as the determination of the degree of crime by the court is an essential prerequisite to the imposition of sentence, if the court is powerless to determine that degree, it is equally powerless to impose sentence, and hence, being unable to hold the defendant for any legal purpose, would be required to discharge him. This situation itself illustrates the wisdom

of the general code provision, and the necessity for its application.

Under the second point appellant insists that the judge of the lower court had no power to insert in the warrant of execution a direction to the warden of the state prison to execute the defendant. Such a direction, however, would not ⁵⁵⁴ render the order void. The law provides that the judge in such warrant shall designate the date of execution, and require the sheriff to deliver the defendant to the warden for execution: Pen. Code, sec. 1217. The fact that the warrant in addition directed the warden to execute the judgment of death is of no moment, as this was a duty devolving upon the warden under the law, independent of the order of court. The order to that extent was surplusage. We are mindful of counsel's contention that there is no provision of law directing the warden to execute a judgment of death, but hardly think the contention worthy of serious consideration. The provisions of the Penal Code, sections 1224, 1226, 1227, designate him as the official who must execute such judgment.

But, assuming that such direction to the warden in the warrant of execution was error, it could not now be available to the defendant for a reversal. From lapse of time the order has become *functus officio*, in as far as it directed the execution of the defendant. He was directed to be executed on June 6, 1902. That time having elapsed, another order of execution must be made, under which the point urged now cannot arise, because, by section 1227 of the Penal Code, the defendant must be brought before the court, and an order made which shall expressly require the warden to execute the judgment at a specified time.

We perceive no reason why the judgment and order should be disturbed, and they are affirmed.

McFarland, J., Shaw, J., Angellotti, J., Van Dyke, J., Henshaw, J., and Beatty, C. J., concurred.

Statutes providing that if one accused of murder is convicted by confession in open court, the court shall proceed by examination of witnesses to determine the degree of the crime, and pronounce sentence accordingly, are upheld as constitutional in *Craig v. State*, 49 Ohio St. 415, 30 N. E. 1120; *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. Rep. 105. And in *Jones v. Commonwealth*, 75 Pa. St. 403, where the defendant indicted for murder pleaded guilty, the court heard the testimony, and decided that the crime was murder in the first degree. As to waiver of trial by jury, see *Harris v. People*, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153, and cases cited in the cross-reference note thereto.

ESTATE OF LEVY.

[141 Cal. 646, 75 Pac. 301.]

APPEAL AND ERROR.—The Executors and the Devises and Legatees of the Deceased are Parties Aggrieved by an order setting apart a homestead for his widow, and, as such, may appeal therefrom. (p. 93.)

HOMESTEAD, Setting Aside Flats as.—The fact that the premises claimed as a homestead consist of a lot and a building thereon divided into three flats, each intended to be used, and used, by a separate family, does not prevent the whole from being selected or set apart as a homestead, where the owner himself occupied one of such flats as a home. (pp. 94, 96.)

HOMESTEAD.—Using a Building Partly, or Even Chiefly, for Business Purposes or Renting Part of It is not inconsistent with the right of homestead, provided it is the bona fide residence of the family of the owner. (p. 94.)

HOMESTEAD, What may be Selected as.—Property suitable for residence purposes at the time of its selection by the court and of such a character that it could have been selected during the life of the husband, may be selected and set apart by the court after his death as a homestead for his widow. (p. 96.)

HOMESTEAD, Probate, Value of.—There is no Limitation of Value in the case of a probate homestead. The court may set aside such property regardless of value as, in view of the value and condition of the estate may seem just and proper. Where the only premises suitable for a homestead are indivisible and no homestead can be given to the family unless the whole of such premises is given, the fact that they are valued at seven thousand five hundred dollars and constitute nearly one-half of the estate does not impair the homestead right in the absence of a statutory limitation as to its value. (p. 97.)

T. E. Pawlicki and Otto Irving Wise, for Hattie Rosenblum et al., appellants in No. 3555, and respondents in No. 4565.

Arthur J. Dannenbaum, for the executors, appellants in No. 3565, and respondents in No. 3555.

W. T. Kearney, for Pauline Levy, widow, respondent in both appeals.

Hugo D. Newhouse, for Edward Calame, assignee of Louis B. Levy, respondent in both appeals.

647 ANGELLOTTI, J. These are appeals from an order setting apart from the property of the estate of deceased a homestead for the use of the surviving wife for and during the period of administration of said estate and until its final distribution. One appeal is taken by the executors of the will of deceased, and the other by certain devisees and legatees under his will. It cannot be held that the executors are not

"parties aggrieved" by such an order, within the meaning of those words as used in the law relative to the right of appeal: In re Heydenfeldt, 117 Cal. 551, 49 Pac. 713. The devisees appealing are specially aggrieved by the order by reason of the fact ⁶⁴⁸ that under the settled law in this state the effect of the homestead order is to remove the premises set apart from the disposition of the will, and to vest title thereto, subject to the order, in the heirs of the deceased, as distinguished from the devisees: Code Civ. Proc., sec. 1468; Estate of Walkerly, 108 Cal. 627, 655, 41 Pac. 772, 49 Am. St. Rep. 97, and note; Estate of Matheny, 121 Cal. 267, 53 Pac. 800. While all such devisees are heirs of the deceased, they will not, as heirs, receive as large shares of the property as they would have received as devisees.

It is contended by appellants that the property set apart should not have been set apart for two reasons, which are, substantially: 1. That the property was of such a character that it was not capable of being selected as a homestead; and 2. That the homestead set apart is excessive in value, considering the value and condition of the estate.

The property set apart consisted of a lot of land in the city and county of San Francisco, with a frontage of twenty-five feet on Ellis street, and a depth of one hundred and thirty-seven and one-half feet, with the frame building thereon. This building was three stories in height, and was subdivided into three flats of one floor each, each flat having a separate street entrance door on Ellis street, and being separate and distinct from the remaining flats, except that all of them were connected by a stairway which ran from the ground in the rear of the building, and connected with the kitchen doors of all of said flats. The top flat, which the testimony showed was more valuable than either of the other flats for rental purposes, was occupied by respondent and deceased as their home prior to and up to the time of the death of deceased, and has been so occupied by respondent ever since the death of her husband.

The lot was appraised at the sum of seven thousand dollars, and the building thereon at ten thousand five hundred dollars. The only other real property of the estate, except a cemetery lot, was a lot on McAllister street in said city, fifty-five by one hundred and thirty-seven and one-half feet, appraised at fifteen thousand dollars, with improvements thereon consisting of a three-story frame building, containing a store and two

upper floors, appraised at three thousand five hundred dollars, and another two-story frame building, the character of which does not appear ⁶⁴⁹ appraised at twelve hundred dollars, all of the same being encumbered by a mortgage for ten thousand dollars. The whole estate was appraised at forty-one thousand four hundred and nineteen dollars and twenty-five cents, and was found to be solvent. So far as appears, there was no creditor other than the holder of the mortgage above referred to, and no property suitable for homestead purposes other than the property set apart.

1. Admittedly, the court in probate proceedings has the power to set apart premises as a homestead, if they be suitable and proper for residence purposes, and could have been legally selected as a homestead during the continuance of the marriage if the parties then actually resided thereon. There is no question as to the suitability of the building here involved for residence purposes, and, leaving out of consideration the question of value, we are satisfied that under the provisions of our statute and the numerous decisions of this court in regard thereto the premises set apart could have been legally selected as a homestead during the continuance of the marriage.

Section 1237 of the Civil Code provides that "the homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided."

Appellant's claim appears to be, that there were in fact three dwelling-houses upon the land; that a court may set apart only one dwelling-house; and that as the land is an ingredient part of the homestead, and a separation of the land and one dwelling-house from the other two dwelling-houses is impossible, owing to the manner of construction, no homestead at all can be set apart.

When the statute speaks of the "dwelling-house" it means the "building" which is occupied as a dwelling-house by the family, and not such portion of the building as may be actually used by the family for residence purposes. It is well settled, as was said by this court in *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404, that "using a building partly, or even chiefly, for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is, and continues to be, the bona fide residence of the family." In that case the homestead claimant built a large addition to his family home for hotel

purposes, and leased the house, reserving a few ⁶⁵⁰ rooms for the use of himself and family, in which they continued to live. Under these circumstances he executed his declaration of homestead. It was held that the homestead claim was valid. In *Skinner v. Hall*, 69 Cal. 195, 10 Pac. 406, the whole house, with the exception of the room in which the claimant resided, was at the time of the filing of the declaration rented to and occupied by another. The homestead was upheld. In *Estate of Ogburn*, 105 Cal. 95, the building was divided into two nearly equal parts, one being used by the claimant as a tin-shop, and the other used partly for the millinery business of the wife, and partly by the family as their home. The whole building was held to be subject to selection by the claimant as a homestead, and properly set apart as such by the probate court: See, also, *In re Lahiff*, 86 Cal. 151, 24 Pac. 850; *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516. These cases are all authority for the proposition that if a building is the actual bona fide residence of a party, he may legally select it and the land on which it is situated as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than those of family residence. There is no decision of this court in conflict with the view. The cases cited above are clearly distinguishable from another line of cases laying down an equally well-settled doctrine, viz.: That the use of the property is an important element to be considered, and that where the building is occupied by the claimant primarily for other purposes than those of residence, the occupancy of a portion thereof by him and his family being for the purpose of conducting a business therein, and but incidental to the business, the property cannot be legally selected as a homestead: *Laughlin v. Wright*, 63 Cal. 113; *McDowell v. His Creditors*, 103 Cal. 264, 42 Am. Rep. 114, 35 Pac. 1031; *Beronio v. Ventura County Lumber Co.*, 129 Cal. 232, 79 Am. St. Rep. 118, 61 Pac. 958. See, however, *Gaylord v. Place*, 98 Cal. 472, 33 Pac. 484. In no case has it been decided that where a portion of a building is dedicated to residence purposes, and is actually occupied by the claimant as the home of himself and his family, and such occupation is not merely incidental to the carrying on of some business in other parts of the building, the building and the land on which it is situated cannot be legally ⁶⁵¹ selected as a homestead. In *Estate of Noah*, 73 Cal. 590, 2 Am. St. Rep. 843, 15 Pac. 290, the property which it was sought to have set apart consisted of

a four-story brick building of the value of twenty-five thousand dollars, which had been erected and occupied exclusively for business purposes.

Appellants rely also on a line of cases where it is held that where two or more buildings suitable for dwelling-house purposes, belonging to the claimant, are situated upon the same parcel of land, and the claimant resides in one he can legally select but one as a homestead: *In re Ligget*, 117 Cal. 352, 59 Am. St. Rep. 190, 49 Pac. 211; *Tiernan v. His Creditors*, 62 Cal. 286; *Maloney v. Hefer*, 75 Cal. 422, 7 Am. St. Rep. 180, 17 Pac. 539; *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108, 22 Pac. 1145; *In re Allen*, 78 Cal. 293, 20 Pac. 679. The distinction between these cases and the case of a single building is obvious. Under the express terms of the statute the homestead "consists of the dwelling-house in which the claimant resides and the land on which the same is situated." While this definition may include not only the land on which the dwelling-house stands, and of which it has become a part, but also such other land as may be necessary to its convenient use and occupation, it does not, when fairly construed with a view to the objects of the homestead law, include such other land as has resting thereon, as a part thereof, a building or buildings devoted to other purposes than those of a family home.

In the case at bar, one floor of a three-story residence building was actually occupied as the family home, the occupation being solely for the purposes of such a home, and not merely incidental to some other purpose. The place so occupied was an integral part of the land on which the building stood. The fact that the building contained two other stories so constructed that they were more adapted for renting purposes, by being built with separate street entrances, could not impair the right of the claimant to select as a homestead the building and all of the land on which it stood. While those floors may have constituted separate dwelling-places, there was but one building, incapable of division, and the form of construction of the building is immaterial.

The case comes fairly within the doctrine of *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404, and we have no doubt that the property could have been legally selected as a homestead during the life of the husband. As has been frequently said, the homestead statute is a remedial measure, and should be liberally construed.

Being suitable for residence purposes at the time of its selection by the court, and of such a character that it could have been legally selected during the life of the husband, it was capable of selection by the court.

2. It is settled that there is no specified limitation of value in the case of a probate homestead, the rule being, that the court may set apart such property as, regardless of its value, in view of the value and condition of the estate, may seem just and proper: *Estate of Walkerly*, 81 Cal. 579, 22 Pac. 888; *In re Smith*, 99 Cal. 449, 34 Pac. 77. It has been held that where an estate is insolvent, the court must take into account the rights of creditors, and as the legislature has fixed the sum of five thousand dollars as the limit in value which the debtor may claim for his homestead against the demands of his creditors, "a wise exercise of judicial discretion would limit the homestead to be so set apart to this amount in value in the case of an insolvent estate, where a homestead of this value can be divided from the remainder of the estate, or where the property sought to be set apart is capable of such admeasurement": *Estate of Adams*, 128 Cal. 380, 384, 57 Pac. 569, 60 Pac. 965.

While the rights of creditors are not to be disregarded in setting apart a homestead, they "are subordinate to the right of the family to a home" (*Estate of Adams*, 128 Cal. 383, 57 Pac. 569, 60 Pac. 965), and if in order to set apart such a home it be necessary to take the entire estate of the deceased, the creditors' rights must yield: *Keys v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296, 34 Pac. 722. Heirs, devisees, and legatees occupy, at best, no more advantageous position than creditors: *Sulzbürger v. Sulzbürger*, 50 Cal. 385; *In re Davis*, 69 Cal. 458, 10 Pac. 671; *Estate of Lahiff*, 86 Cal. 151, 24 Pac. 850. While they have rights which should be considered, the family is first entitled to a home, if there be property capable of being set apart as such; and where the only premises suitable for homestead purposes are indivisible, and no homestead can be given to the family unless the whole of such premises is given, ⁶⁵³ the fact that such premises are valued at seventeen thousand five hundred dollars, and constitute in value nearly one-half of the estate, does not impair the homestead right, in the absence of a statutory limitation as to value.

As before stated, there is here no question as to the right of any creditor, and, so far as the record goes, it shows that the only other premises were appraised at a higher sum, and

fails to indicate that the same, or any portion thereof, was of such a character that it could be set apart as a homestead.

In view of the peculiar condition of this estate, the action of the court below was just and proper. Being unable to divide the only property suitable for homestead purposes, it was necessary to set aside the whole of such property, but it was set apart for the most limited period, the period of administration of the estate, and it was further provided that the family allowance theretofore granted should cease and determine. Thus the rights of all others interested in the estate were preserved so far as was practicable.

The order is affirmed.

Shaw, J., and Van Dyke, J., concurred.

Property may be the Subject of a Homestead, notwithstanding a part of it is used for business purposes, when its primary use is for a dwelling place: See monographic not to Pryor v. Stone, 70 Am. Dec. 349, 350. As to the right of a homestead in a hotel, see Kiesel v. Clemens, 6 Idaho, 444, 56 Pac. 84, 96 Am. St. Rep. 278, and cases cited in the cross-reference note thereto; and as to the right of a homestead in premises used as a store and hotel, see Beronio v. Ventura County Lumber Co., 129 Cal. 232, 79 Am. St. Rep. 118, 61 Pac. 958. Homesteads in flats are considered in the recent case of Potter v. Clapp, 208 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81.

AMES v. SOUTHERN PACIFIC COMPANY.

[141 Cal. 728, 75 Pac. 510.]

RAILWAYS, Right of to Run Special Trains for the Accommodation of Those Persons Only Who Purchase Sleeping-car Berths.—A railway has the right to run a special limited train for those only who have secured sleeping-car accommodations, and to make it a condition as to the purchase of a ticket that the passenger shall procure a sleeping berth before he can have the benefit of the special train, and to exclude him from the train when such berth cannot be procured thereon. (p. 100.)

A RAILWAY TICKET is not a Contract Expressing all the Conditions and Limitations usually contained in a written agreement. Hence, parol evidence is admissible to prove the terms of the contract or the representations made by the agent at the time the ticket was purchased, if not in conflict with its express terms. (pp. 100, 101.)

RAILWAYS—Ticket, Parol Evidence to Vary Effect of.—Notwithstanding a ticket purports on its face to be for a particular train, parol evidence is admissible to prove that before it was pur-

chased the purchaser had been told by the ticket agent that he could not ride on the train specified unless he could and did procure a sleeping-car berth. (p. 102.)

P. F. Dunne, for the appellant.

George B. Merrill, for the respondent.

729 VAN DYKE, J. This is an appeal from an order granting the plaintiff's motion for a new trial. The action is for damages on account of being put off from one of defendant's trains.

The evidence shows that the plaintiff went to defendant's ticket office at the foot of Market street in San Francisco, a little before 5 o'clock, in November, 1899, being a very short time before the boat left that crosses the bay in connection with the train for Los Angeles. He asked the defendant's ticket-seller for a ticket for the "Owl" train, and was immediately asked if he had a berth in the sleeper. Plaintiff informed the defendant's agent who sold the tickets that he had not, and was then told he would have to get a sleeping-berth across the bay or his ticket would not be good on the "Owl." He, however, requested the ticket and paid for and purchased one which, as far as material here, reads as follows: "Special limited; good for one continuous first-class passage, San Francisco to Los Angeles, 9:26m. Good only by Martinez route by train No. —." On the ticket in the blank space after No. was stamped the words, "The Owl." This ticket was sold at the same price as a regular first-class ticket. On crossing the bay to connect with the "Owl" train plaintiff went to the Pullman conductor and asked for a berth. He was told that the berths had all been sold, and that his ticket would not be good on that train, as no berths could be procured. He was again told the same thing on the steps of the train before he got aboard. Notwithstanding this, however, he boarded the train and took a seat in the day coach, which was not a sleeper, and ran only as far as Bakersfield. Defendant at the time was running two regular daily trains from San Francisco to Los Angeles, one leaving in the morning at 9 ⁷³⁰ o'clock, the other leaving in the evening at 5:30, and, in addition thereto, to accommodate persons desiring to make the trip quickly, it was running a special limited train called the "Owl," which ran at night only, at a special rate, upon a special schedule, with a limited number of Pullman sleepers, containing no accommodations for passengers except those who had berths. This

was known to the plaintiff, as, in addition to being informed of the same, he had previously traveled on that train three or four times, between San Francisco and Los Angeles. Upon presenting his ticket to the conductor he was told his ticket was not good on the train unless he had a sleeping-berth, and that he would have to get off at Port Costa, and could there take the next regular Los Angeles train, which would be along in forty minutes, and would reach Los Angeles at 1 o'clock on the following day, instead of 8 o'clock in the morning, that being the schedule time for the "Owl." This the plaintiff refused to do, and said he would return to San Francisco and bring suit against the company for damages, which he did.

The case was tried before a jury, resulting in a verdict for the defendant. The court in granting plaintiff's motion for a new trial said: "The same is granted upon the ground that the evidence does not support the verdict in this: That the notification to the plaintiff by the ticket-seller, when he purchased the railroad ticket in question, that such ticket would not be good upon the 'Owl' train unless he secured a berth, cannot and did not control or affect the obligation of the company, as evidenced by the ticket."

The question to be considered on this appeal, therefore, is whether the court below, in granting the new trial, correctly stated the law governing the case. The theory on which the order seems to have been made is, that the ticket is a contract, expressing all of its terms, and that the purchaser is not bound by any rules or regulations of the carrier other than those expressed on the ticket. We do not think such a contention can be maintained. Defendant had a right to run a special limited train for those only who could secure sleeping accommodations, and to make it a condition as to the purchase of the ticket that the passenger should procure a sleeping-berth before it could give him the benefit of the special ⁷³¹ train. The ticket stated on its face that it was a special limited ticket, good for one continuous first-class passage, "San Francisco to Los Angeles." The evidence shows that the ticket was good for any other train on the date stamped upon it. The words cannot be held to be a contract that the purchaser could ride upon the "Owl," except upon compliance with the regulations of the defendant as to securing a berth. According to the letter of the ticket the plaintiff was entitled to take the "Owl" train at San Francisco instead of at Oakland. Yet he knew when he purchased it that he could not

take that train at San Francisco, but must cross by ferry-boat from San Francisco to the Oakland side of the bay and take it there, and that was therefore the contract or agreement, notwithstanding the reading of the ticket to the contrary. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful": Civ. Code, sec. 1636. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates": Civ. Code, sec. 1647. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract": Civ. Code, sec. 1648. "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected": Civ. Code, sec. 1653.

But a railroad ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement. It is more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules. The fact that the words "The Owl" were stamped on the ticket entitled the plaintiff to ride upon that train if he had complied with the conditions of securing a berth thereon, which he failed to do. It is said in Elliott on Railroads, section 1593: "According to the generally accepted doctrine, a ticket, in the ordinary form, is a voucher, token, or receipt, rather than a contract, adopted for convenience, to show that the passenger has paid his fare from the place or station named therein as the place of departure ⁷³² to the place or station named therein as the place of destination. . . . A ticket is evidence of a contract to carry and the right to passage, but the contract itself is implied by law, except in so far as it is expressed in the ticket. Upon the theory that it is not itself the written contract, parol evidence has been held admissible to prove the terms of the contract in fact entered into between the company and the passenger, or the representations made by the agent, at the time the ticket was purchased, as to stop-over privileges or the like." In conformity with the foregoing, our code provides: "A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and rea-

sonable": Civ. Code, sec. 2186. "A passenger who refuses to pay his fare or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping-place or near some dwelling-house": Civ. Code, sec. 2188. In *Dietrich v. Pennsylvania etc. R. R. Co.*, 71 Pa. St. 436, 10 Am. Rep. 711, in speaking of railroad tickets, it is said: "So far as they are expressed the terms are binding, of course, but such tickets are not the whole contract, which must be gathered so far as not expressed, from the rules and regulations of the company in running its trains. . . . The authorities, as well as the reason of the thing, show that the company must make its own regulations, and that passengers purchase their tickets subject to these rules, and that it does not lie on the company to bring home notice of them in order to establish the terms of the contract of carriage." This case was approved in a later one, *Lakeshore etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 536, 6 Atl. 547, in which it was said: "The plaintiff's ticket was evidence of the payment of his fare, and of his right to be carried according to its terms. It did not express the whole contract. What it does not set forth may be ascertained from the reasonable rules and regulations of the defendant; and the holder of the ticket is bound to inform himself of such regulations respecting the conduct of trains and the right of passengers." In *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 515, 5 Am. Rep. 60, the court said: 783 "When a traveler obtains such a ticket, he should inform himself as to the usual mode of travel on the road, and so far as the customary mode of carrying passengers is reasonable, he should conform to it. . . . The requisite information can always be had from the agent where the ticket is procured, and it is but reasonable to require passengers to obtain the information and act upon it": See, also, *Peck v. New York Cent. etc. R. R. Co.*, 70 N. Y. 587; *McRae v. Wilmington etc. R. R. Co.*, 88 N. C. 532, 43 Am. Rep. 745; *Wright v. California Cent. Ry. Co.*, 78 Cal. 360, 20 Pac. 740. As stated in the foregoing, a ticket seldom expresses all the conditions of the contract between the carrier and the passenger. The liability of the carrier, the conditions implied by law, and the conditions upon which the passenger may use the ticket are seldom expressed therein. In such case parol evidence is admissible to show the elements of the contract, if not in conflict with its express terms: 1 *Fetter on Carriage of Passengers*, sec. 275;

Burnham v. Grand Trunk Ry. Co., 63 Me. 301, 18 Am. Rep. 220; *Peterson v. Chicago etc. Ry. Co.*, 80 Iowa, 98, 45 N. W. 573. The rule as herein laid down worked no injustice to the plaintiff. He was distinctly told when he purchased the ticket, and subsequent thereto, that he could not use it on the "Owl" without a berth in the sleeper, and his ticket was good on a regular train following it in less than half an hour at the point where he left the "Owl," which would have carried him to the same destination a few hours later than the schedule time of the "Owl." While it is the duty of railroad companies carrying passengers to use all reasonable protection for their safety, comfort, and convenience, it is also the duty of passengers to comply with reasonable rules and regulations of the company.

The court below erred in holding that the notification to the plaintiff that his ticket in question would not be good upon the "Owl" train unless he secured a sleeping-berth could not control or affect the obligation of the company as evidenced by the ticket. As this appears to be the only ground upon which the motion for a new trial was granted, the order granting the same is reversed.

McFarland, J., Lorigan, J., and Henshaw, J., concurred.

Chief Justice Beatty and Justice Shaw joined in a dissenting opinion written by the latter, in which he said:

"I take it that no proposition is more fully settled than this, that parol evidence cannot be admitted or used to vary or contradict the effect of a written contract. In this state this rule has the express force of statute law. 'The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument': Civ. Code, sec. 1625. 'When a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone, if possible': Civ. Code, sec. 1639. 'The language of a contract is to govern its interpretation if the language is clear and explicit': Civ. Code, sec. 1638. And the previous decisions of this court are in full accord with these principles. 'The law deems all such stipulations merged in the writing, which is treated as the exclusive medium of ascertaining the agreement to which the parties bound themselves': *Goldman v. Davis*, 25 Cal. 256; *Guy v. Bibend*, 41 Cal. 322; *Ward v. McNaughton*, 43 Cal. 159; *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101. Parol evidence is inadmissible to prove that an unconditional written obligation is not to be performed except upon a contingency not stated in the writing: *San Jose Sav. Bank v.*

Stone, 59 Cal. 187; Long v. Sanfley, 89 Cal. 439, 26 Pac. 902; Bradford Inv. Co. v. Joost, 117 Cal. 210, 48 Pac. 1083; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283; Dexter v. Ohlander, 87 Ala. 262, 7 South. 115. The majority opinion holds that this case is an exception to the rule.

"The reason first given is, that the ticket in question, notwithstanding its terms, is subject to the rules and regulations of the defendant company contrary thereto. I concede that proof of such regulations or of other explanatory facts, coupled with proof of knowledge thereof by the parties, is competent to help out a contract where it is uncertain, or to supply anything omitted therefrom. It would have been proper, for illustration, to show in the case at hand what was meant by the 'Martinez route,' and by the 'Owl train.' For this would explain what would otherwise be an ambiguity in the terms of the contract. But here the effect of the regulation is to contradict the contract, to destroy altogether the undertaking of the defendant therein set forth, except upon a condition not therein expressed, and to require the payment of an additional consideration for an additional accommodation as a condition precedent to the existence of any obligation on the part of the carrier. The proposition that such regulations control, instead of the contract, is certainly a startling one. There is a well-known principle to the effect that a contract must be interpreted according to the law or usage of the place where it is to be performed: Civ. Code, sec. 1646. It has been said that such laws are a part of the contract: 9 Cyc. of Law & Proc., sec. 582. But even this doctrine is confined to such terms as are omitted from the contract, and which the law supplies. Where the contract is contrary to the law, it does not have the effect of adding a term to the contract, and thus making an agreement to which the parties have not consented, but of making the contract to that extent invalid. I think it has never before been decided that the rules and regulations of a railroad company are of greater potency than the law of the land, and when inconsistent with and contrary to a written contract, into which the company has entered, are paramount thereto, and furnish the legal measure of the rights of the parties, instead of the contract itself. Not even a general usage or custom of trade, much less a mere business regulation of one of the parties, can be proven to relieve a party from his express stipulation, or to vary a written contract which is certain in its terms: Code Civ. Proc., sec. 1870, subd. 12; Holloway v. McNear, 81 Cal. 156, 22 Pac. 514; Burns v. Sennett, 99 Cal. 371, 35 Pac. 916; Milwaukee Co. v. Palatine, 128 Cal. 74, 60 Pac. 518; Ah Tong v. Earle Fruit Co., 112 Cal. 681, 45 Pac. 7.

"The other reason given for the prevailing opinion is, that 'a railroad ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement,' but 'is

more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules.' Of course, railroad tickets do not always express the whole contract. In fact, they seldom do. But this is beside the question. We are not here concerned with some term of the actual agreement that was omitted from the writing, but with a term which was inserted, and which defendant seeks to nullify by proof of a parol contract of a different effect. With singular inconsistency, the majority opinion quotes in its support a passage from *Dietrich v. Pennsylvania etc. R. R. Co.*, 71 Pa. St. 436, 10 Am. Rep. 711, the very first words whereof are, 'So far as they are expressed the terms are binding, of course.' I concede that where a railroad ticket is unsigned, and is a mere memorandum expressing, in part, an agreement for the carriage of the passenger, it is proper to supplement it, or even contradict it, by proof of additional parol conditions and stipulations inconsistent with the printed memorandum. Many of the decided cases are thus explainable. But it cannot be successfully contended that the ticket here in question was not a contract, intended to be binding on the parties, so far as it expressed the terms thereof. This is best shown by the contract itself. It was regularly signed by the plaintiff and indorsed by the defendant, and was as follows:

" 'Special limited ticket, good for one continuous first-class passage, San Francisco to Los Angeles. 9:26 m. Good only by Martinez route, by train No. — "The Owl" subject to the following contract: In consideration of this ticket being sold at a rate less than the regular first-class rate, I, the purchaser, hereby agree that it shall not be good for passage after the date indicated by the agent's punch marks in the margin (Nov. 12, 1899), and that it will be good only for a continuous trip to destination by the proper train and its connecting trains. That it is not transferable and shall be void after the date of expiration. And that failing to accept and comply with this agreement, the conductor will refuse to accept this ticket, and demand the full regulation fare, which I agree to pay. No stop-over privileges will be given on this ticket. Baggage must not be checked hereon to or from intermediate or way stations. Liability for damage limited to \$100. Agent will in no case extend time on this ticket. If more than one date be punched, it shall not be received for passage by conductor.'

(Signed) 'W. AMES.'

(Indorsed by stamp):

'Southern Pacific Company,'

'November 11, 1899.'

"The defendant must certainly have intended to exact from the plaintiff the execution of this ticket as a contract, and one that would be binding on him for all the conditions expressed therein. The cases involving tickets not signed, or terms not covered by the

contract therein expressed, have no application here. It is from such cases alone that the prevailing opinion finds support. If the evidence offered had been of some agreement not contradictory of the agreement expressed in the ticket, it would of course have been admissible, but this cannot be contended. The ticket in question was a clear undertaking on the part of the defendant to carry the plaintiff upon a continuous trip with first-class accommodations on the Owl train from San Francisco to Los Angeles by the Martinez route. No conditions were expressed requiring the purchase of any berth upon the sleeping-car. By the parol evidence introduced the defendant endeavored to prove that, notwithstanding this agreement, there was a contract that the defendant should be under no obligation to carry the plaintiff upon that particular train, unless, in addition to the price of the ticket which he paid, he should succeed in purchasing from another company a berth in a sleeping-car at an additional price. This was making a contract inconsistent with the written contract, and is contrary to all the principles laid down in our codes, and contrary to the rules expressed in the authorities cited in the prevailing opinion itself. I can see no reason why a railroad company is not as much bound by such a contract for the carriage of a passenger as it is by the terms and conditions of an ordinary bill of lading for the carriage of freight. The signature to a ticket is required because the railroad company intends that the passenger shall be bound. It is an unvarying rule that contracts are mutual, and if one party is bound by its terms, both must be.

"There is no element of hardship in the case which requires any relaxation of the rule. The defendant was entitled to the benefit of the evidence which it introduced, not for the purpose of varying or changing the contract in the least, but for an entirely different purpose. The question of damages was a material one in the case, and it was proper for the defendant to prove that the plaintiff had been informed before he entered upon his journey that he would not be allowed to ride upon that train unless he obtained a sleeping-car berth. If he was thus warned of the consequences he could not claim so much damages as he might well do if he had been taken by surprise and ejected from the train without previous notice. The testimony was therefore admissible in mitigation of damages, and would be of much weight for that purpose, but it should not be used to vary the contract expressed in the ticket."

A Railway Ticket seems to be regarded, not as the contract of carriage, but merely as evidence of such contract. Therefore, one who makes a contract for transportation is entitled to passage, according to its terms, even though the ticket given him is defective in not expressing those terms: *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, and cases cited in

the cross-reference note thereto: Aiken v. Southern Ry. Co., 118 Ga. 118, 98 Am. St. Rep. 107, 44 S. E. 828. Conversations between the ticket agent and the purchaser of a ticket, or between a flagman and the purchaser, cannot deprive him of his rights under the terms of the ticket: Illinois Cent. v. Harris, 81 Miss. 208, 95 Am. St. Rep. 466, 32 South. 309. See, also, Kansas City etc. R. R. Co. v. Little, 66 Kan. 378, 97 Am. St. Rep. 376, 71 Pac. 820.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

HERRING v. FITTS.

[43 Fla. 54, 30 South. 804.]

MARRIED WOMAN—Reformation of Conveyance Executed by.—A mortgage executed by a married woman and her husband in the form prescribed by statute may be reformed in equity so as to include real property intended to be embraced therein, but omitted therefrom by mistake. (pp. 110, 111.)

NOTICE to Mortgagee by Recitals in His Mortgage.—Where a mortgage of two parcels of land recites that they are subject to another mortgage, giving its date and the name of the mortgagee, but one of such parcels has by mistake been omitted from the mortgage referred to, the second mortgagee cannot resist the reformation of the first mortgage so as to include the omitted parcel. (pp. 112, 113.)

Suit by Herring against William R. Fitts and wife, and the Volusia County Bank to reform a mortgage executed by the husband and wife to the complainant, which it was alleged was intended to include certain real property, a parcel of which was omitted therefrom by mistake. The bank, some time after the recording of the mortgage sought to be reformed, received from the same husband and wife a mortgage of the lots thus omitted from the first mortgage and other parcels of property, which second mortgage declared that the pieces of land therein described were subject to a mortgage thereon given to W. C. Herring, bearing date May 26, 1890, this being the date of the mortgage, the reformation of which was sought. The bank and Mrs. Fitts answered, and a decree was taken against the husband pro confesso for failure to answer. The trial court granted the relief sought as against the husband and wife,

but refused it as against the bank. Thereupon both the complainant and Fitts and wife appealed.

B. M. Miller, for the appellant.

Isaac A. Stewart and Egford Bly, for the appellees.

•• MABRY, J. The two controlling questions now presented for decision arise upon the respective appeals taken by parties in this case. The one presented by the appeal of defendants Louisa Fitts and her husband William R. Fitts comes first in natural order, and will be first considered. We ⁶¹ find that it is not free from difficulty. The court found from the evidence submitted that a mutual mistake was made as to the description of part of the land embraced in the mortgage executed by William R. and Louisa Fitts to the complainant Herring, bearing date May 26, 1890, and decree that it be corrected and reformed so as to embrace, in addition to the lots as to which there was no question, the north half of the south half of the southeast quarter of the northwest quarter of the southeast quarter of section 8, township 17 south, range 30 east, containing two and one-half acres more or less. It will be seen by comparison that the description in the Herring mortgage before its reformation did not include the identical parcel of land embraced in the correction. The conclusion of the court, that a mutual mistake existed as to the description of the parcel of land containing two and one-half acres, must be sustained on the evidence. Some evidence of a mistake is apparent from the description inserted in the mortgage at the time of its execution. It describes a parcel of land containing ten acres, and it is stated to contain two and one-half acres, the amount included in the parcel which it is claimed the parties mutually intended should be embraced in the mortgage. The draughtsman of the mortgage testified positively that he made the mistake in the description, which it will be seen is an unusual one, on account of the shape of the parcel of land, and William R. Fitts also testified that there was a mistake. In the subsequent mortgage executed by Fitts and wife to the bank, in which there is a correct description of the two and one-half acres, and also the three lots, there is a recital that it was a second mortgage "on the above-described pieces of land, and subject to a mortgage thereon ⁶² given to W. C. Herring, bearing date May 26, 1890." Neither William R. Fitts nor his wife owned the ten acre parcel described in the Herring mortgage, but Mrs. Fitts

did own the two and one-half acre parcel which it is claimed they designed to mortgage.

The recital in the bank mortgage that the Herring mortgage was given on the two and one-half acre parcel correctly described may not operate as an estoppel on Mrs. Fitts that such was the fact, but it contains a very deliberate declaration on her part to that effect, and, taken in connection with all the evidence in the case, sufficiently sustains the conclusion of the court that the parties mutually intended to mortgage the two and one-half acre parcel, and by mistake another parcel was included.

The jurisdiction of the court of chancery to correct a mutual mistake when clearly shown is not questioned, and were it not for the fact that the correction in this case relates to the land of a married woman, the matter would end without difficulty.

At common law a married woman could not, either alone or by uniting with her husband in a deed, bar herself, or her heirs, of her interest in real estate. Such a deed and her contracts generally were void, except so far as they related to her equitable separate estate and permitted by its nature and holding. The only way she could convey real estate was by uniting with her husband in the solemn proceeding in a court of record known as a fine and recovery. This mode of conveying real estate by married women is abolished in this state, but by the constitution and statute they can mortgage or deed their interests in realty, and the mode thereby provided is said to be a substitute for the fine and recovery of the common law: *Hart v. Sanderson*, 18 Fla. 103. The constitution provides that "all property, real and personal, of a wife owned by her before marriage or lawfully acquired afterward by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women": Const. 1885, art. 11, sec. 1. By statute a married woman may sell, convey or mortgage her real property as she might do if she were not married, provided her husband join in such sale, conveyance or mortgage, and provided she acknowledge before some officer authorized to take acknowledgments of deeds, separately and apart from her husband, that she executed the same freely and voluntarily and

without compulsion, constraint, apprehension or fear of or from her husband, and the officer's certificate must set forth such requirements: Rev. Stats., secs. 1956, 1958. In the case before us the Herring mortgage, in reference to which there was a mistake as to the description of the land sought to be encumbered, was executed with all the formalities required by the statute and the power of the court was not invoked to perfect a defectively executed or acknowledged instrument. The decree rendered does not undertake to compel the wife to execute another mortgage, but its effect is that the instrument duly executed by the parties shall operate upon the real subject matter that the parties had in mind and purpose when they made it. Our opinion is that the decision of the court was correct. Confining the decision to the facts before us, we think that where a married woman intends to convey or ^{or} mortgage her real estate, and to accomplish this purpose executes a proper instrument in conjunction with her husband with all the formalities required by law, but by mistake of the scrivener an erroneous description of the land is inserted contrary to the intent of the parties, a court of chancery has power to correct the mistake upon clear proof of the facts, and that in so doing the policy and intent of our laws, in reference to the alienation of real estate by married women, are not contravened. Causing the true description to be read into the deed neither makes a new conveyance nor changes an old one; it simply makes the conveyance affective by applying it to the property intended to be included. There is a decided conflict of authority on the point under law similar to ours, and there is much weight in those holding a contrary view to that we adopt; but after much reflection we think they do not announce the correct doctrine. Our conclusion is sustained by the following decisions which we think state the correct view: *Hamar v. Medsker*, 60 Ind. 413; *Styers v. Robbins*, 76 Ind. 547; *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670; note to *Williams v. Hamilton*, 65 Am. St. Rep. commencing on page 511. It was supposed that California had adopted a different view in the case of *Leonis v. Lazzarovich*, 55 Cal. 52, but if this case can be so construed it has been overruled by *Savings & Loan Soc. v. Meeks*, 66 Cal. 371, 5 Pac. 624, and *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 41 Pac. 670. The mortgage executed by Mrs. Fitts was not voluntary in the sense of being without consideration. It was given to secure fifteen hundred dollars which

her husband received, and this, of course, was a consideration for the security.

⁶⁵ The next question arises on the appeal of Herring from the portion of the decree subordinating his mortgage as corrected to that of the bank, and in this we are of opinion that the court committed an error. The bank's mortgage, in reference to the property, contains the following statement: "All those lots, pieces or parcels of land lying and being in the city of De Land, Volusia county, Florida, described as follows, to wit: The north half of the south half (S. 1-2) of the southeast quarter (S. E. 1-4) of the northwest quarter (N. W. 1-4) of the southeast quarter (S. E. 1-4) of section eight (8), township seventeen (17) south, range thirty east, containing two and one-half acres, more or less, also lots B, C and F of block ten (10) according to map and survey of Rich's Addition to the town (now city) of De Land, in said county of Volusia, and state of Florida. This being a second mortgage on the above-described pieces of land, and subject to a mortgage thereon given to W. C. Herring bearing date May 26, 1890." It is argued for the bank that the recitation in its mortgage about its being subject to the one given to W. C. Herring refers to lots B, C and F only, and if this be incorrect there is ambiguity whether it does or not, and that, as a matter of fact disclosed by the evidence, the bank did not know of the intention to include the two and one-half acre parcel in the Herring mortgage. We do not perceive any ambiguity about the recital. It contains a clear statement that the bank's mortgage was second on the "above-described pieces of land"—which included all that had been described in the immediate connection, with nothing to indicate the absence of any part, and that it was subject to a mortgage thereon given to Herring on May 26, 1890. The bank accepted this mortgage and ⁶⁶ is bound by its recitals and conditions. In terms it contracted with the mortgagors for a second mortgage to that of Herring on the land described and the reformation of the first mortgage does not alter the contractual relation voluntarily assumed by the second one. It does not appear that the representatives of the bank ever made any investigation or inquiry in the right direction to ascertain whether or not Herring had any mortgage claim on the land, and its mortgage clearly imparted information of this fact. It must, therefore, be accepted that the bank received its mortgage under the agreement and belief that Herring was entitled to a prior lien on the land, and as he was in fact so entitled,

it would be contrary to equity to deprive him of his rights. It was held in *Council Bluffs Lodge v. Billups*, 67 Iowa, 674, 25 N. W. 846, that where a mortgagee has notice of a first but unrecorded mortgage, which is recited in his mortgage as being a first lien, he cannot claim that his mortgage takes precedence of a new mortgage, executed after his mortgage, to correct a mistake in the description of the property in the first mortgage. This view is also sustained in *Gale v. Morris*, 29 N. J. Eq. 222; *Gale v. Morris*, 30 N. J. Eq. 285.

There is some contention made that appellant Herring was guilty of laches in not proceeding earlier to correct the mistake in his mortgage as the proof showed he had information of it not long after his mortgage was recorded, but we do not see how the bank can complain of the delay. Its mortgage furnished unmistakable evidence that it was second and subordinate to Herring's on the land, and no just complaint can be made, after accepting such a mortgage, for the delay in this case.

⁶⁷ The part of the decree of the chancellor correcting the description of the land in the mortgage given to W. C. Herring, bearing date May 26, 1890, is affirmed, and the part subordinating the mortgage as reformed to the lien of the mortgage given to the Volusia County Bank is reversed, with directions for further proceedings consistent with this opinion.

The Reformation of deeds of married women is discussed in the monographic note to Williams v. Hamilton, 65 Am. St. Rep. 511-514. A mistake in the description of land intended to be mortgaged by a married woman may be corrected on a proper showing: Christensen v. Hollingsworth, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.

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FLORIDA EAST COAST RAILWAY COMPANY v. HAZEL

[43 Fla. 263, 51 South. 272.]

STATUTES, Title of, Subject of, Doubts as to Whether It is Sufficiently Expressed.—A court will not declare that a statute is obnoxious to the constitutional requirement that it shall embrace but one subject, which shall be expressed in its title, if the question is a doubtful one. (pp. 116, 117.)

STATUTES, Title of, When Sufficient to Include a Penalty.—A statute entitled "An act requiring railroad companies to fence their tracks, and providing remedies against them for failure to do so," may include a provision in the way of a penalty, as by creating a liability for double damages and for attorneys' fees. (p. 117.)

STATUTES—Repeals by Implication are not Favored.—In order that a court may declare that one statute repeals another by implication, it must appear that there is a positive repugnancy between the two, or that the last was clearly intended to prescribe the only rule that should govern the cases provided for, or that it revises the subject matter of the former. (p. 118.)

STATUTES, Repeal of by Implication, When Does not Take Place.—A statute requiring railroad companies to fence their tracks and regulating their liability for stock killed, because of their not doing so, is not repealed by a subsequent act to force railroads and other companies to postmarks, brands, color and sex of livestock killed or injured by their engines and cars, and providing for their payment for such stock. (p. 118.)

ATTORNEYS' FEES, Allowance of, in the Supreme Court.—Under a statute allowing attorneys' fees in actions against railroad companies for the killing of stock, the supreme court has no jurisdiction to allow such a fee to the attorney of the defendant in error for his services in that court. If he is entitled to such fee, he must seek it by application to the trial court. (p. 118.)

W. A. MacWilliams, for the plaintiff in error.

Fowler & Fowler, for the defendant in error.

²⁶⁴ Per CURIAM. It appears from the abstract in this case that the defendant in error instituted suit in the circuit court of St. John's county against plaintiff in error to recover double damages and attorneys' fees for the killing of certain livestock, the declaration, filed January 1, 1896, alleging the failure of defendant to fence its tracks as required by chapter 4069 of the acts of 1891. The company demurred ²⁶⁵ to the declaration upon the ground that the act referred to was unconstitutional, which demurrer was overruled. Thereafter it pleaded not guilty. The referee to whom the case was referred, after hearing evidence found for the plaintiff and entered judgment for the sum of one hundred dollars double damages and thirty-five dollars attorneys' fees, besides costs. Motions for a

new trial and in arrest of judgment were made and overruled, and the company took writ of error to this court.

The errors assigned relate to the rulings before stated, but the only questions presented and argued in the briefs are as follows: 1. Whether the provisions authorizing double damages and attorneys' fees in the act referred to are unconstitutional, because of a defect in the title of the act; 2. Whether such provisions were repealed by section 7, chapter 4189 of the act of 1893.

Chapter 4069 is entitled "An act requiring railroad companies to fence their tracks, and providing remedies against them for failure to do so." The first section requires railroad companies or persons operating railroads in this state to begin within sixty days after the passage of the act to construct a fence on both sides of its line, so as to prevent the intrusion of any cattle and horses upon its track, except in certain places therein designated. The second section requires the companies or persons to commence to construct such fence within sixty days after the passage of the act, and to continue such construction uninterruptedly until the work is completed, which is required to be done within two years after the approval of the act, and also to erect proper stockguards as provided in the third section. The third section specifies the character of fence and stockguards to be constructed. The ~~200~~ fourth section provides that any railroad company or person owning or operating any railroad in this state failing to fence at least one twenty-second part of their entire line of road and to provide stockguards as required each and every month after sixty days from the passage of the act shall be liable for double the amount of all damages caused by injuring or killing any livestock, cattle or horses by railway engines or cars, and all costs, expenses and reasonable attorneys' fees incurred in collecting same by suit, and a lien is thereby given for the amount of said damages, costs and attorneys' fees upon the railroad line, appurtenances, properties, franchises, machinery and equipments equal in dignity to laborer's liens. It also provides for the recovery of the damages and attorneys' fees and the enforcement of the liens in courts having jurisdiction within twelve months after the presentation of a claim for such damages as is in the statute specified, and in all such suits the burden of proof is declared to be upon the company or person operating the road. The fifth section requires the maintenance of such fences after their construction, and in default thereof the same liability is imposed

as in cases where fences are not constructed as required. The sixth section regulates the liability for stock killed while complying with the provisions of the act and also provides that the act shall not apply to log roads.

It is contended that the liability for double damages and attorneys' fees imposed by this act is a penalty—that the title of the act does not indicate that penalties are imposed, but only that remedies are provided, and therefore that the title is misleading and insufficient to sustain the provisions for double damages and attorneys' fees under section 16, article 3, of the constitution of 1885, that "each ²⁸⁷ law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." The well-settled rule in this as well as other states is that when the title of an act clearly though briefly expresses the subject matter of the legislation contained in the body of the act, and there is nothing in the act which is not properly connected with such subject matter, the constitutional requirement quoted is complied with. There can be no doubt that under the first clause of the title of this act, to wit, "An act requiring railroad companies to fence their tracks," it would be competent for the legislature to provide the means for its enforcement, and in doing so to authorize the recovery of double damages and attorneys' fees: *Railroad v. Crider*, 91 Tenn. 489, 19 S. W. 618; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *Snook v. Clark*, 20 Mont. 230, 50 Pac. 718; *Missouri Pac. Ry. Co. v. Harrelson*, 44 Kan. 253, 24 Pac. 465; *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759; *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 64 N. W. 501. The only question that can arise here is as to the effect of the last clause in this title, to wit, "and providing remedies against them for failure to do so," it being argued that this clause so restricts the title as to make it misleading with reference to the provisions for double damages and attorneys' fees. There is no doubt that a general title may become restricted by the addition of a provision or provisions thereto (*State ex rel. Attorney General v. Burns*, 38 Fla. 367, 21 South. 290, and cases cited), but we are of the opinion that the objection made does not apply to the title of the act under consideration. The court is not authorized to declare the ²⁸⁸ title obnoxious to the constitutional requirement as to title if the question be a doubtful one: *County Commrs. of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 South. 339. It is not clear that the word "remedies" was used in a technical sense in the second clause of the

title, but rather that it was intended by this clause to assert in a most general way that means were provided for enforcing the act, without designating specifically whether these means consisted of the imposition of liabilities, penalties or otherwise. It certainly does not exclude the idea that liabilities or penalties are imposed for violating the duty declared. The court should not resort to critical or technical construction of the language of the title in order to exclude parts of the body of the act from its purview: *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 64 N. W. 501. We do not feel authorized to declare that the matter objected to is not properly connected with the subject matter embraced in the title, or that the title is so restricted as to render its insertion improper.

The second question presented is whether the provisions relating to double damages and attorneys' fees in the act of 1891 were repealed by section 7, chapter 4189 of the act of 1893. That act is entitled, "An act to force railroad companies, other companies and other persons running cars or trains in this state to post marks, brands, color and sex of livestock that may be killed or injured by engines and cars; and to keep a record, and to provide for the payment of the same." The first six sections of this act require certain designated officials and employés of railroads to make certain reports of the killing or injuring of stock ^{and} by the operation of trains, to provide blackboards at depots, and post marks and brands and other description of livestock killed or injured, and making certain omissions connected therewith misdemeanors punishable by fines. The seventh section reads as follows: "The posting of marks and brands shall be prima facie evidence of the killing or injuring of stock; and whenever the owner establishes his claim the railroad company shall pay to the owner the full cash market value for such stock. If the owner has to resort to law to collect his claim and judgment should be rendered against the railroad company and they should desire to appeal to a higher court, they must first pay all court costs in the lower court, including plaintiff's lawyers' fee which must in all cases be a reasonable lawyers' fee." The act contains no repealing clause, nor does it anywhere make any reference to the fencing of railroad tracks, but it is contended that the seventh section fixes the amount of recovery by owners of stock killed by the operation of railroads in all cases, whether in consequence of failure to fence their tracks as required by the act of 1891 or otherwise, and

therefore by implication repeals so much of the act of 1891 as gave double damages and attorneys' fees. Repeals by implication are not favored, and in order that a court may declare that one statute repeals another by implication it must appear that there is a positive repugnancy between the two or that the last was clearly intended to prescribe the only rule which should govern the case provided for, or that it revises the subject matter of the former: *State v. Palmes*, 23 Fla. 620, 3 South. 171; *Mitchell v. Duncan*, 7 Fla. 13; *State v. Moore*, 37 Or. 536, 62 Pac. 26. The act of 1893 was certainly not a revision of the subject matter embraced in the act of 1891, ²⁷⁰ for it makes no reference whatever to fences. Nor can it be contended that there is anything in its language that indicates an intention to change, modify or repeal the fence statute or any of its provisions, and there is no necessary repugnancy between the two acts. The clause "and whenever the owner establishes his claim the railroad company shall pay to the owner the full cash market value for such stock," contains no negative words, nor is there anything in the language indicating an intention to apply the rule it announces to cases arising under the act of 1891. While the language is general it is not exclusive, and we are of opinion that it must be so interpreted as to except the cases provided for by the act of 1891: *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. Rep. 532; *United States v. Greathouse*, 166 U. S. 601, 17 Sup. Ct. Rep. 701.

This disposes of all the questions presented, and finding no error the judgment must be affirmed.

In this case a motion has been made in this court for the allowance of an attorney fee in favor of defendant in error for defending the suit in this court, but without reference to the sufficiency of proof here to establish such a claim, we are of opinion that this court has no jurisdiction to entertain such a demand. If he is entitled to attorney fees under the statute for maintaining his judgment in the appellate court, he must first resort to a court having original jurisdiction. Such motion is, therefore, hereby denied.

The Title of a Statute should be liberally construed, and not be condemned as insufficient constitutionally to suggest those things found in the body of the act, unless, giving thereto the largest scope which reason will permit, something is found therein which is neither within its literal meaning, nor its spirit, nor germane thereto: *Diana Shooting Club v. Lamoreaux*, 114 Wis. 44, 91 Am. St. Rep. 898, 89 N. W. 880. When there is doubt as to whether the subject is clearly expressed in the title, the doubt is resolved in favor of the act: See

the monographic note to *Lewis v. Dunne*, 86 Am. St. Rep. 274. A statute forbidding the manufacture and sale of adulterated food, drugs, and drinks, defining such articles, prescribing the duties of the state board of health, in relation thereto, and declaring penalties for violations of the law, is not violative of the constitutional requirement that every act shall embrace but one subject, which shall be expressed in its title: *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40. Compare *State v. Great Western Coffee etc. Co.*, 171 Mo. 634, 94 Am. St. Rep. 802, 71 S. W. 1011; and see *Augustine v. State*, 41 Tex. Cr. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77; *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 937. The sufficiency of titles to statutes generally is discussed in the monographic notes to *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486; *Bobel v. People*, 64 Am. St. Rep. 70-107; *Lewis v. Dunne*, 86 Am. St. Rep. 267-279.

The Repeal of Statutes by implication is the subject of a monographic note to *Howard v. Hulbert*, 88 Am. St. Rep. 271-297. In the absence of a clear intention, repeal by implication can be indulged only so far as unavoidable: *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280.

BRONK v. STATE.

[43 Fla. 461, 51 South. 248.]

HABEAS CORPUS.—An Error in the Judgment Under Which a Prisoner is Held does not entitle him to be discharged on habeas corpus, unless it is such as makes the judgment void. If it is merely erroneous, as where a court having jurisdiction has given a wrong judgment, the party aggrieved can obtain relief only by writ of error or other process of review. (p. 125.)

HABEAS CORPUS.—Collateral Inquiry.—If a prisoner is in custody under a writ of ne exeat issued in a suit in which it is alleged that he is a resident of the state, this allegation presents one of the issues to be determined in the action, and he cannot obtain his release on habeas corpus on the ground that such allegation is not true. The adjudication involved in the issuing of the writ and the refusal to discharge it, though only in limine and subject, upon further investigation in the same proceeding, to be differently adjudged, cannot be inquired into or reviewed on habeas corpus. (p. 126.)

HABEAS CORPUS.—Release from Custody Under a Writ of Ne Exeat cannot be obtained on habeas corpus on the ground that the writ could not issue in the case or under the circumstances under which it was issued, because this contention is in the nature of a collateral attack upon the order of a court of general jurisdiction. (p. 127.)

HABEAS CORPUS.—Under an Allegation that the Court Acted Without Jurisdiction in Issuing Process under which the prisoner is held, courts, on habeas corpus, will go far enough to see whether in reality this be true, and also whether or not the action of the court is illegal to the extent of rendering its decision entirely void, and not merely irregular. (p. 127.)

ALIMONY—Ne Exeat.—The writ of ne exeat was commonly used in cases of equitable demand, and it is applicable in cases of alimony under certain conditions. Though not specially authorized in proceedings for alimony, yet if a proper case should be presented for the writ under the general principles of law or other provisions of our statutes, it should be awarded. (p. 128.)

NE EXEAT—Issuing Before a Decree for Alimony.—The English courts of chancery never issued writs of ne exeat to secure the payment of alimony until after a decree therefor in the ecclesiastical courts, and then only for the amount of such decree. (p. 128.)

ALIMONY—Ne Exeat, When may Issue Before Decree for.—Where a court of chancery has been given jurisdiction of suits for divorce and for alimony and maintenance, and is vested with authority to make such orders as may be necessary to secure to the wife such maintenance, it may issue a writ of ne exeat before any decree or order fixing the amount of alimony or maintenance has been made in all cases where it seems to the chancellor just to issue it, and necessity therefor exists. (p. 128.)

CONSTITUTIONAL LAW—Imprisonment for Debt.—Alimony or Maintenance from a husband to his wife is not a debt within the meaning of the constitutional inhibition against imprisonment for debt. (p. 129.)

A WRIT OF NE EXEAT is not Void Because Issued Without First Requiring a Bond with Sureties.—The nonobservance of statutory provisions requisite to the issuing of the writ does not render it void. (p. 129.)

NE EXEAT, Irregular, When not Void.—An order requiring the defendant to give bond conditioned for the payment of alimony decreed by the court and by the appellate court on appeal, and to abide and perform the decrees of the court before being liberated from the writ of ne exeat, though erroneous as to this requirement, is not void, nor does this error entitle the defendant to be released on habeas corpus, where he has not tendered any bond properly conditioned. (p. 130.)

HABEAS CORPUS—Inquiry into the Merits Upon.—A party in custody under a writ of ne exeat to secure alimony is not entitled to be discharged on habeas corpus on the ground that the proofs taken show that the complainant is not entitled to alimony. This is a proper matter for decision in the original suit, and cannot be inquired into on habeas corpus. (p. 130.)

DIVORCE AND ALIMONY—Attorneys' Fees in Independent Proceedings.—A wife who has secured a writ of ne exeat in a suit against her husband for alimony and maintenance cannot, on his suing out a writ of habeas corpus to obtain his release from custody, and prosecuting to the supreme court a writ of error in such habeas corpus proceeding, obtain there an order that he pay her alimony pendente lite, and attorneys' fees for representing her interest in the supreme court on such writ of error. (p. 130.)

Isaac A. Stewart and Egford Bly, for the plaintiff in error.

F. W. Marsh, Pas. D. Beggs and George B. Perkins, for the defendant in error.

403 TAYLOR, C. J. John Parker Bronk, the plaintiff in error, filed his petition on the third day of May, 1901, in this

supreme court for a writ of habeas corpus, addressed to the chief justice, who ordered the issuance of the writ making the same returnable, as is almost invariably the custom of this court in such cases, before the judge in whose jurisdiction the detention was had: Rev. Stats., sec. 1771. The petition for the writ was substantially as follows: "Your petitioner, John Parker Bronk, respectfully represents that he is imprisoned and detained in custody without lawful authority, and illegally restrained of his liberty by J. R. Turner, the sheriff of Volusia county, Florida, at De Land, in said county, by virtue of an order of Hon. Minor S. Jones, judge of the circuit court of the seventh judicial circuit of the state of Florida, in and for said county of Volusia, issued under the following circumstances: On the nineteenth day of April, 1901, one Lillie L. P. Bronk, claiming to be the wife of your petitioner, filed her bill of complaint in the circuit court of said county of Volusia, in chancery, against petitioner and his son Frederick Bronk, praying for alimony against your petitioner, and the cancellation of certain alleged conveyances from petitioner to said Frederick Bronk; that thereupon on the twentieth day of April, A. D. 1901, without any bond being required of complainant, and without any alimony having been decreed against petitioner, your petitioner was taken in custody by said J. R. Turner under a writ of ne exeat issued in said cause requiring petitioner to procure bail in the sum of ten thousand dollars that ~~and~~ he would not go beyond this state without leave of court, and that he would abide by and comply with all lawful orders and decrees of said court, and that in case your petitioner should refuse to give such bail, your petitioner should be brought forth in custody of said sheriff before said judge at Titusville for further proceedings in the premises, until he shall do it of his own accord. Copy of said writ is hereto attached and made part of this petition; that your petitioner was unable to give bail as required by said writ, and was thereupon held in custody and deprived of his liberty by said J. R. Turner, sheriff as aforesaid; that on the twenty-fifth day of April, A. D. 1901, petitioner moved before Honorable Minor S. Jones, judge as aforesaid, that said writ of ne exeat be quashed and vacated; that said judge denied said motion and ordered your petitioner to be held in custody and detained of his liberty and imprisoned in the common jail of Volusia county, unless and until your petitioner should give bond in the sum of ten thousand dollars that he will not depart without the state of Florida without the leave of the court, and abide by

and conform to all lawful orders and decrees made in said cause, and pay the alimony and other sums decreed by said court to be due, or upon appeal by the appellate court. A copy of said order is hereto attached and made part of this petition. And your petitioner says that said detention, confinement and restraint is unlawful for the following reasons: 1. Because said writ of ne exeat was issued without bond from complainant to petitioner, as required by law; that the court was without jurisdiction to issue said order without bond, and the same was and is illegal and void; 2. Because in alimony proceedings the court has no jurisdiction to issue writ of ne exeat until alimony has ⁴⁰³ been decreed, and no alimony having been decreed against petitioner the said order was and is illegal and void; 3. Because said order is in excess of the jurisdiction of the court and is illegal and void; 4. Because at the time of the filing of the bill of complaint neither the complainant nor either of the defendants were, and are not now, residents of the state of Florida, and none of the property mentioned in said bill has ever been within the limits of this state, and the court has no jurisdiction to decree alimony in said cause, or to issue the writ of ne exeat, and the said writ and order were and are illegal and void. Wherefore your petitioner prays that a writ of habeas corpus may be granted and issued directed to said J. R. Turner, sheriff as aforesaid, commanding him to bring and produce before this honorable court, at the place and time in said writ specified, the body of said John Parker Bronk, together with the cause of his detention, and that said John Parker Bronk, your petitioner, may be restored his personal liberty."

Attached as exhibits to said petition for the writ of habeas corpus were copies of the two following documents:

"In the Circuit Court of Volusia County, State of Florida.

"In the name of the State of Florida, to all and singular the sheriffs of the state of Florida:

"Whereas, it is represented to said honorable court sitting in chancery, on the part of Lillie L. P. Bronk, complainant, against John Parker Bronk, and other defendant, among other things, that he the said John Parker Bronk, defendant, is greatly indebted to the said complainant on account of alimony and other causes, and designs quickly to go into parts without this state, as by oath made on that behalf appears, which tends to the great prejudice and damage of the said complainant, therefore, ⁴⁰³ in order to prevent this injustice, we hereby command you, that you do, without delay, cause the said John Parker Bronk person-

ally to come before you and give sufficient bail or security in the sum of ten thousand dollars, to be approved by the clerk, that the said John Parker Bronk will not go, nor attempt to go, into parts beyond this state, without leave of our said court, and that he will abide by, and comply with all lawful orders and decrees of our said court, and in case the said John Parker Bronk shall refuse to give such bail or security, then you are to bring him, the said John Parker Bronk in custody before me at Titusville in said district forthwith for further proceeding in the premises until he shall do it of his own accord; and when you have taken such security you are forthwith to make and return a certificate thereof, together with this writ to us in our said court of chancery distinctly and plainly under your hand.

"Witness the honorable Minor S. Jones, judge of the circuit court in and for the county of Volusia in seventh judicial circuit of the state of Florida and the seal of the said court, this twentieth day of April, A. D. 1901.

"[Seal]

SAM'L D. JORDAN,

"Clerk of the Circuit Court, Volusia County, Florida."

"In the Circuit Court of Volusia County, State of Florida:

Lillie L. P. Bronk }
 va. }
J. P. Bronk et al. }

"The defendant John Parker Bronk being brought before me in chambers at Titusville this day under the writ of ne exeat issued in compliance with the order of this court made on the nineteenth day of April, A. D. 1901, for further proceedings in the said cause, and it appearing that the defendant is in custody, not having given bond as required by said order and writ; and appearing by his solicitors filed his motion to quash the said writ on the several grounds therein set forth. And the said cause having come on for hearing on the said motion to quash before me on this day, and the same having been argued by the respective counsel in the cause, and considered by the court, it is now ordered and decreed that the said motion be and the same is hereby denied; and the said defendant John Parker Bronk is hereby remanded to the custody of the said sheriff of Volusia county, Florida, in whose county the said writ was served, and he is hereby commanded to restrain him, the same John Parker Bronk from going without the state of Florida without leave of this court, unless he give bond with security in the usual form in the penal sum of ten thousand

dollars, to be approved by the clerk of the said court, conditioned that he will not depart without the state of Florida without the leave of this court and abide by and conform to all lawful orders and decrees made in said cause, and pay the alimony and other sums decreed by said court to be due, or upon appeal by the appellate court, and in default thereof, then to commit him, the said John Parker Bronk, to the common jail of Volusia county to be dealt with according to law. Done and ordered at chambers at Titusville this twenty-fifth day of April, A. D. 1901.

"MINOR S. JONES,
"Judge."

In response to the writ of habeas corpus, the sheriff made return alleging as the cause of the detention the said orders and writ of ne exeat, and attached as part of his return to said writ a copy of the entire record in the suit which such order of ne exeat was issued. At the ~~400~~ hearing on the writ of habeas corpus, the circuit judge refused to discharge the petitioner, but remanded him to the custody of the sheriff, to be held in accordance with the writ of ne exeat theretofore granted and under the terms therein mentioned, and adjudged the petitioner to pay the costs of such habeas corpus proceeding. From this judgment the petitioner sued out this writ of error to this court.

There are nine assignments of error. The first seven of these relate wholly to admissions and rejections of evidence on the hearing of the habeas corpus. As we deem all of this questioned evidence wholly irrelevant and immaterial to the issues properly before the court on the habeas corpus proceeding, it becomes unnecessary for us to pass upon them, since they could not affect the conclusions at which we have arrived, no matter what might be our ruling thereon.

The eighth and ninth assignments of error question the correctness of the court's ruling refusing to discharge the plaintiff in error and remanding him to custody.

Before discussing the contentions made by counsel it will be proper to announce the rule as to the extent to which a court can go behind the judgment or process of another court of general jurisdiction on habeas corpus. Church in his work on Habeas Corpus, section 348, says: "Void and voidable judgments may alike be reversed on appeal or writ of error, but the former only gives authority to discharge on habeas corpus, which writ cannot have the operation of an appeal, writ of error, or certiorari, or have the force or effect of those proceedings. Illegality can be affirmed only of radical defects, and signifies that which

is contrary to the principles of law as distinguished from rules of procedure. Illegality denotes ⁴⁶⁹ a complete defect, in the proceedings. . . . Neither error nor the regularity of judicial proceedings can be reviewed on habeas corpus, whether it be some informality of procedure before trial, error in the sentence itself, or some irregularity subsequent to sentence." "An irregularity may be defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner": 1 Tidd's Practice, 512. "If the record shows that the judgment, order or process under which the party is held is not merely erroneous, but such as could not, under any circumstances, or upon any state of facts, have been pronounced or awarded by the court ordering or issuing it, then the party is entitled to discharge. But if the judgment is merely erroneous, the court having given a wrong judgment when it had jurisdiction, the party aggrieved can only have relief by writ of error or other process of review. He cannot be relieved summarily by habeas corpus." Judge Freeman's notes to Commonwealth v. Lecky, 26 Am. Dec. 37, and numerous leading cases there cited. These general rules have been settled here as well as elsewhere: Ex parte Sam, 51 Ala. 34; Ex parte Schwartz, 2 Tex. App. 74; Ex parte Winston, 9 Nev. 71; Ex parte McGill, 6 Tex. App. 498; Ex parte Bowen, 25 Fla. 214, 6 South. 65; Ex parte Prince, 27 Fla. 196, 26 Am. St. Rep. 67, 9 South. 659; Ex parte Pitts, 35 Fla. 149, 17 South. 76; Ex parte Senior, 37 Fla. 1, 19 South. 652; Randall v. Tillis, 43 Fla. 43, 29 South. 540; Ex parte Gilchrist, 4 McCord (S. C.), 233.

⁴⁷⁰ Sections 1477 to 1489, both inclusive, of the Revised Statutes give to our courts of chancery plenary jurisdiction over the entire subject of granting divorces, awarding alimony and maintenance to wives and the custody of children in such cases.

The first contention of the plaintiff in error is that the bill for alimony by Lillie L. P. Bronk against John P. Bronk, in which the writ of ne exeat was granted, contains no allegation as to the residence of said complainant, and that according to the proofs on the hearing of the habeas corpus it was shown that neither the complainant nor defendant in said bill for alimony were bona fide residents or citizens of this state, and that in such cases the courts of this state, as held in Miller v. Miller, 33 Fla. 453, 15 South. 222, were without jurisdiction to entertain such suit. The bill for alimony mentioned expressly alleges that the

defendant John P. Bronk was a resident and citizen of Florida, and had been such for five years, which allegation, if proven to be true, would authorize our courts of chancery, upon a proper case made to award alimony to the wife, regardless of her place of residence, as was held in the case of *Miller v. Miller*, 33 Fla. 453, 15 South. 222. The fact as to whether John P. Bronk was such a bona fide resident of Florida as to give our courts of chancery jurisdiction over him to enforce against him the marital duty of maintaining and supporting his wife, is and was one of the issues in the proceeding pending for alimony, which issue the court of chancery in which that proceeding is pending has full and general jurisdiction to pass upon and adjudicate in that proceeding, and its adjudication of it, though only in limine, and subject upon further investigation by it in the same proceeding to be differently adjudged, cannot be collaterally inquired into ⁴⁷¹ or reviewed on habeas corpus. In the case of *Epping, Bellas & Co. v. Robinson*, 21 Fla. 36, it was held, in effect, that the judgment of a court, made within its jurisdiction, that involved the adjudication of jurisdictional facts could not be attacked collaterally. The granting of the order of ne exeat on the bill for alimony filed, necessarily involved an adjudication in limine of the jurisdictional fact as to whether either of the parties to that bill were such residents of this state as to authorize that court to deal with the question of alimony between them, and its decision of that question, though it may be erroneous, cannot be reviewed or interfered with on habeas corpus, but, if erroneous, can be reversed only on appeal. There is nothing in the case of *Ex parte Harfourd*, 16 Fla. 283, that is inconsistent with this view. The latter case was where a committing magistrate bound a party over to keep the peace. On habeas corpus from the circuit court, it was held that as the circuit judges are invested here with the authority of committing magistrates they could, on habeas corpus, in such cases inquire into the cause of the imprisonment on the proofs upon which the committing magistrate acted, or upon further proofs taken in the habeas corpus proceeding, and thereon to discharge, admit to bail or remand to custody, as the law and the evidence shall require. The writ of habeas corpus is more far-reaching in this class of cases for the reason that committing magistrates are courts of inferior and limited jurisdiction and that no appeal or writ of error lies from their commitments.

It is next contended that the circuit court had no jurisdiction to grant the writ of ne exeat in the case before it, because

the bill is not predicated upon the existence of any ground of divorce mentioned in sections 1484 and 1485 of the Revised Statutes, and that by section 1487, *ne exeat* ⁴⁷³ can only be issued where there is a decree for alimony under the two first-mentioned sections, and further that the writ cannot issue before a decree for alimony has been rendered. As all this contention under the habeas corpus proceedings is in the nature of a collateral attack upon the order of a court of general jurisdiction, we are not at liberty under the rule already stated to go further into the inquiry than to see if the court was acting within the limits of its jurisdictional powers. Under an allegation, however, that the court acted without jurisdiction we should go far enough to see whether in reality this be true, and also whether or not the action of the court is illegal to the extent of rendering its decision entirely void, and not merely irregular. The bill in this case is for maintenance under section 1486 of the Revised Statutes, and if it be conceded that there is no authority for a writ of *ne exeat* under it derived from the authority given for the writ under section 1487, referring in specific terms to alimony under sections 1484 and 1485, it does not follow that the writ cannot issue at all. Section 1487 does not deny the use of the writ in applications under section 1486, nor is it restrictive, in our judgment, of the writ to cases arising solely under sections 1484 and 1485. The maintenance section—1486—declares it to be the duty of husbands, having ability to maintain their wives and minor children, and when there is a failure to do so a wife, whether living with her husband or separate from him by his fault, may go into a court of chancery by bill for the enforcement of this duty. The right of the wife is an equitable demand for maintenance in the nature of alimony arising out of the duties incident to the marital status, and can only be secured or enforced by her in a court of equity. The writ of *ne exeat* was commonly used in ⁴⁷³ cases of equitable demands, and at an early date it was applied in cases of alimony under certain conditions. Though section 1487 may not of itself authorize the writ in proceedings under section 1486, yet, if a proper case should be presented for the writ under general principles of law or other provisions of our statutes, it should, of course, be awarded. The second part of the objection involves a reference to some extent to the practice of the court in such cases, and consequently the power of the court in awarding the writ.

As we have already said, the demand sued for in the case where the *ne exeat* was granted, is in the nature of alimony, and arises from the duty imposed by the law upon the husband to support and maintain the wife under the circumstances designated in the section of the Revised Statutes referred to. That statute invests the courts of this state with power to enforce such maintenance upon bill filed and suit prosecuted as in other chancery cases. It is conceded by the English courts of chancery, which alone had jurisdiction to issue *ne exeat* as a judicial process, never issued such writs until after a decree for alimony rendered by the ecclesiastical courts, and then only for the amount so decreed. By the English practice, equity had no jurisdiction to decree alimony in any case. It could only be obtained in the ecclesiastical courts which alone had jurisdiction to decree it, but as their power to enforce their decrees was very limited, and the common law took no notice of their decrees in such matters, equity, in order to aid the enforcement of such decrees, when necessary, issued the writ of *ne exeat*, when it was made to appear that the husband was about to leave the realm to avoid a decree for alimony rendered by the ecclesiastical courts. As there was no jurisdiction in equity, for any purpose,⁴⁷⁴ until a decree for alimony had been rendered in the ecclesiastical courts, the writ *ne exeat* would not issue until such decree had been made. Under our system chancery has exclusive jurisdiction of all suits for divorce and for alimony and maintenance given by statute, and the statute giving jurisdiction in the class of cases designated in section 1486 of the Revised Statutes, under which the bill was filed upon which the writ *ne exeat* issued in this case, expressly provides that the court shall make such orders as may be necessary to secure to the wife such maintenance. The power in our courts of equity to issue *ne exeat* in proper cases is expressly recognized by statute and the matter of issuing such writs is to some extent regulated by sections 1473-1476 of the Revised Statutes. By section 1473 it is provided that no writ of *ne exeat* shall be granted until a bill sworn or supported by affidavit is filed praying such writ, except in certain cases not necessary to mention. It is further provided by that section that the writ may issue in any case where the issuance shall seem to the chancellor just. We are of opinion that under our system the writ *ne exeat* may now be issued by our equity courts in suits for maintenance, before a decree fixing an amount to be paid is rendered, in all cases where it seems to the chancellor just to issue it and a necessity therefor exists:

Denton v. Denton, 1 Johns. Ch. 441; People v. Barton, 16 Colo. 75, 26 Pac. 149; Bishop on Marriage, Divorce and Separation, secs. 1112, 1113. The allegations of the bill upon which the writ issued are sufficient if true, to give jurisdiction to the court to issue the writ complained of, and the court had power to issue it, notwithstanding the fact that no sum had then been decreed.

⁴⁷⁵ It is next contended that the writ of ne exeat will not be issued when useless, and that it will not be allowed unless it is apparent from the bill that the performance of the decree in the suit in which it is applied for can be enforced against the person of the defendant; and that the only relief prayed in the bill in this case being alimony for support of the wife, a decree therefor cannot be enforced by imprisonment of the husband, as alimony without divorce is merely a debt, and that our constitution forbids imprisonment for debt. It is almost universally settled that alimony or maintenance from the husband to the wife is not a debt within the meaning of the constitutional inhibition against imprisonment for debt. It is regarded more in the light of a personal duty, due, not alone from the husband to the wife, but from him to society, that the courts of equity have the power to enforce by detention of the person of the husband, in cases where he can discharge it but will not: People v. Barton, 16 Colo. 75, 26 Pac. 149, and cases cited.

The next contention of the plaintiff in error to the effect that before ne exeat can properly issue it must appear that the debt will be endangered by the defendant's going abroad. This contention may be admitted to be true, but the allegations of the bill in this case make such endangerment quite apparent here.

The next contention of the plaintiff in error is that the ne exeat is void because issued without requiring a bond from the complainant with sureties prior to awarding the same. The nonobservance of a statutory prerequisite to the issuance of the writ, such as requiring the complainant to give bond, does not render the writ absolutely void, but, if erroneous in a case like this, is such an irregularity as can only be corrected in a direct proceeding on appeal from the order awarding it.

⁴⁷⁶ The next contention of the plaintiff in error is that the order is void requiring him to be held in custody until he gives a bond conditioned, among other things, that he pay the alimony and other sums decreed by said court to be due, or upon appeal by the appellate court. It may be conceded that the order of the court requiring the defendant to give bond conditioned to pay the alimony decreed by the court, or by the appellate court on

appeal and to abide and perform the decrees of the court before being liberated from the writ of ne exeat was erroneous, as being outside of and beyond the scope and purpose of ne exeat, but this does not entitle the plaintiff in error to his discharge on habeas corpus, for the reason that part of the conditions of the ne exeat bond as ordered were proper, viz. that he should not depart the state without leave of the court, and no tender of any bond thus properly conditioned having been made: *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59; *Ex parte Bowen*, 25 Fla. 214, 6 South. 65.

It is next contended that the proofs taken show that the complainant wife is not entitled to alimony, and that, therefore, the writ of ne exeat should be discharged. This contention, if true, is essentially a matter for inquiry and adjudication in the suit pending for alimony, and cannot be reviewed or inquired into collaterally through habeas corpus.

The judgment of the circuit court in the habeas corpus proceeding is hereby affirmed at the cost of the plaintiff in error.

Before the argument on the merits in this court the complainant wife Lillie L. P. Bronk by her solicitors moved this court for an order requiring the plaintiff in error John P. Bronk to pay her alimony pendente lite and ⁴⁷⁷ attorneys' fees to represent her interests before this court on the writ of error in the habeas corpus proceeding. We cannot see how a complainant wife who, in a proceeding by her for alimony against her husband, secures a writ of ne exeat against him can acquire such a status before the court in an ex parte proceeding on habeas corpus brought by the husband to test the legality of his detention under such ne exeat, as that she can before an appellate court, on writ of error from the judgment in such habeas corpus proceeding brought by the husband as plaintiff in error, properly claim suit money or counsel fees or alimony pendente lite such writ of error. The granting of alimony and counsel fees is exclusively within the jurisdiction of the courts of equity here, while habeas corpus is a proceeding at law.

This motion is denied.

Habeas Corpus is not a proper remedy for inquiring into mere errors and irregularities leading up to a judgment of a court of competent jurisdiction, nor into mere defects in the judgment or sentence itself, nor irregularities after it has been pronounced. To entitle one to be released on habeas corpus, from a judgment restraining him from his liberty, the judgment must be void, and not merely erroneous: See the monographic note to *Koepeke v. Hill*, 87 Am. St. Rep. 167-202, on when a prisoner may be released on habeas

corpus after judgment and sentence. An error committed in decreeing alimony cannot be reviewed on habeas corpus: *In re Cave*, 26 Wash. 213, 90 Am. St. Rep. 736, 66 Pac. 425.

A *Decree for Alimony* is not a debt, within the meaning of a constitutional prohibition against imprisonment for debt; and it may be enforced by an attachment for contempt, even in the absence of statutory authority: *In re Cave*, 26 Wash. 213, 90 Am. St. Rep. 736, 66 Pac. 425; *Welty v. Welty*, 195 Ill. 355, 63 N. E. 161, 88 Am. St. Rep. 208, and cases cited in the cross-reference note thereto; *In re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222, 55 Pac. 1083; note to *State v. Brewer*, 37 Am. St. Rep. 763, 764.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

HOME SAVINGS AND STATE BANK v. PEORIA AGRICULTURAL AND TROTTER SOCIETY.

[206 Ill. 9, 69 N. E. 17.]

VENDOR AND PURCHASER—Protection Against Unknown Equities.—A bona fide purchaser of the legal estate is protected against a prior equitable title of which he has no notice. (p. 133.)

EXECUTIONS—Legal Title Subject to.—A person vested with the legal title to land to plat and convey it to purchasers, though he executes a written declaration of trust to his grantors, which is not recorded, has a title subject to levy and sale under execution upon judgment against him obtained in good faith without notice of the alleged trust. (p. 135.)

DEEDS—Notice of Trust.—A warranty deed conveying the fee for a nominal consideration and reciting that it is made in pursuance of a resolution of the board of directors of the corporation grantor, is not notice of any kind that such conveyance is made in trust for such corporation. (p. 135.)

CORPORATIONS—Notice to Director When not Notice to Bank.—Although a bank director when purchasing land for himself, learns that the title thereto is held in trust, his bank is not chargeable with notice thereof, so as to defeat an execution sale to it of the land under its judgment obtained against the holder of the legal title. (p. 136.)

D. F. Raum, for the plaintiffs in error.

W. T. Whiting, for the defendant in error.

10 WILKIN, J. This is a bill in equity filed in the circuit court of Peoria county, in which the defendant in error seeks to have set aside two sheriff's deeds issued to the plaintiffs in error.

The facts are as follows: The defendant in error was desirous of subdividing a certain tract of land into lots and selling the same to raise money to carry out the object for which the association was organized. It was the owner of one of the three pieces of land constituting said tract, and by its warranty deed, for a consideration of one dollar, conveyed the same to one John B. Samuel. The other two pieces of the tract were purchased by the association and by its directions also conveyed to the said Samuel. The three deeds of conveyance were absolute, without any limitations or conditions whatever appearing upon the face of any of them, and conveyed the fee simple title to the grantee, John B. Samuel. After these deeds of conveyance had been made the land was divided into lots, known as the "fair ground subdivision," and on May 15, 1895, the plat of said subdivision was filed for record in the recorder's office of Peoria county, which plat was executed and acknowledged by the said Samuel, as proprietor and owner. On the same day he executed his declaration of trust, in writing, to the association, in which he certified that he held the title of record, in his name, to the lots described in the fair ground subdivision in trust for the Peoria Agricultural and Trotting Association, but this declaration of trust was never filed for record. As to plaintiffs in error it never took effect, ¹¹ unless the evidence shows that they had actual notice of its existence: 1 *Starr & Curtis' Statutes of 1896*, c. 30, sec. 31, p. 944; *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934. In that case we said (129 Ill. 43, 21 N. E. 938): "The law is well settled that a bona fide purchaser of the legal estate will be protected against the prior equitable title of another, of which he had no notice: 2 *Pomeroy's Equity Jurisprudence*, 740. This court has frequently announced this rule and applied it." And again, on page 44 of 129 Ill. and page 938 of 21 N. E.: "So a purchaser of land who has no notice that his grantor's deed is but a mortgage will be protected"—citing *Jenkins v. Rosenberg*, 105 Ill. 157. So, although the grantor in a deed may hold the legal title in trust for another, a third person may acquire the title from the trustee if he has no notice of the trust and acts in good faith: *Emmons v. Moore*, 85 Ill. 304; 2 *Pomeroy's Equity Jurisprudence*, 770. See, also, *Peck v. Arehart*, 95 Ill. 113; *McDaid v. Call*, 111 Ill. 298; *Bradley v. Luce*, 99 Ill. 234. It is not claimed that there was any actual possession of the property in question by the defendant in error. As lots were sold Samuel executed deeds of conveyance to the

purchasers, and if all the purchase price was not paid in cash he took mortgages, as trustee, for the deferred payments.

On April 28, 1898, the plaintiffs in error recovered a personal judgment against the said Samuel for one thousand and sixty-six dollars and fifty cents, upon which judgment execution was duly issued, and on April 14, 1899, regularly levied by the sheriff of Peoria county upon all the right, title and interest of the said John B. Samuel in and to the lots in controversy in this case, and by virtue of said levy, on June 7, 1899, all of the right, title and interest of said John B. Samuel in and to said lots was sold to the plaintiffs in error herein and a certificate of purchase issued therefor. On April 28, 1899, one Charles E. Ulrich, one of the officers of the plaintiff in error bank, sued out a writ of attachment against the said Samuel, and levied the same upon all of the right, title and interest of the said Samuel in and to certain other of the lots in controversy. A judgment ¹² was obtained, special execution issued, and all of the right, title and interest of the said John B. Samuel in and to said lots was sold and the certificate of purchase afterward assigned to the plaintiffs in error herein, and, the equity of redemption having expired upon both sales, the sheriff executed to the plaintiffs in error his deeds for said lots, which said deeds specifically stated that they conveyed all the right, title and interest of the said John B. Samuel. On March 1, 1901, the defendant in error filed this its bill for relief, and upon the hearing the court decreed that at the time of the levy and sales made by said sheriff the said Samuel had no right, title or interest in said lots in the fair ground subdivision, except as trustee, and that said interest of said Samuel was not subject to levy and sale under said executions, and that the plaintiffs in error acquired no title or interest in said lots by virtue of said sales and said certificates and deeds, and that said sheriff's deeds were clouds upon the title of said defendant in error, and they were accordingly set aside and declared null and void. From this decree a writ of error has been prosecuted to this court.

In support of the decree as entered by the circuit court the defendant in error claims that under the declaration of trust as made by Samuel, and under the deeds of conveyance to him, a mere dry or naked trust was created, and by reason of such dry trust the legal title to the land never vested in the said Samuel at all, but went instantaneously to the cestui que trust as soon as the use was declared, and for this reason,

at the time of the sale by the sheriff the said Samuel had no right, title or interest in said lots in question, and that the sheriff's deeds did not give plaintiffs in error any title. We are of the opinion that this claim of defendant in error is not sustained by the law under the evidence in this record: *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934. Conceding that, as between defendant in error and Samuel a dry trust was created, it ¹³ does not follow that innocent purchasers or judgment creditors without notice are concluded thereby. As to such purchasers or creditors the right, title and interest of John B. Samuel was the absolute fee simple title. From time to time, as the lots were sold, he made deeds conveying the fee to the purchasers, receiving mortgages to secure deferred payments. It is not disputed that he was vested with the legal title for the purpose of making these conveyances. If the contention of defendant in error is correct, then there was no title in him at the time of such conveyances and his deeds conveyed no title whatever to purchasers. If he was vested with sufficient title to make conveyances to the purchasers he was also vested with the title to be subject to a sale on a judgment against him, obtained in good faith and without any notice of the alleged trust.

It is contended, however, that plaintiffs in error had notice of such trust, and three reasons are given for such contention: 1. Because the conveyance from defendant in error to Samuel was by a warranty deed, for a stated consideration of one dollar, which contained the following recital: "This conveyance is made and executed pursuant to a resolution of the board of directors of the Peoria Agricultural and Trotting Society"; 2. For the reason that at a meeting in the city hall in Peoria, of citizens and contract holders, the lots were allotted to the purchasers, which meeting was so public in its nature as to constitute notice to plaintiffs in error; 3. For the reason that one Fred L. Block, who was vice-president of the Schipper & Block Drygoods Company and at the time a director of the plaintiff in error bank, negotiated with defendant in error for the purchase of a lot, and thereby learned that it owned said lots. We do not think any of these reasons are sufficient to charge plaintiffs in error with notice of the alleged trust, either actual or constructive. The deed in question does not show that the conveyance was less than a ¹⁴ conveyance of the fee. Nor do we think that the meeting referred to even tends to prove a trust relation between the parties. There is nothing

in the evidence tending to show that any of the officers of the plaintiff in error bank were at the public meeting claimed to have been held in the city hall, or that they had any notice thereof. It can scarcely be contended that every citizen in a city like Peoria is charged with notice, etc. There is no presumption of law that the director, Block, communicated to plaintiffs in error any knowledge he may have had as to the character of Samuel's title, and he was under no legal obligations so to do: 4 Thompson on Corporations, secs. 5204, 5219, 5221.

From a careful examination of all the evidence we are of the opinion that it entirely fails to show notice to plaintiffs in error, either actual or constructive. For over three years defendant in error permitted the fee simple title to appear of record in Samuel. The declaration of trust, as already stated, was never placed upon record, and there is no claim that it was ever brought to the knowledge of plaintiffs in error; nor is there evidence of notice to them, of any kind or character, of the conditions or circumstances under which he, Samuel, held the title to the premises. We are therefore of the opinion that the said Samuel, at the time of the levy and sale under said executions, held the title of said lots, and that the same were subject to levy and sale, and that by reason of such sales and said deeds the plaintiffs in error acquired title to the lots in controversy, and that for this reason the circuit court had no power or authority to set aside said deeds.

For the reasons above stated the decree of the circuit court will be reversed, and the cause will be remanded for further proceedings in accordance with the opinion herein expressed.

A Corporation is not ordinarily chargeable with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself: Franklin Min. Co. v. O'Brien, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016; Kearney v. Froman, 129 Mo. 427, 50 Am. St. Rep. 456, 31 S. W. 769; Seaverns v. Presbyterian Hospital, 173 Ill. 414, 64 Am. St. Rep. 125, 50 N. E. 1079; Merchants' Nat. Bank v. Clark, 139 N. Y. 314, 36 Am. St. Rep. 710, 34 N. E. 910; Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 625; Gommell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; Koehler v. Dodge, 81 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913. It is otherwise, however, as to knowledge obtained by him while acting in his official capacity: Note to Treator v. Pothem, 24 Am. St. Rep. 228; Guarantee Co. v. East Rome Town Co., 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

As to the Protection of a Bona Fide Purchaser against unknown equities, see Davis v. Ward, 109 Cal. 186, 50 Am. St. Rep. 29, 41 Pac. 1610.

SUPREME TENT KNIGHTS OF MACCABEES v. STENSLAND.

[206 Ill. 124, 68 N. E. 1098.]

INSURANCE—Expert Evidence as to Cause of Death.—A physician who has witnessed a number of cases of hanging, or who is informed on the subject of strangulation from reading medical works, is competent to give his opinion as a witness, from the facts in evidence, as to whether the death of an insured person was caused by strangulation. (p. 140.)

INSURANCE—Life—Contradiction of Proof of Cause of Death.—Sworn statements in the proof of the cause of death of an insured may be contradicted on the trial, unless the usual elements of equitable estoppel are present, without first showing that such statements were made by mistake or produced by fraud. (p. 141.)

ESTOPPEL—Equitable—Essentials.—Before an equitable estoppel can exist, it must appear that a party has, by his conduct, wilfully made false representations of material facts for the purpose of inducing another to act upon them, and that such other, not knowing that the representations were false, and trusting to their truthfulness, has so altered his position that he would suffer a loss if the false conduct were repudiated. (pp. 141, 142.)

INSURANCE—Life—Contradiction of Proof of Death—Equitable Estoppel.—If the widow and beneficiary, with no intention to defraud or mislead, signs and swears to a proof of the death of the insured containing a statement of the cause thereof, she is not, from this fact alone, equitably estopped from contradicting on the trial such statement as to the cause of death. (p. 142.)

EVIDENCE—Burden of Proof.—The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises. By the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial to make or meet a *prima facie* case. (p. 143.)

EVIDENCE—The Burden of Proof as applied to the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and never shifts, and unless he meets this obligation upon the whole case he fails. (p. 143.)

INSURANCE—Life—Burden of Proof.—If the insurer insists that a life insurance policy was avoided by a breach of its conditions, the burden of proof to establish that proposition is always upon the insurer and never shifts. (p. 143.)

H. H. C. Miller and W. S. Oppenheim, for the appellant.

Beach & Beach, for the appellees.

¹²⁵ RICKS, J. This was an action in assumpsit brought by appellees, against appellant, in the circuit court of Cook county.

The appellant issued a benefit certificate to Peter A. Stensland on March 25, 1895. At that time the by-laws of appellant provided that if the insured committed suicide, whether he was sane or insane at the time, no benefit should be paid. In 1897 this by-law was changed by extending the time to five years, so that in case of suicide within five years the insurer should be liable only for the amount of all assessments paid. Peter Stensland was found dead at his home on April 2, 1898. His neck was suspended about six inches above the floor by a rope attached to the door-knob. His chest, hips and legs were resting upon the floor. At the time of his death Stensland's family was away from home. A man by the name of Bense occupied a room in the flat with the Stenslands, and it was he who notified the police of Stensland's death. The coroner's inquest returned a verdict of "suicide by strangulation," and the proofs of death sent in by appellees stated that the remote cause of death was suicide by strangulation. Appellant refused to pay anything more than the amount of the premium it had received, and this suit was brought upon the certificate.

Appellant interposed a plea of general issue, and a further special plea alleging that the deceased committed suicide. On the trial appellees showed the death of the insured, and introduced the certificate and proofs of death. The appellant then offered the by-laws which were in force when the certificate was issued and when the deceased died. The appellees put in testimony tending to show that the deceased did not commit suicide, and appellant introduced a rebuttal tending to show that he did commit suicide. The jury brought in a general verdict for the plaintiffs (appellees) and assessed their ¹²⁶ damages at two thousand dollars, and also found specially that the deceased did not come to his death by committing suicide with suicidal intent. From a judgment on the general verdict an appeal was taken to the appellate court for the first district, where the judgment was affirmed. This case comes here by a further appeal from that judgment.

The first point made by appellant is, that the court erred in not giving the peremptory instruction offered by the defendant after the introduction of all the evidence. The affirmance of this judgment by the appellate court leaves this court with only the bare legal question, Was there evidence fairly tending to show the plaintiffs' cause of action? We must hold that there was. We cannot disregard the testimony of the three physicians who swear that in case of strangulation the face is dis-

torted and discolored, and there would be marks on the neck at the point of the constricting material due to the escape of blood from the blood vessels into the tissues. This expert evidence, coupled with the testimony of several witnesses to the effect that there were no marks whatever on the neck, all went to support the plaintiffs' case. A paper was found on the table by the officers. It was in the handwriting of the deceased, partly in Norwegian and partly in English, and as translated is: "If you come while I live then then me till hospital," and below this the word "house." We think this is additional evidence tending to show that there was no suicidal intent, for it is unusual for one contemplating self-destruction to provide for the contingency of some one coming while he lives. The following word, "hospital," indicates serious illness at the time the note was written. This is further corroborated by the generally disjointed and incoherent nature of the note. There was also testimony that the deceased had two weeks previously fallen five stories in an elevator. The widow testified that she kept the clothes line hanging on the door in loops, and no one swears that the rope was tied around the neck of the ¹²⁷ deceased. Upon all this evidence we believe that reasonable minds might come to a different conclusion on the question of suicide.

The next point reviewed by counsel for appellant is, that the hypothetical question propounded to Dr. Reed was inadmissible. The question, after stating the circumstances, concluded with the words: "In your opinion, doctor, could the death of this man have been caused by strangulation with suicidal intent?" The counsel for the appellant questioned the last two words, "suicidal intent," and the court ordered that these two words be stricken. In their argument counsel for the appellant—for the purpose of fairness, they say—quote this portion of the evidence, but they omit altogether the court's order to strike those words, and attribute to the court certain words spoken, as the record shows, by counsel. It was either careless or reprehensible to misquote the judge's words at this time, for it changes the entire complexion of the question. We are convinced that the record shows no error in allowing the question as modified by the court.

The contention that the physicians were not experts on the question of strangulation is likewise without merit. The question before these experts was whether, in case of strangulation, there was any discoloration of the skin or distortion of the

features. Dr. Reed had seen several instances where persons had died from hanging. Dr. McNamara, the attending surgeon and medical director of the Cook County Hospital, had seen sixteen or seventeen men hung and had made several postmortem examinations of people who had died of strangulation. Dr. Craig's testimony agreed with that of the others, and he states that he had read on this question in Taylor on Medical Jurisprudence. The contention is, that although these doctors may know the condition of the face or body in cases of ordinary strangulation or hanging, they are not experts in cases of strangulation where part of the body was suspended and a part resting on the floor. ¹²⁶ This objection is frivolous. The phenomena connected with strangulation are not so technical as to require a specialist on the subject. Of course, a physician, just because he is a physician, is not necessarily an expert witness on matters that involve difficult questions of chemistry or bacteriology; but we think of no better expert witness, in a case like that under consideration, than a physician who has seen a number of cases of strangulation, whether the persons strangled had their feet on the floor or not.

Plaintiffs, on the trial, introduced the sworn proofs of death which were filed with the defendant, but limited the offer to the purpose of showing appellant received notice of the death of the insured. The proofs were signed by Minnie M. Stensland, the widow, and Christ. Runden, guardian of the minor beneficiary. In this proof it was stated that the remote cause of death was "suicide by strangulation." The plaintiffs were then permitted by the court to introduce evidence contradicting the sworn statement made in this proof of death, that the remote cause of death was suicide by strangulation. It is contended by appellant that the sworn admissions as to the cause of death in the proofs of death were binding, and could not properly be contradicted unless the plaintiffs could show that the statements were made by mistake or obtained by means of fraud. The trial was begun October 8, 1901. On September 26, 1901, appellees gave appellant written notice that if the written proof of death assigned suicide by any means as the cause of death of the insured, appellees would, on the trial, offer evidence that such proof of death was in that particular erroneous and untrue and made under misapprehension and in ignorance of the facts, and would show that the insured did not come to his death by suicide. In *Aetna Ins. Co. v. Stevens*, 48 Ill. 31, this court held that in a suit on a fire in-

insurance policy the failure of the insured to include certain articles in the proof of loss did not estop ¹²⁹ him from subsequently showing on the trial that these other articles were destroyed, if he satisfied the jury that the omission was from no design or bad purpose. In *Modern Woodmen of America v. Davis*, 184 Ill. 236, 56 N. E. 300, the court says: "Any statement contained in the notice and proofs of death was available to the order as evidence in the nature of admissions made by the plaintiff in the action, but we find nothing in the averments of the plea upon which to base the contention an estoppel arose. That the statement in the proof of loss was made with the intention the order would act upon it, and that the order did act upon it and changed its position to its injury, was at least essential to the creation of an estoppel." .

While there may be some slight authority for the contention of appellant, we are convinced that reason and the great weight of authority are with the rule which permits the statements in the proof of loss to be contradicted on the trial, unless it appears that the usual elements of equitable estoppel are present. The rule insisted upon by appellant is, that before the statements in the proof of loss can be contradicted* the plaintiffs must show that they were made by mistake or produced by fraud. The evidence shows that the plaintiffs knew nothing as to the cause of the death. The widow was away from home at the time, and, of course, was no more able to state the cause of death, as a fact, to be suicide, than were the agents of appellant. She swears that the agent of the insurance company prepared the proof of loss and that she did not read it before she signed it. It was attempted, also, on the trial to show the circumstances under which she signed, but this was objected to by counsel for appellant. It may be admitted that the widow was negligent in not reading the proof of loss before signing it, but such negligence is by no means reason for applying the doctrine of equitable estoppel. But even granting that she knew and comprehended, at the time, that the proof of death contained the statement that the death ¹³⁰ was from suicide, still no estoppel arises, for the reason that the statement that the death resulted from suicide by strangulation was a mere opinion. Moreover, it is not shown that appellant, relying upon her statement, has changed its position or condition in any respect. Before the doctrine of equitable estoppel can apply, it must appear that a party has, by his conduct, willfully made false representations of material facts for the purpose of induc-

ing another person to act upon them, and that the other, not knowing that the representations were false, has, because of his reliance upon the conduct, so altered his position that he would suffer a loss if the court should permit the false conduct to be repudiated. These essentials are not present in this case. Taking the view most favorable to the appellant, the record shows no more than this: that the widow, with no intention to defraud or mislead, signed and swore to a proof of death in which the statement was made that the remote cause of death was suicide by strangulation, and then, on the trial, introduced testimony tending to show that the death was not caused by suicide. That is the entire matter as shown by the record. There is no evidence that the appellant has relied upon that statement, nor that it is in a worse condition, because of anything stated as to the cause of death, than if the statement had not been made. The closest scrutiny of her entire conduct fails to disclose a single act which could be looked upon as a reason for excluding evidence as to the real cause of death. If there was any fraud whatever in the transaction at the time she signed the proof of death, she certainly was not the perpetrator.

The insured died April 2, 1898. Proof of death was made August 20, 1898. This suit was begun in December, 1898. June 22, 1900, appellant filed a special plea setting up that the insured committed suicide, in violation of his contract. On October 5, 1900, appellees filed a replication denying that the insured committed suicide. There ¹²¹ have been two jury trials. The first was had December 14, 1900. It will thus be seen that more than two months before any trial of the cause was had or entered upon appellant was fully notified and apprised, by the pleadings, that it could not rely on the admissions contained in the proof of death, and before the trial resulting in the present judgment a special notice in writing was given by appellees to appellant that the question of suicide would be controverted. We accordingly think that there was no error in permitting the plaintiffs to introduce testimony tending to show that the cause of death was not suicide: *Parmalee v. Hoffman Fire Ins. Co.*, 54 N. Y. 193; *Supreme Lodge K. of P. v. Beck*, 181 U. S. 49, 21 Sup. Ct. Rep. 532; *Leman v. Manhattan etc. Co.*, 46 La. Ann. 1189, 49 Am. St. Rep. 348, 15 South. 388; *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417, 4 Pac. 413; *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 12 Sup. Ct. Rep. 332; *Keels v. Mutual Ins. Co.*, 29 Fed. 198.

See specially note to *John Hancock Mutual Life Ins. Co. v. Dick*, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846.

The final contention of appellant is, that the court erred in refusing to instruct the jury that the beneficiaries could not recover unless they showed, by a preponderance of the evidence, that deceased did not commit suicide. Under the pleadings we think there was no error in refusing to give this instruction. The defendant filed a special plea, in which it averred "that on April 2, 1898, said Peter A. Stensland committed suicide, in violation of the terms of the benefit certificate," etc. By this plea it asserted the affirmative of the proposition, and the burden of proof was upon it throughout the trial, and did not shift. The proof of death had no effect whatever in shifting the burden of proof. It was nothing more than evidence which, standing alone, might be considered *prima facie*. It was introduced by appellees, and the duty devolved upon them to offer sufficient evidence then to overcome the *prima facie* case made by the admission, but this did not affect the burden of proof. It was but evidence that could be considered, for the benefit of ¹²² appellant, upon the proposition, which it asserted, that the insured came to his death by suicide, and upon which appellant was bound to make the burden of proof. In *Egbers v. Egbers*, 177 Ill. 82, we said (p. 88, 52 N. E. 287): "The term 'burden of proof' has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a *prima facie* case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end." The case of *Fidelity etc. Co. v. Weise*, 182 Ill. 496, 55 N. E. 540, cited by appellant, is not in conflict with these views. That was an action upon an accident policy. The only right to recover was upon showing that the death of the insured was accidental, and it was said in that case that the burden was upon the plaintiff to show that the death was not due to suicide.

The case at bar, however, is upon a life policy. The issuing of the policy and the making of all of the payments by the insured under it were admitted. The insurer insists that the policy was avoided by a breach of its conditions, and upon that proposition the burden was upon the insurer: *Spencer v. Citizens' Mut. Ins. Co.*, 142 N. Y. 505, 37 N. E. 617; *Supreme Lodge v. Foster*, 26 Ind. App. 333, 59 N. E. 877; *John Hancock Mut. Ins. Co. v. Moore*, 34 Mich. 41; *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 12 Sup. Ct. Rep. 332.

We think there is no reversible error in the record, and the judgment of the appellate court is affirmed.

Proofs of Death under a policy of life insurance, showing that the death was caused by suicide, are admissible, but not conclusive against the insured: *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, 49 Am. St. Rep. 348, 15 South. 388.

The Death of an Insured person is presumed to have been due to natural causes, and the burden of proof to show that it was caused by self-destruction is on the insurance company: *Cox v. Royal Tribe*, 42 Or. 365, 95 Am. St. Rep. 752, 71 Pac. 73; *Hale v. Life Indemnity etc. Co.*, 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108; *Supreme Counsel v. Brashears*, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866; *Agan v. Metropolitan Life Ins. Co.*, 105 Wis. 217, 76 Am. St. Rep. 905, 80 N. W. 1020; note to *Meadows v. Pacific Mut. Life Ins. Co.*, 50 Am. St. Rep. 442.

Equitable Estoppel arises only when one, by his words or conduct, willfully causes another to believe in the existence of a state of facts, and induces him to act so as to alter his previous position to his prejudice: *De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 558, 30 S. W. 338. See, too, *Priewe v. Wisconsin State Land etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, 74 N. W. 780; *Smith v. Sprague*, 119 Mich. 148, 75 Am. St. Rep. 384, 77 N. W. 689; *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575, 83 N. W. 230; *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354; *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707, 2 Atl. 681.

FORTHMAN v. DETERS.

[206 Ill. 159, 69 N. E. 97.]

CONTRACTS—Implied Assent.—If a person accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and to be bound by them. (p. 146.)

CONTRACTS—Implied Assent—Lack of Mutuality.—A contract for the sale of land signed by the vendor, reciting that he has sold the land described therein to the vendee, accepted and adopted by the latter, does not lack mutuality, though not signed by him. (p. 147.)

CONTRACTS Under Seal to Convey Land are presumed to have been made upon a sufficient consideration. (p. 147.)

SPECIFIC PERFORMANCE—Willingness to Perform—Burden of Proof.—A complainant in a proceeding for specific performance must prove that he has been willing and ready to perform, and the burden is upon him to show a full and complete performance, or offer to perform on his part. (pp. 147, 148.)

CONTRACT to Convey Land—Title Free from Encumbrance. A contract by a widow to convey the land of her deceased husband to give a "good deed free from all encumbrance" imposes upon her the duty of discharging any liability of the land for the payment of claims allowed against the decedent's estate. (p. 149.)

MERGER OF ESTATES at Law.—At law if a legal and equitable estate coincide in the same person, the equitable estate is immediately merged and annihilated. (p. 150.)

MERGER OF ESTATES in Equity.—If a legal and an equitable estate coincide in the same person, the question whether a merger takes place in equity depends upon the intention of the parties, and the surrounding circumstances. Equity, however, will prevent a merger only for the purpose of promoting substantial justice, and it will not prevent it, when prevention would give effect to a fraud or wrong. (p. 150.)

MERGER of Legal and Equitable Estate.—If the purchaser of encumbered land agrees to pay the mortgage thereon as part of the consideration, his subsequent purchase of the notes and mortgage merges the equitable and legal estate. (p. 151.)

SPECIFIC PERFORMANCE of Contract to Convey Land—Purchaser with Notice.—If a vendor, after entering into a contract to convey land, conveys it to a third person who has knowledge or notice of such prior contract, the latter may be compelled by the first vendee to specifically perform the contract by conveying the land in the same manner as his vendor should have done, for whom he is deemed the trustee. (p. 152.)

J. W. Gibson, for the appellant.

Davidson & Isley, for the appellee.

¹⁶⁵ **MAGRUDER, J.** 1. The first reason, urged by the appellant for the reversal of the decree of the trial court, is that the contract was not signed by appellee, Deters, and, therefore,

is not such a contract as a court of equity will specifically enforce. It is true that the contract was signed only by Reka and Ferdinand Huckstead, the vendors, and was not signed by appellee, Deters, the vendee. But the evidence shows clearly that, after the execution of the contract by Reka and Ferdinand Huckstead, it was delivered by them to appellee, and appellee accepted the contract, and on May 10, 1902, recorded the same. The evidence is also clear that he paid a part of the ¹⁰⁰ \$2,100, named in the contract as the purchase money of the land, to wit, \$902.72, to pay off and take up the amount of principal and interest, due upon the mortgage resting upon the land.

It is well settled by the decisions of this and other courts that, where a party accepts and adopts a written contract, even though it is not signed by him, he shall be deemed to have assented to its terms and conditions and to be bound by them: *Memory v. Niepert*, 131 Ill. 623, 23 N. E. 431; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535; *Lowber v. Connit*, 36 Wis. 176; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790. In *Memory v. Niepert*, 131 Ill. 623, 23 N. E. 431, it was claimed that the contract there under consideration, because it was signed by one party only, lacked mutuality, that is, failed to show that it received the assent of the party not signing it, and, therefore, was no evidence of any contract whatever, but this view was held to be unsound. There, as here, the party, signing the contract stated that he had "sold" to the party not signing the same the property, therein described, upon the terms therein set forth. The same is true of the contract in the case at bar, which contains the following words: "We have sold to one Joseph Deters" the eighty acres in question, describing the land. By these words Reka and Ferdinand Huckstead declared and acknowledged that they had sold the premises in question to Deters, and this declaration or acknowledgment was binding upon them. As we said in the *Memory* case, *supra*: "The word 'sold' imports, not a mere proposition to sell, but a consummated contract of sale. . . . The writing in this case is the acknowledgment of a contract, in which there is complete mutuality—a buyer and a seller—a purchase and a sale. It is clear that the execution and delivery of such a writing by the seller to the buyer is not the submission of a mere proposition, but the execution of a contract capable of being enforced, as such, against him." The contract here also recites "that said Joseph Deters agrees to pay all of said pur-

chase ¹⁶⁷ money on the delivery of a good title to said described land," etc. By these words Reka and Ferdinand Huckstead further declared and acknowledged that Deters had agreed with them to pay the purchase money.

It is claimed, however, that the contract lacks mutuality, so as to render it enforceable as a written agreement, upon the alleged ground that it could not be enforced against Deters, the purchaser, if the breach had been on his part. In *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535, however, where a similar contract was signed by the purchaser, and suit was brought against him by the sellers for the purchase money, we said: "When the sellers accepted the paper as a contract, they became bound by its terms and conditions as completely as if they had in form signed the paper." In *Lowber v. Connit*, 36 Wis. 176, it was said by the supreme court of Wisconsin: "Where the contract has been accepted and adopted by the party not signing it, he does assent and agree to it on his part, and the law implies a promise to perform." In the *Memory* case we further said: "The delivery of a writing and its acceptance and adoption by the party to whom it is delivered, are necessarily facts dehors the writing itself, and must, therefore, be proved by extrinsic evidence; and where mutuality is established by proof of the acceptance of the writing, the contract is, notwithstanding such resort to parol evidence, a contract all of which is in writing. . . . But where the writing on its face purports to be a consummated contract, the mere acceptance and adoption of the writing establishes mutuality, and makes the contract binding on both parties." We see no reason, therefore, why, if there had been a breach of the contract by the appellee, it could not be enforced against him, even though it was not signed by him. The contract in the case at bar was made under seal, and, hence, must be regarded as having been made upon a sufficient consideration: *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73. The terms of the contract are criticised ¹⁶⁸ by counsel, but it gives the names of the contracting parties, a proper description of the premises sold, the time for the delivery of possession, the price and mode of payment, the character of the title to be conveyed, and the terms which go to make up a contract of sale.

2. In a proceeding for specific performance the complainant must prove that he has been ready, willing and eager to perform, and the burden is upon him to show a full and com-

plete performance, or offer to perform on his part: *Morse v. Seibold*, 147 Ill. 318, 35 N. E. 369; *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220. It is claimed by the appellant that the appellee in this case has not proved his willingness to perform the contract, or any offer on his part to perform it. We do not think that this claim is sustained by the evidence. The appellee, Deters, not only paid the principal and interest due upon the mortgage upon the property within two days after the execution of the contract, but he tendered and offered to pay the balance of the purchase money, over and above the amount due on the mortgage, to wit, \$1,197.28, as soon as a deed, showing good title, should be given to him, as required by the contract. It will be observed that the contract for the sale of the eighty acres to Deters was made before any administration was taken out upon the estate of the deceased, Christopher Huckstead. The real estate belonging to the deceased testator was liable to be sold by the administrator for the payment of the claims to be allowed against the estate, and the appellee insisted that whatever claims there might be against the estate should be paid off, in order to relieve the land from its liability for their discharge. We have held in a number of cases that the lands of a decedent are liable to be charged with the debts of the estate: *Noe v. Moutray*, 170 Ill. 169, 48 N. E. 709, and cases there cited. The proof shows that appellee was desirous of going abroad to Germany, and that he did leave for Germany on May 11, 1902, and did not return until August 6, 1902. Before his departure, and on ¹⁶⁹ February 3, 1902, Charles Schmidt was appointed administrator of the estate. On March 3, 1902, the report of the appraisers, fixing the widow's award at \$807, was approved by the court, and, on April 11 and June 7, 1902, claims against the estate were allowed to the amount of \$172, making a total, including the widow's award, of \$979, which, after deducting \$446 of personal property, left \$533 as the amount of the claims due from the estate. The appellee proposed to pay the money, including the amount necessary to discharge these claims, and offered, as he was obliged to leave the country, to place the money in the hands of his own attorney, or in the hands of the attorneys of Reka and Ferdinand Huckstead, the vendors, in order that a portion of it might be applied to the payment of the claims allowed, and the balance be paid over to the vendors. As we understand the evidence, the money was left in the hands of appellee's attorney for such purpose, or left in such a way that

the attorney had the power to pay the \$1,197.28 as soon as a deed, conveying good title, was delivered to him. Appellee left for Europe with the understanding that the claims, when allowed, would be paid off with a portion of this amount. As soon, however, as appellee had left the country, and on June 2, 1902, the vendors, Reka and Ferdinand Huckstead, in violation of the agreement, made a deed of the land to the appellant for a nominal consideration of \$2,350, which deed was never recorded. Upon the return of appellee on August 6, 1902, he ascertained that this deed had been made to the appellant, and he tendered the money, and demanded a deed, which demand was refused. We discover nothing in the evidence to indicate that appellee did not do everything which he could do to show his willingness to perform the contract on his part, nor anything to show that he did not offer to perform it.

The decree of the court is criticised, upon the alleged ground that creditors would have two years within which ¹⁷⁰ to file their claims, and that the vendors could not be compelled to wait two years for all the claims to be filed before receiving the purchase money for the land. The decree is not capable of the construction thus placed upon it, but provides that the clerk shall keep the money, until the premises are released "from all liens of said claims allowed against said estate of Christopher Huckstead." The claims allowed, and which were to be paid out of the money, by the terms of the decree, amounted to the sum already mentioned.

It is further said by the appellant that the mode provided by the decree for the extinguishment of the liability of the land to pay the claims allowed was not a specific enforcement of the contract as made, but was tantamount to the insertion therein, and the enforcement, of new terms, so as to create a new contract for the parties. The decree in all its material provisions is substantially the same as the decree, approved by this court in *Hunt v. Smith*, 139 Ill. 296, 28 N. E. 809. By the terms of the contract the vendors agreed to give "a good deed free from all encumbrance with abstract of title up to date." The obligation, thus created by the contract, involved the duty of removing the liability of the land for the payment of the claims allowed. In *Hunt v. Smith*, 139 Ill. 296, 28 N. E. 809, where it appeared that, at the time of the decree, the lien of a mortgage, held by an insurance company, had not been removed, we held that the obligation on the part of the vendor to convey an unencumbered title necessarily involved the legal

obligation or duty to remove the lien of the mortgage, and we there said: "This is in no sense a creation of a new contract for the parties, but only a mode, and we think an appropriate mode, of enforcing the legal obligations imposed by the contract, which the parties have made for themselves."

3. It is further claimed on the part of the appellant that the appellee, Deters, did not pay off the mortgage upon the premises, but that he obtained an ¹⁷¹ assignment to himself of the note and mortgage from the original mortgagee, Wyatt, and held it uncanceled against the land. In this connection it is also insisted that the note and mortgage were not surrendered. The appellee produced upon the trial the original mortgage, and the assignment thereof to himself, and the unpaid principal and coupon notes, secured by the mortgage, transferred to himself. Appellee alleges in his bill that he paid the principal and interest due on the mortgage to Wyatt, and the decree rendered by the court finds that he paid the mortgage and interest. This allegation in the bill as to payment would estop appellee from asserting the mortgage claim against the property, and the finding of the decree that the mortgage was paid protects the vendors and their grantee, and they have no reason to complain.

Appellee being the holder of the mortgage—when the original vendors in the contract, or their grantee, the appellant, should execute to him a deed—there would unquestionably be a merger in appellee of the two estates, the legal estate of mortgagor and the equitable estate of mortgagee. It is well settled that, at law, when a greater or lesser, or a legal and equitable estate, coincide in the same person, the lesser, or the equitable estate, is immediately merged and annihilated: 15 Am. & Eng. Ency. of Law, 1st ed., 314. It is true that the question, whether or not a merger takes place in equity, depends upon the intention of the parties, and a variety of other circumstances: 15 Am. & Eng. Ency. of Law, 1st ed., 314. But "a merger will be prevented by equity only, however, for the purpose of promoting substantial justice; it will not prevent a merger, where such prevention would result in carrying a fraud or other unconscientious wrong into effect": 15 Am. & Eng. Ency. of Law, 1st ed., 315. Pomeroy, in his work on Equity Jurisprudence, section 794, says: "Whatever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented ¹⁷² and a mortgage or other security to be kept alive, when this result would aid

in carrying a fraud or other unconscientious wrong into effect, under the color of legal forms. Equity only interposes to prevent a merger, in order thereby to work substantial justice." In this case it would be an injustice to the original vendors in the contract, and to appellant, their grantee, to permit appellee to hold the mortgage as a subsisting encumbrance, and the note as a subsisting indebtedness, after a deed had been executed to the appellee by Reka and Ferdinand Huckstead, and the appellant. Hence, upon the execution of the deed required by the contract to appellee, there would be a merger, which would protect the interest of appellant, and the vendors in the contract. Although a conveyance of the mortgagor's estate to the mortgagee does not operate as a merger in equity unless it was intended to have that effect, yet when the holder of the notes, secured by the mortgage, accepts a conveyance from the mortgagor of the lands, and gives the notes up to the maker, or, as here, deposits them in court, and no reason exists for keeping the encumbrance alive, there will be a complete merger, and the mortgagee will acquire the entire title: *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642.

The contract is capable of the construction that the appellee, Deters, assumed the payment of the mortgage upon the property, because the purchase price of the property is stated in the contract to be \$2,100, and the \$2,100 included the principal and interest due upon the mortgage. The rule is, that where the grantee of the mortgagor takes a conveyance of the land subject to the mortgage, and expressly assumes and promises to pay it as a part of the consideration, the assignment of the encumbrance to the owner of the property works a merger thereof, because such grantee is thereby made principal debtor and the land is the primary fund for payment, so that, if he pays off the charge, it becomes ¹⁷³ extinguished: *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223, 54 N. E. 631; 2 *Pomeroy's Equity Jurisprudence*, secs. 797, 793. Inasmuch, therefore, as an execution of a deed to appellee in accordance with the terms of the decree would create a merger, no injury could result to appellant, if the terms of the decree should be carried out.

4. The evidence in the case shows clearly that, before appellant accepted his deed from the heirs or devisees of Christopher Huckstead, deceased, he had notice both actual and constructive of the contract of sale, made with appellee on January 20, 1902. That contract was on record as early as May

11, 1902, and appellant did not obtain his deed until June 2, 1902. In addition to this, the proof shows that appellant went to the recorder's office, and saw the contract with appellee, as there recorded. He, therefore, had full notice and knowledge of the rights of appellee under the contract before accepting his deed. Consequently, appellant, not being a bona fide purchaser without notice, will be compelled to perform the contract of his vendors, Reka and Ferdinand Huckstead. He stands upon the same equity as they did; although he is not personally liable, yet he is properly decreed to convey the land in the same manner as his vendors; in other words, he is treated as a trustee of appellee, the first vendee. "The general principle upon which this doctrine proceeds is, that, from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities as the party would be from whom he purchased": 1 Story's Equity Jurisprudence, 12th ed., sec. 789. In Pomeroy's Specific Performance, section 465, it was said: "When the vendor, after entering into a contract of sale, conveys the land to a third person, who has knowledge or notice of the prior agreement, ¹⁷⁴ such grantee can be compelled, at the suit of the vendee, to specifically perform the agreement by conveying the land in the same manner, and to the same extent, as the vendor would have been liable to do, had he not transferred the legal title": See, also, Bryant v. Booze, 55 Ga. 438; Hunt v. Smith, 139 Ill. 296, 28 N. E. 809; Chicago etc. R. R. Co. v. Hay, 119 Ill. 507, 10 N. E. 34; Woolensak v. Briggs, 119 Ill. 453, 10 N. E. 23; Bishop v. Newton, 20 Ill. 175.

For the reason above stated, we are inclined to think that the decree of the circuit court is correct, and, accordingly, it is affirmed.

MERGER OF ESTATES.

- I. Merger at Law Generally.
- II. Life Estate into Remainder, Reversion, etc.
- III. Merger of Dower.
- IV. Merger of Trust Estate.
- V. Merger in Equity.
 - a. Merger Largely a Question of Intention in Equity.

VI. Merger of Mortgage.

- a. When Merger Occurs Generally.
- b. When Merger Does not Occur Generally.
 1. Intention and Interest of Mortgagee.
 2. Purchase of Equity of Redemption.
 3. Purchase at Judicial Sale.
 4. Assignment of Mortgage.
 5. Intervening Lien or Encumbrance.
 6. Payment of Mortgage by Owner of Fee.

I. Merger at Law Generally.

Merger is the annihilation of one estate in another, and takes place usually when a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately merged, that is, sunk or drowned, in the greater.

The general rule at law is, that equal estates will not merge in each other, but to this rule are well-established exceptions, and even when estates are theoretically equal the first in order of succession may merge in the next vested remainder. Thus, an estate at will may merge in an estate for years, and estates for years may merge into each other or in estates for life, and estates for life may merge into each other: *Boykin v. Ancrum*, 28 S. C. 486, 19 Am. St. Rep. 693, 6 S. E. 305. The rule at law is inflexible that when a greater and less estate meet in the same person, without any intermediate estate, the less estate at once merges into the greater: *Fox v. Long*, 8 Bush, 551; *Bassett v. O'Brien*, 149 Mo. 381, 51 S. W. 107; *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 683; *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475; *Jackson v. Roberts*, 1 Wend. 478; *Little v. Bowen*, 76 Va. 724. To constitute a merger, it is necessary that the two estates be in one and the same person, at one and the same time, and in one and the same right: *Reed v. Latson*, 15 Barb. 9; *Garland v. Pamplin*, 32 Gratt. 305. When two or more titles unite in one person, they are merged at law, and a conveyance of one title by such person passes them all: *Logan v. Steele*, 7 T. B. Mon. 101.

A merger as to a portion of the premises, the legal titles to which have become united in the same person, may take place pro tanto, although no union takes place as to the residue: *Fox v. Long*, 8 Bush, 551. Merger never takes place by the greater estate sinking into a smaller estate. If either perishes by merger, it must be the smaller estate: *Colliamer v. Kelly*, 12 Iowa, 525.

II. Life Estate into Remainder, Reversion, etc.

Generally, if a life estate and a remainder, reversion, or the like, become united in the same person, the life estate is merged or annihilated. Thus, if a life estate is the only estate preceding an estate in reversion or remainder, and the remainderman buys the life estate, or under an agreement rents the estate for life, for and during the life of the person entitled to it, the life estate is merged

in the remainder: *Fox v. Long*, 8 Bush, 551. If the tenant for life conveys all his interest in the estate to the reversioner, the life estate is merged in the fee: *Cary v. Warner*, 63 Me. 571. If the son of a testator who takes under the will a life estate in lands consequent on the life estate of the testator's widow therein, purchases the widow's life estate, the latter merges in the life estate of the son. In other words, an estate for years may merge in a reversionary term of years, even though the latter is of less duration: *Boykin v. Ancrum*, 28 S. C. 486, 13 Am. St. Rep. 698, 6 S. E. 305. The life estate of one in lands of which he receives a conveyance in fee is merged in the fee: *Allen v. Anderson*, 44 Ind. 395. If a tenant for life in possession purchases the remainder or reversion, and pays the purchase money in full, though he does not take a conveyance or bond for title, there is a merger of the estates: *Wilkinson v. Chew*, 54 Ga. 602. If a tenant for life under a will creating a remainder, receives the remainder through the death of her child, the life estate merges in the fee thus obtained by her: *Harrison v. Moore*, 64 Conn. 344, 30 Atl. 55. If the fee estate of a married woman is sold at her death to pay debts, subject to the life estate of her husband, and such life estate is purchased by the person who thus acquires the fee, the life estate is merged therein: *Shelton v. Hadlock*, 62 Conn. 143, 25 Atl. 423. If a husband and wife join in a conveyance of the wife's land, in which she holds the fee and he an estate by the curtesy, both estates become merged and united in the purchaser: *Talcott v. Draper*, 61 Ill. 56. If the tenant for life conveys her estate to children having a vested remainder in the property, the life estate becomes merged in the fee, and such children may maintain ejectment before the death of the former life tenant, as against those claiming the premises in fee and not by virtue of color of title to the life interest: *Field v. Peoples*, 180 Ill. 376, 54 N. E. 304. If a testator whose wife and daughter were his only heirs, devised land to his wife for life with remainder to his daughter during her natural life, with power to devise and bequeath such real estate by will, the daughter, upon the death of her mother, of whom she was sole heir, becomes the owner of the fee, and the estates for life are merged therein: *Wilder v. Holland*, 102 Ga. 44, 29 S. E. 134. But a life estate merges in the remainder only to the extent of the interest of the life tenant in such remainder: *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157, 39 Atl. 898. An equitable life estate does not merge in the legal estate in remainder merely because the same person becomes entitled to both, if it is necessary for the purposes of justice or to carry out the intent of the testator that they should be kept distinct: *Wehrhane v. Safe Deposit etc. Co.*, 89 Md. 179, 42 Atl. 930. If a cotenant of a life estate becomes the owner of the reversion, equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, and an

intent to keep the two estates separate will be presumed where it will best promote the interest of the person in whom they have vested: *Jameson v. Hayward*, 106 Cal. 682, 46 Am. St. Rep. 268, 39 Pac. 1078. Title acquired by a tax deed is not merged or destroyed by the grantee accepting a deed to the property from one claiming a life interest therein: *Doren v. Lupton*, 154 Ind. 396, 56 N. E. 849. On the other hand, the remainderman who redeems the land from a tax sale does not thereby acquire the life estate. Such transaction does not constitute a merger: *Yocum v. Zahner*, 162 Pa. St. 468, 29 Atl. 778. An estate for life may be merged in the estate in reversion or remainder by a surrender by the life tenant, but this can be accomplished only by mutual agreement: *Fisher v. Edington*, 12 Lea, 189; but a tenant for life cannot destroy the rights of a remainderman by a surrender, release, or by any other voluntary act for the purpose of merging the particular estate in the greater: *Moore v. Luce*, 29 Pa. St. 260, 72 Am. Dec. 629. Merger takes place only when the greater and less estate come together in the same person, and there is no reason for their longer existence as separate estates, and when the rights of strangers not parties to the act that would otherwise merge the particular estate require it, the estates will still have a separate continuance in contemplation of law: *Moore v. Luce*, 29 Pa. St. 260, 72 Am. Dec. 629. By the conveyance of the most remote of several contingent remainders to a life tenant, the life estate is not thereby merged in the remainder and enlarged into a fee simple, to the destruction of the intermediate remainders: *Stewart v. Neely*, 139 Pa. St. 309, 20 Atl. 1002. If a wife has an estate for life, and she and her husband are seised together of the remainder in entirety, the estate for life does not merge in the remainder: *Bomar v. Mullins*, 4 Rich Eq. 80; or if land is jointly held by one and his wife, for their joint lives, and the life of the survivor of them, a conveyance to the husband by the children, during the life of the wife, of an undivided share in the remainder, does not merge his life estate or give him such a title as will enable him to maintain partition: *Johnson v. Johnson*, 7 Allen, 196, 83 Am. Dec. 676. A life estate owned by the husband is not merged in an estate in remainder owned by him only in right of his living wife: *Pool v. Morris*, 29 Ga. 374, 74 Am. Dec. 68. If he who has a reversion takes a lease of the particular estate and covenants to pay rent, there is no such merger of the two estates as will extinguish the liability to pay rent: *McMurphy v. Minot*, 4 N. H. 254. In *Cole v. Grigsby* (Tex. Civ. App.), 35 S. W. 680, it appeared that a father having a one-third interest in land for life, with remainder to his son, conveyed all his interest therein to his son, who owned the other two-thirds interest. The son was at the time an infant, and before he reached his majority the title of his father had become fixed by limitation in a third person. Afterward such third person acquired by limitation the two-thirds inter-

est of the son, and if the deed from father to son worked a merger of the estates, the son lost the remainder by limitation, but the court held that there was no merger, and that the statute of limitations would not commence to run as to the remainder until the death of the father. A legal term for years does not merge in an equitable title to the reversion. If a person who has an annuity charged upon certain real estate, inherits such estate, either as the heir at law of the devisee of the grantor of the annuity: *Jenkins v. Van Schaak*, 3 Paige, 242; or, as the devisee of the owner of the estate subject to the annuity, such annuity is merged in the devised estate: *McLarin v. Knox*, 6 S. C. 23; *Little v. Ott*, 3 Cranch C. C. 416, Fed. Cas., No. 8389.

III. Merger of Dower.

It has been held that, if a widow whose dower is charged upon lands, receives a conveyance of them in fee, her life estate is as to third persons merged in the fee: *Kreamer v. Fleming*, 191 Pa. St. 554, 43 Atl. 388. But if a widow is entitled to dower in certain lands and takes quitclaim deeds to the property from all the heirs, her dower is not thereby extinguished by merger, when the continuance of her dower right would be beneficial to her, and no intention to create a merger is shown: *Wettlaufer v. Ames* (Mich.), 94 N. W. 950. If a widow entitled to dower in land accepts from the heir a warranty deed of the land in fee, and enters into possession, her right to dower is not merged in the conveyance, as against the widow of the heir making such conveyance: *McLeery v. McLeery*, 65 Me. 172, 20 Am. Rep. 683. To merge a less estate in a greater, the latter must be valid and continuing, and there can be no merger where it has been avoided. Hence, a widow's right to dower is not merged in an absolute conveyance to her by her husband in his lifetime which was afterward declared constructively fraudulent as to his creditors, and set aside at the instance of the persons who are contesting the right of the widow to dower: *Humes v. Scruggs*, 64 Ala. 40; *Richardson v. Wyman*, 62 Me. 280, 16 Am. Rep. 459. Or if a husband, by a deed in which his wife joined to release dower, conveyed to a third person, who conveyed back to the wife, and subsequently both deeds are set aside as being fraudulent as against the husband's creditors, the wife's inchoate right to dower was not merged in the fee thus conveyed to her, so as to estop and prevent her from claiming it, after such deeds were set aside: *Malony v. Horan*, 12 Abb. Pr., N. S., 289; affirmed, 49 N. Y. 111, 10 Am. Rep. 335. In the absence of such circumstances as stated above, if a wife becomes the owner in fee of land of which her husband has previously been seised during coverture, her inchoate right to dower under her husband's seisin is merged in her own fee simple title, and if she conveys such land to another before her husband's death, she cannot thereafter recover dower therein from her vendee: *Youmans*

v. Wagener, 30 S. C. 302, 9 S. E. 106. If a widow unites with the heirs in a warranty deed conveying all the right, title and interest of the grantors, and reciting that the consideration was paid to all of them, the equitable estate of the widow is merged in the legal estate conveyed by the heirs, and she is estopped to deny the title of the grantees by asserting a claim to either dower or homestead: Reeves v. Brooks, 80 Ala. 26. Or, if a widow holding a life estate in lands, with remainder to her son, conveys the land to him, the life estate is merged in the son's greater estate: Mangum v. Piester, 16 S. C. 316. If a widow has a dower right in lands, the fee to which descends to her by the death of her son, merger of the two estates becomes a question of intent, and cannot take place against her wishes, to her prejudice: Estate of Danhouse, 130 Pa. St. 256, 18 Atl. 621.

If a person in possession of a mining claim obtains a patent for the land, the claim, as a separate estate, is merged in the fee simple title, and the right to dower in the subordinate estate is thus extinguished: Black v. Elkhorn Min. Co., 49 Fed. 549. Until the assignment of dower, a widow has neither seisin of the dower land, nor a right of entry, but only a right of action. Hence, there can be no merger thereof in a fee simple estate afterward acquired in the land: Downs v. Allen, 10 Lea, 653. A widow's right to dower is not defeated by the fact that the husband of her deceased daughter has a life estate in the property, and that such widow is heir to the reversion. Her dower estate, in such case, will not merge in the reversion, as the doctrine of merger applies only where the less and the greater estates come together in the same person without any intervening estate: Miller v. Talley, 48 Mo. 508. If land of a husband is sold by the sheriff during the coverture, and the purchaser conveys it to a trustee in fee in trust for the wife of the judgment debtor, there is no such merger of the legal estates, as will destroy the wife's inchoate right of dower, and her rights in this respect remain unaffected: Davis v. Townsend, 32 S. C. 112, 10 S. E. 837. Where the legal estate and the equitable interest or trust estate in the same lands become united in the same person by conveyances from different persons at different times, the equitable estate merges in the legal, and the whole fee simple estate follows the legal title, and in case of the decease of the owner of the united interests in the land, it descends, and dower in it will be taken as though the whole united interest had passed to the intestate, with the legal interest: Hopkinson v. Dumas, 42 N. H. 296.

IV. Merger of Trust Estate.

If a legal estate and a trust estate are coextensive, and both become vested in the same person, there is a merger of the trust estate in the legal estate: Robison v. Codman, 1 Sum. 121, Fed. Cas. No. 11,970; Wills v. Cooper, 25 N. J. L. 137. But if an estate limited to

an ancestor is an equitable or trust estate, the two estates will not merge in him: *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

Where a trust estate is created by will, but it and the legal estate are not commensurate, they will not merge, though they meet in the same person, especially when such merger would frustrate the intent of the deviser, and prejudice the beneficial interest of the holder of the two estates: *Donalds v. Plumb*, 8 Conn. 447. If a corporation, while holding a leasehold interest in land in trust to be used for church purposes, takes a conveyance from the reversioner, there is a complete merger of the trust into the legal estate: *Bennett v. Trustees of Methodist Church*, 66 Md. 36, 5 Atl. 291.

V. Merger in Equity.

The doctrine of merger is never regarded with favor in a court of equity, nor allowed therein, except for special reasons, and to carry out the intention of the parties. Estates in equity are always kept distinct when the interest of either party or a creditor requires it: *Clark v. Clark*, 56 N. H. 105; *Mechanics' Bank v. Edwards*, 1 Barb. 272. Merger is not favored in equity, and if a term for years and the fee meet in the same person, the former will not be merged in the latter, if the continuance of the term is necessary to the protection of the owner of the inheritance, though the term would be merged at law: *Dougherty v. Jack*, 5 Watts, 456, 30 Am. Dec. 835. In equity, a merger never takes place, contrary to the intention of the parties or the requirements of justice: *Sheldon v. Edwards*, 35 N. Y. 279. The doctrine of merger will not be applied by a court of equity to the union of two estates in the same person, when it will conflict with the intention, or be against the interest of such person: *Sater v. Hunt*, 66 Mo. App. 527. Equity will keep the lesser estate alive, or consider it merged and extinguished as will best serve the purposes of justice and the actual intention of the parties: *Goulding v. Bunster*, 9 Wis. 466, *513. Equity will, when justice requires, prevent a merger of the legal and equitable estate: *Gleason v. Carpenter*, 74 Vt. 399, 52 Atl. 966. Although the well-settled rule at law is, that where the equitable and legal estate unite in the same person, the equitable estate is merged in the legal, this does not necessarily follow in equity: *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Cole v. Beale*, 89 Ill. App. 427; *Hinchman v. Emans*, 1 N. J. Eq. 100; *Whythe v. Arthur*, 17 N. J. Eq. 521. Although the equitable and legal estates unite in the same person, merger thereof will not take place, if he has a beneficial interest in keeping the estates distinct: *Lockwood v. Sturdevant*, 6 Conn. 373. And a merger of such estates does not take place if justice requires that they shall be kept separate: *Earle v. Washburn*, 7 Allen, 95. A court of chancery will generally relieve from the legal consequences of a merger, where equity requires it: *Slocum v. Catlin*, 22 Vt. 137.

a. Merger Largely a Question of Intention in Equity.—Although generally speaking, a prior equity sinks or merges in a subsequently acquired legal title, unless there is some declared intent to prevent it, or some beneficial purpose to the holder not inconsistent with the rights of others, yet a court of equity will keep alive an encumbrance, or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the party, so long as the purpose is innocent, and injurious to no one: *Lewis v. Starke*, 10 Smedes & M. 120; *Wead v. Gray*, 78 Mo. 59. The doctrine of the merger of estates is not favored in equity, and where two or more rights or estates are united in one person, equity will keep them distinct, if, from the intention of the party, express or implied, he wishes them so kept: *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255; *Wilcox v. Davis*, 4 Minn. 197; *Davis v. Pierce*, 10 Minn. 376; *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475. While it is a general rule that where two unequal estates vest in the same person, at the same time, without an intervening estate, the smaller is thereupon merged in the greater, such is not always the necessary result, and whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected: *Petersborough Sav. Bank v. Pierce*, 54 Neb. 712, 75 N. W. 20. The rule governing the merger of estates in equity is that a person may become entitled to an estate, subject to a charge for his own benefit, and if he chooses can hold the estate and keep the charge alive, and in such case it becomes a question of intention in the person in whom the two interests are vested: *Bassett v. O'Brien*, 149 Mo. 381, 51 S. W. 107. When a greater and less estate meet in the same person, a merger does not necessarily follow in equity. That will depend upon the intent and interest of the parties, and if the court perceives that it is necessary to the ends of justice that the two estates shall be kept alive, it will so treat them: *Edgerton v. Young*, 43 Ill. 464; *Cole v. Beale*, 89 Ill. App. 427; *Lyon v. McIlvaine*, 24 Iowa, 9; *Hayden v. Leffenburger*, 157 Mo. 88, 57 S. W. 721; *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Champney v. Coope*, 32 N. Y. 543; *Aiken v. Milwaukee etc. Ry. Co.*, 37 Wis. 469. A leading case on this subject is *Smith v. Roberts*, 91 N. Y. 470, where it was held that while a merger at law follows upon the union of a greater and less estate in the same ownership, it does not necessarily follow in equity, and the estates will be kept separate when such is the intention of the parties, and justice requires it. Such intention may be gathered, not only from the acts and declarations of the party, but also from a view of the situation as affecting his interests; at least prior to the presence of some right in a third person, and until such right intervenes, the intention as to a merger remains subject to change, and whatever occurs, between the parties interested, tending to show the inten-

tion, is, when the question of merger is in issue, admissible as part of the *res gestae*. Most of the cases considered under this heading relate to situations where the mortgagee has acquired, in addition to his equitable title, the legal title to the land also, and the general rule is that if a person acquires an estate upon which he has an encumbrance, the encumbrance is, in equity, considered as subsisting or extinguished, according to his intention, express or implied. The intention is the controlling consideration, and if no intention is manifested, equity will consider the encumbrance as subsisting or merged and extinguished, as may be most conducive to the interest of such party. If it is a matter of indifference, the equitable title is generally regarded as extinguished in the after-acquired legal title: *Campbell v. Carter*, 14 Ill. 286. A merger never takes place, except where the legal and equitable interests unite in the same person; and not even then, if it is contrary to the plain intent of the parties: *Bascom v. Smith*, 34 N. Y. 320. In order to merge an equitable and a legal estate uniting in the same person, the equitable must be coextensive with the legal estate, and in such case the merger is largely a question of intention: *Millard v. McMullin*, 5 Hun, 572.

VI. Merger of Mortgage.

a. When Merger Occurs Generally.—Ordinarily when one having a mortgage on real estate becomes the owner of the fee, the former estate is merged in the latter, unless the intention of the parties express or implied is otherwise, or it is not to the interest of the mortgagee for the estates to merge: *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642; *Pike v. Gleason*, 60 Iowa, 150, 14 N. W. 210; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9, 75 N. W. 241; *Ames v. Miller* (Neb.), 91 N. W. 250. If a mortgagee purchases the fee or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage and mortgage debt are extinguished, unless it expressly or impliedly appears that the parties intended otherwise: *Wilhelm v. Leonard*, 13 Iowa, 330. If the conveyance to the mortgagee is of a part only of the mortgaged premises, the debt is extinguished, and merger occurs only *pro tanto*: *Wilhelm v. Leonard*, 13 Iowa, 330. If the holder of the mortgage accepts a conveyance from the mortgagor of the lands mortgaged, gives up the notes, and no reason exists for keeping the encumbrance alive, there will be a complete merger, and the grantee will acquire the entire title: *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642. If the holder of the mortgage takes a conveyance of the mortgaged land, and then conveys the land to another, with full covenants, the mortgage is discharged by merger: *Pearson v. Bailey*, 180 Mass. 229, 62 N. E. 265. If, in such case, the mortgagee treats the two estates as having coalesced, and assumes to convey, this is conclusive as to him on the question of merger, which must be deemed as having irrevocably taken place: *Ames v. Miller* (Neb.), 91 N. W. 250. A convey-

ance of lands by a mortgagee in possession, after default, carries the legal title, although the debt is not assigned, and such conveyance with warranty amounts to an equitable assignment of the debt: *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679. Where the whole title, legal and equitable, unites in the same person, and there are no outstanding, intervening interests or liens, the acceptance of a deed by the mortgagee, in which he assumes the mortgage debt, affects a merger of the two estates, which cannot be defeated by the grantee thereafter assigning the notes secured before their maturity: *Chase Nat. Bank v. Hastings*, 20 Wash. 433, 55 Pac. 574. A mortgage becomes merged and extinguished when the mortgagee, being an heir of the mortgagor, acquires the interests of the other heirs in the premises: *Clark v. Clark*, 76 Wis. 306, 45 N. W. 121. If the owner of land, who holds it subject to two mortgages made by his predecessor in title, conveys it, reserving an easement therein, to the first mortgagee, by a warranty deed, in which the grantee assumes and agrees to pay both mortgages, and to hold the grantor harmless therefrom, the first mortgage is merged and extinguished: *Kneeland v. Moore*, 138 Mass. 198.

b. *When Merger Does not Occur Generally.*—The lien of a mortgage is not merged in the legal title acquired by the mortgagee, where it is his intention that it shall not so merge, and in the absence of evidence his intention will be presumed to accord with his interest. Hence, a conveyance of the legal title to a mortgagee in satisfaction of his debt does not necessarily operate as a merger: *Wickersham v. Reeves*, 1 Iowa, 413; *Woodward v. Davis*, 53 Iowa, 694, 6 N. W. 74. If the mortgagor conveys the premises by a quitclaim deed to the mortgagee in satisfaction of the mortgage debt, the lien of the mortgage is not merged in the fee simple title: *Coburn v. Stevens*, 157 Ind. 683, 45 Am. St. Rep. 218, 36 N. E. 132; *Quimby v. Williams*, 67 N. H. 489, 68 Am. St. Rep. 685, 41 Atl. 862. If the mortgagee takes a conveyance from the mortgagor, and retains the note and mortgage, there is no merger of the mortgage unless a contrary intent is shown: *Dunphy v. Riddle*, 86 Ill. 22; *Linseott v. Lamart*, 46 Iowa, 312. A deed by a mortgagor to a mortgagee intended as additional security only will not merge the mortgage in the greater estate so as to give priority to another mortgage constituting a second lien: *Huebsch v. Scheel*, 81 Ill. 281. The legal estate will never absorb the equitable one unless the two estates are coextensive or commensurate. Hence, if a person having a mortgage lien upon an entire tract of land acquires a title to such land, less extensive and comprehensive than his mortgage title, there can be no merger: *Chase v. Van Meter*, 140 Ind. 321, 39 N. E. 455. If a mortgagor of land conveys a portion of it, a conveyance of such portion by the grantee to the mortgagee does not merge the mortgage in the fee as to the portion still remaining in the mortgagor, although the mortgagor's grantee assumes payment of the mortgage, Am. St. Rep., Vol. 99—11

and though his deed to the mortgagee purports to convey the entire mortgaged premises: *Souther v. Pearson* (N. J. Eq.), 28 Atl. 450. A conveyance by the mortgagor to the mortgagee and a reconveyance back, no money or other consideration being paid on account of such conveyance, does not merge the mortgage: *McCrory v. Little*, 136 Ind. 86, 85 N. E. 836.

If a wife who has the beneficial interest in land of which her husband holds the legal title, mortgages the land, and subsequently conveys it to the mortgagee, it does not create a merger which will prevent a foreclosure of the mortgage for the purpose of cutting off equities existing prior to the conveyance of the property: *Bush v. Herring*, 118 Iowa, 158, 84 N. W. 1036. Or if a husband purchases a mortgage which his wife has given on her separate estate, the mortgage is not merged in any legal estate held by either, when the mortgage was given: *Skinner v. Hale*, 76 Conn. 225, 56 Afl. 524. If an undivided interest in mortgaged land descends by operation of law to the mortgagee, there is no merger of the mortgage: *Theband v. Hollister*, 37 N. J. Eq. 402; *Sahler v. Signer*, 44 Barb. 606.

1. *Intention and Interest of Mortgagee.*—Although, ordinarily, when it is a matter of indifference, and the one having a mortgage on real estate becomes the owner of the fee, the former estate is merged in the latter, this is not necessarily so, but, on the contrary, when it is not the intention of the parties that it shall merge, or when it is not to the interest of the mortgagee that such merger should take place, the mortgage continues to subsist for the protection of the owner of the fee from subsequent or intervening encumbrances, or liens: *Hines v. Ward*, 121 Cal. 115, 53 Pac. 427; *Meacham v. Steele*, 93 Ill. 136; *Chase v. Van Meter*, 140 Ind. 321, 39 N. E. 455; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9, 75 N. W. 241; *Moore v. Harrisburg Bank*, 8 Watts, 138. If there is no expression or intention on the part of the mortgagee at the time he acquires the fee, it must be presumed that he intended to do that which was most advantageous to himself, and if this is that the two estates should not merge, no merger will take place: *Chase v. Van Meter*, 140 Ind. 321, 39 N. E. 455; *Patterson v. Mills*, 69 Iowa, 755, 28 N. W. 53; *Freeman v. Paul*, 3 Greenl. 260, 14 Am. Dec. 237; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9, 75 N. W. 241. If the legal ownership of land, and the absolute ownership of an encumbrance upon it, become vested in the same person, the intention governs the question of merger, and if the owner has an interest in keeping such interests distinct, there will be no merger unless he expressly wishes it: *Title Guarantee Co. v. Wrenn*, 85 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271. There is no merger of the mortgage as against subsequent encumbrances, when the mortgagor conveys the land to the mortgagee, when it would be inequitable or where there is an express agreement of the parties that the lien shall remain alive: *Shattuck v. Belknap Bank*, 63 Kan. 443, 65 Pac.

643; *Collins v. Stocking*, 98 Mo. 290, 11 S. W. 750; *Fitch v. Applegate*, 24 Wash. 26, 64 Pac. 147; *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585. Nor is there such merger when the interest and situation of the parties clearly indicate that there is no intention to let in subsequent liens ahead of the mortgage, even though the satisfaction of the mortgage is entered of record, and the secured notes are surrendered: *Walker v. Goodsell*, 54 Mo. App. 631.

When the mortgagee purchases the fee to the mortgaged premises, no merger of the mortgage will occur when the intention of the mortgagee is otherwise, or such merger is against his interests: *Smith v. Swan*, 69 Iowa, 412, 29 N. W. 402; *Tower v. Devine*, 37 Mich. 443; *Davis v. Pierce*, 10 Minn. 376; *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Van Nest v. Latson*, 19 Barb. 604. And the rule is the same at law as in equity: *Hutchins v. Carleton*, 19 N. H. 487. This rule as to the intention or presumed intention, of the parties, or of the mortgagee, is not affected by the fact that the mortgage includes other estates of which the mortgagee is not the owner: *Knowles v. Carpenter*, 8 B. I. 548. If a mortgagor conveys a portion of the premises to a third person, and afterward the mortgagee purchases the remaining portion from the mortgagor, if it is intended to keep the mortgage alive as against the rights of such third person, equity will treat the two estates as coexisting in the mortgagee: *Meacham v. Steele*, 93 Ill. 135. If a mortgagee takes a conveyance of the mortgaged land under a mistaken impression that the lien of his mortgage is lost, but without any intention of releasing the mortgage, it is not merged or discharged: *Edgerton v. Young*, 43 Ill. 464. Of course, if the mortgagor conveys the mortgaged land to the mortgagee by deed expressly reciting that it shall not operate to merge the mortgage, there is no merger: *Abbott v. Curran*, 98 N. Y. 665.

2. *Purchase of Equity of Redemption.*—The rule is almost universal, we believe, that if the mortgagee purchases the equity of redemption, there is no merger of the equitable and legal estate resulting therefrom, except when such merger is the declared wish of the mortgagee, or when no possible injustice can be done to any one by allowing a merger. Thus, the purchase of the equity of redemption by the mortgagee does not merge the different estates of the mortgagee and mortgagor, so as to operate as payment or satisfaction of the debts for which the mortgage was given, and this rule will obtain both in law and equity: *Vanderkemp v. Shelton*, 11 Paige, 28; *Walker v. Baxter*, 26 Vt. 710. If by a release of the right of redemption the two estates are united in the mortgage, the mortgages will not be deemed merged in the legal estate, but will be kept alive, and upheld as a subsisting source of title, whenever it is required by the justice of the case, or by the intention of the parties: *Stantons v. Thompson*, 49 N. H. 272. Even if the release of the equity of redemption is by warranty deed, the mortgage is not

merged, if it is not to the interest of the mortgagee to have it merged: *Marshall v. Wood*, 5 Vt. 250. When the equity of redemption is purchased by the mortgagee, the general rule is, that the mortgage still subsists, if it is to his interest that it should, to protect him against any other charge or encumbrance upon the estate. If, however, this rule would be inequitable, contrary to the clear intention of the parties, or conducive to fraud, the mortgage is regarded as merged: *Campbell v. Knights*, 24 Me. 532. The conveyance of the equity of redemption to the mortgagee, after he has transferred the mortgage to a third person, does not merge the mortgage: *Campbell v. Vedder*, 1 Abb. App. Dec. 295. Whether a merger of the equity of redemption into the legal estate occurs when they meet in one person many times depends simply upon the intention of that person, and the estates do not merge if he does not so intend. Thus if an assignment of a mortgage in process of foreclosure is taken by the holder of the equity of redemption, and he goes on and forecloses and sells the premises, purchasing them himself, it is presumed from such act that he does not intend to have the equity of redemption merge in the legal estate, and, therefore, such merger will not take place: *Knowles v. Lawton*, 18 Ga. 476, 63 Am. Dec. 290; *Salvage v. Haydock*, 68 N. H. 484, 44 Atl. 696; *Lydecker v. Bogert*, 38 N. J. Eq. 136. A mortgagee's title to land is not merged or extinguished by purchasing the equity of redemption and giving up the mortgage note, as against an intervening title by levy, if it was not intended to operate as a payment, and the mortgage has not been discharged: *New England Jewelry Co. v. Merriam*, 2 Allen, 390. An assignment of the decree of foreclosure to the grantee of the equity of redemption will not operate as a merger, if the intent is expressed that it shall not: *Binsse v. Paige*, 1 Abb. App. Dec. 139. If the equity of redemption is conveyed to the mortgagee under agreement between the parties that the deed shall not operate as a merger of the mortgage, except at the election of the mortgagee, equity will preserve the two estates distinct, unless the mortgagee elects that they shall be merged: *Spencer v. Ayrault*, 10 N. Y. 202. If the mortgagee makes such purchase under agreement between the parties that he shall retain possession of the note and mortgage for the purpose of cutting off by foreclosure a subsequent levy made upon the mortgaged premises, equity will treat the estates as separate, and, after foreclosure, will, at the suit of the mortgagee, set aside such levy and sale thereunder as a cloud on the title: *Gibbs v. Johnson*, 104 Mich. 120, 62 N. W. 145.

If the owner of a prior mortgage purchases the equity of redemption, his prior lien is not merged in the title thus purchased, so as to become subject to a second mortgage given by his vendor: *Webb v. Melvy*, 32 Wis. 319. Or if there are two recorded encumbrances, the purchase of the equity of redemption by the holder of the senior security does not, of itself, let in the junior mortgage

to a preference over the former: *Wilson v. Vanstone*, 112 Mo. 315, 20 S. W. 612. A mortgagor's sale of the equity of redemption to the mortgagee does not merge the mortgage so as to let in an intervening lien upon the mortgaged premises: *Cohn v. Hoffman*, 45 Ark. 376. If the mortgagee purchases the equity of redemption from an execution purchaser, the mortgage is not merged in the equity where there are intervening rights of third persons: *Miller v. Finn*, 1 Neb. 254; and although as a general rule, when the legal and equitable titles become united in the mortgagee, the mortgage is merged in the unity of possession, yet there is no merger, when it is to the interest of the mortgagee, that the titles be kept distinct, nor when there is an intervening right in a third person, and when the mortgagee purchases the principal's equity of redemption, without the consent of the surety, the equity of the latter to have the property of the principal first applied to the payment of the common debt, will prevent a merger: *Gresham v. Ware*, 79 Ala. 192. And there is no merger when the mortgagee takes a deed of the equity of redemption from the mortgagor, although that is intended by the mortgagee, if he is fraudulently led by the mortgagor to believe that the premises are free from encumbrance, and he accepts such deed under such mistaken belief: *Howard v. Clark*, 71 Vt. 424, 76 Am. St. Rep. 782, 45 Atl. 1042. Nor does such purchase create a merger so as to release a surety for the mortgage debt, when it is not the intention of the mortgagee to create a merger by his purchase: *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757.

A release to the mortgagee of the equity of redemption in premises which have been sold for taxes, does not work a merger when such merger would deprive him of his right to redeem from the tax sale: *Keith v. Wheeler*, 159 Mass. 161, 34 N. E. 174.

If the mortgage is conveyed by quitclaim deed to an owner of a moiety of the equity of redemption, such conveyance is merely an assignment of the mortgage, and not a merger discharging it: *Bledgett v. Hildreth*, 8 Allen, 186. A merger is not caused by the holder of a part of a mortgage buying the equity of redemption: *Carpenter v. Gleason*, 58 Vt. 244, 4 Atl. 706. If the mortgagee of an entire tract receives a deed to the equity of redemption in an undivided one-half interest in the land, his mortgage will not merge in the title so acquired: *Mann v. Mann*, 49 Ill. App. 472. Some early cases, not well considered, hold that the purchase of the equity of redemption by the mortgagee merges and extinguishes the mortgage debt: *Stevenson v. Black*, 1 N. J. Eq. 338; *McLure v. Wheeler*, 6 Rich. Eq. 343; at least to the extent of the value of the mortgaged premises after deducting the amount paid for the equity of redemption: *Murphy v. Elliott*, 6 Blackf. 482.

If a mortgagee, knowing that subsequent judgment liens exist against the premises, takes a deed of equity of redemption with an agreement that the mortgage shall thereby be satisfied, a merger is

created, and such liens become paramount to claims under the mortgage: *Beacham v. Gurney*, 91 Iowa, 621, 60 N. W. 187. If an owner of land has executed a mortgage thereon, and a lease thereof to the same person, and the latter assigns the lease to a third person to whom the equity of redemption is assigned by the land owner, the leasehold and the equity merge and become one estate, all of which is subject to the mortgage, and a sale under foreclosure passes title paramount to that of the person claiming under the assignment of the lease: *Hudson etc. Co. v. Glencoe etc. Co.*, 140 Mo. 103, 62 Am. St. Rep. 722, 41 S. W. 450. If a person holds both the mortgage and the equity of redemption, and makes a conveyance in fee, this is an election to treat the mortgage as merged: *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475.

3. **Purchase at Judicial Sale.**—Some of the cases hold that a purchase of the mortgaged land by the mortgagee at a sale thereof, under execution, under a junior judgment, extinguishes and merges the mortgage: *Schnell v. Schroeder*, Bail. Eq. 334. But whether a merger takes place in such case would seem, as in most other cases, to be a question of the intention and interests of the mortgagee, and merger does not take place against such intention or interest. Thus, a mortgage is not merged in the estate by the purchase of the property by the mortgagee at a sale under a junior mortgage, against his intention to that effect: *Hospes v. Almstead*, 83 Mo. 473. It does not necessarily follow that by a mortgagee becoming the purchaser of the premises and taking title at a sale under foreclosure, his mortgage is merged or extinguished in the legal title: *Parker v. Child*, 25 N. J. Eq. 41. Or if a mortgagee purchases at his own foreclosure sale, and before deed issues, pays a prior mortgage, and takes an assignment thereof, with the intention that the prior mortgage shall not merge in his title acquired at foreclosure there will be no merger, as merger of the mortgage in the legal title is always purely a question of intention and interest: *Moore v. Olive*, 114 Iowa, 650, 87 N. W. 720; *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566. If a mortgagee purchases the mortgaged premises upon execution against the mortgagor in favor of a third person, he purchases subject to the mortgage, and merges the debt if such is his intention: *Speer v. Whitfield*, 10 N. J. Eq. 107. If a mortgagee purchases the property at a foreclosure sale under a mechanic's lien filed prior to the execution of the mortgage, the mortgage is not merged in the fee: *Crombie v. Rosentock*, 19 Abb. N. C. 312. If, however, a sheriff on selling land on execution, announces that the sale is made subject to a prior lien, and bidders so understand it, the holder of such lien, by purchasing and forfeiting his title in default of redemption, not only extinguishes his lien upon the land, but also loses his remedy on the mortgage note if such lien consists of a mortgage: *Biggins v. Brockman*, 63 Ill. 316.

If one takes a deed to real estate subject to, but without agreeing to pay a mortgage thereon, and without actual notice of any other encumbrance, he cannot defeat the mortgage lien by obtaining a sheriff's deed under a sale on a prior judgment, as the title thus taken merges in that previously held, although equity will keep such judgment alive for his protection, and a foreclosure must be had subject to it: *Hancock v. Fleming*, 103 Ind. 534, 3 N. E. 254.

In *Reed v. Latson*, 15 Barb. 9, the rule was applied that to constitute a merger the greater and less estate must meet and coincide in the same person; and while at law a merger then at once takes place, this is not necessarily so in equity. There it depends on the intention of the parties, and a variety of other circumstances. Thus, if mortgaged premises are sold under execution, and the purchaser at the sale receives the sheriff's certificate, which he subsequently assigns to the mortgagee, and the latter assigns it to another person who receives the sheriff's deed, the two estates do not meet in the mortgagee, so as to constitute a merger.

A vendor claiming a lien on land under a purchase money mortgage who purchases such land sold under execution, subject to such lien, thereby extinguishes the purchase money debt to the extent of the value of the land purchased, after deducting the sum paid on such sale: *Murphy v. Elliott*, 6 Blackf. 482.

4. Assignment of Mortgage.—The acquisition of the absolute title to real estate by a mortgage thereof, after an assignment and transfer of the mortgage to a third person, does not operate to merge the mortgage: *White v. Hampton*, 13 Iowa, 259; *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 552. A mortgage remains an equitable lien on lands in favor of the assignee thereof, to whom it was assigned as collateral security for a loan made by him to the mortgagee, although the latter afterward receives a conveyance of the premises from the mortgagor, and gives him in consideration therefor, an acquittance of the mortgage: *Brown v. Blydenburgh*, 7 N. Y. 141, 57 Am. Dec. 506. The assignee of a mortgage by the assignment becomes a mortgagee, and the original mortgagee has no estate left in the land, and if he afterward, by quitclaim, acquires the interest of the mortgagor, he does thereby obtain an estate which merges that of the assignee: *Pratt v. Bank of Bennington*, 10 Vt. 293, 33 Am. Dec. 201; *Case v. Fant*, 53 Fed. 41. The union of the mortgage and the fee in the mortgagee does not merge the estates where the mortgagee transfers the mortgage before dealing with the property: *Oregon etc. Investment Co. v. Shaw*, 6 Saw. 52, 52 Fed. Cas. No. 10,557. There can be no merger of a mortgage with the legal estate upon a conveyance by the mortgagee to the mortgagor if the former has previously assigned his mortgage, although such assignment is not of record: *Curtis v. Moore*, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168. A conveyance of real estate by a mortgagor to a mortgagee, or vice versa, after the assignment of the

notes secured, and the mortgage to another, taking them in good faith and for value, without the knowledge or assent of the assignee, does not, as to him, operate as a merger of the mortgage or affect his rights, and after the recording of the assignment of the mortgage, a purchaser from the mortgagee, after the mortgagor's release of the equity of redemption will take subject to the equitable rights of such assignee: *International Bank v. Wilshire*, 108 Ill. 143; *Lime Rock Nat. Bank v. Mowry*, 66 N. H. 598, 22 Atl. 555; *Watson v. Dundee Mortgage etc. Co.*, 12 Or. 474, 8 Pac. 548. An assignment of the mortgage debt to the wife of the mortgagor does not operate as a merger, though she has in the premises an inchoate right of homestead and dower: *Dyer v. Dean*, 69 Vt. 370, 57 Atl. 1113.

A mortgage assigned to the owner of the premises, subject to a life estate reserved to the assignor, is not merged in the fee: *Cox v. Ledward*, 124 Pa. St. 435, 16 Atl. 826. If an assignee of a mortgage takes a quitclaim deed of one-half of the premises, this does not merge or extinguish the mortgage: *Klock v. Cronkhite*, 1 Hill, 107.

If first, second and third mortgages exist against the same property, and the third mortgage is by deed absolute on its face, an assignment of the first mortgage to the third mortgagee will not merge the first and third mortgages: *Buzzell v. Still*, 63 Vt. 490, 25 Am. St. Rep. 777, 22 Atl. 619. If the assignee of a senior mortgage receives from the mortgagor a conveyance of the mortgaged premises, such conveyance does not, in equity, merge or extinguish the mortgage as between such assignee and a junior encumbrancer: *Bell v. Tenny*, 29 Ohio St. 240. If the assignee of a first mortgage takes a conveyance of the mortgagor's equity of redemption there is no merger of the mortgage in the estate thus conveyed: *Belknap v. Dennison*, 61 Vt. 520, 17 Atl. 788. A deed executed by a mortgagor to the assignee of the mortgagee does not create a merger of the mortgage, when the assignee refuses to accept the deed, and retains the mortgage: *Bredenberg v. Landrum*, 32 S. C. 215, 10 S. E. 956.

Where a mortgagee assigns a mortgage to his daughter, the wife of the mortgagor, as a gift, and, on the death of the daughter, the mortgage passes to the mortgagor, the legal and equitable estates are merged: *Hackney v. Vrooman*, 62 Barb. 650. If the assignee of a mortgage, having purchased the mortgaged property and assumed the payment of the mortgage debt, afterward represents the mortgage as valid and subsisting, and transfers it as such to a purchaser in good faith and without notice, such assignee is estopped as against such purchaser from insisting upon the fact of the payment of the mortgage debt, or claiming that the mortgage title has merged in the fee: *Graves v. Rogers*, 59 N. H. 452.

5. *Intervening Lien or Encumbrance.*—The merger of mortgage liens with the fee, upon both being united in the same person, is

purely a question of intent, and merger will not be implied when there is an intervening claim, but equity will keep the legal title and the mortgagee's interest separate, though held by the same person, whenever necessary for the full protection of his just rights, and, if from all the circumstances, a merger would be disadvantageous to the party holding the fee, his intention that a merger shall not result will be presumed and maintained, and equity will keep the liens alive for the purpose of doing justice: *Davis v. Randall*, 117 Cal. 12, 48 Pac. 906; *Richardson v. Hockenhull*, 85 Ill. 124; *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057; *Watson v. Dundee Mortgage Co.*, 12 Or. 474, 8 Pac. 548. It is only when the fee and the lien center in the same person, without any intervening claims, liens, or equities, that a merger of the title and the lien will take place: *Coburn v. Stephens*, 137 Ind. 683, 45 Am. St. Rep. 218, 36 N. E. 132. If an outstanding lien or estate intervenes between the several interests uniting in the same person, there cannot be a merger: *Watson v. Dundee Mortgage Co.*, 12 Or. 474, 8 Pac. 548.

If the owner of land subject to a homestead right extinguishes the latter by purchasing notes given for the purchase price of the land, and having priority over such homestead right, and by thereafter purchasing the land at foreclosure sale made under a deed of trust made to secure such notes, there is no such merger of the legal and equitable estates as extinguishes the debt and lien for the purchase money, and revives the homestead: *Irvine v. Surum*, 97 Tenn. 259, 36 S. W. 1089. A conveyance of the fee by quitclaim deed to the beneficiary in a deed of trust will not cause a merger of the legal and equitable estates in the grantee if there is an outstanding second deed of trust at the time of the conveyance: *Collias v. Stocking*, 98 Mo. 290, 11 S. W. 750. A conveyance to a mortgagee by a grantee of the mortgagor does not effect a merger, where there is an outstanding junior encumbrance: *Sieberling v. Tipton*, 113 Mo. 373, 21 S. W. 4. If two notes secured by the same mortgage are held by different persons and the holder of one note surrenders it to the maker and accepts a deed to the premises, such act does not work a merger of his equitable lien, and he is entitled to intervene in a foreclosure of the mortgage by the other noteholder, and share pro rata in the proceeds of the sale: *Stewart v. Eaton*, 20 Wash. 378, 55 Pac. 814.

If a prior mortgagee takes a conveyance of the fee from the mortgagor, the two estates meeting in him do not merge so as to make him lose his lien as against a junior encumbrancer or mortgagee: *Rogers v. Herron*, 92 Ill. 583. Equity will never compel a merger where land is deeded to a prior mortgagee, if subsequent to the making of such mortgage the grantor has burdened the land with a second mortgage. But the question of nonmerger cannot be kept alive for the benefit of the junior encumbrancer: *Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412. If the holder of a senior

mortgage purchases the legal title to the mortgaged premises, he is entitled to keep his mortgage alive to protect such title against a junior mortgage: *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057. If mortgaged premises are conveyed by the mortgagor to the mortgagee in satisfaction of the mortgage and to avoid the expense of a foreclosure, there is no merger of the equitable and legal titles if there is an intervening mortgage: *Brooks v. Rice*, 56 Cal. 428; *Richardson v. Hockenhull*, 85 Ill. 124.

If a mortgagor conveys the mortgaged premises to the mortgagee, the mortgage does not merge, but is superior to the lien of one who bought the property at sheriff's sale prior to such conveyance, but junior to the mortgage: *Jewett v. Tomlinson*, 137 Ind. 326, 36 N. E. 1106.

A owned B's notes secured by a deed of trust. A and B each devised his property to C, and it was held that this constituted no merger of the mortgage in the fee, the intervening estate of A's administrator preventing: *Wead v. Gray*, 8 Mo. App. 515. The conveyance of the legal estate to the vendee, and the simultaneous execution of a mortgage to the person who advances the purchase money is not such a merger as will let in mechanics' claims against the equitable estate of the vendee: *Campbell's Appeal*, 36 Pa. St. 247, 78 Am. Dec. 375; or the acceptance of a conveyance of mortgaged property, subject to a judgment lien, by the mortgagee, in payment of the mortgage debt, and without knowledge of the judgment, or intention to surrender the priority of the mortgage is not a merger of the mortgage in the fee which will make the judgment a first lien on the property: *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501.

6. **Payment of Mortgage by Owner of Fee.**—Whether or not the acquisition of a note and trust deed by the owner of the fee if the encumbered property operates in equity as a merger, depends upon the intention of the parties and the surrounding circumstances, and any act by the owner of the fee showing that he regards the encumbrance as still existing is strong evidence that there is no merger: *Security Title etc. Co. v. Schlender*, 190 Ill. 609, 60 N. E. 854. A person owning the title of real estate in fee has a right to buy up a mortgage lien thereon, created by a predecessor in title, and to keep such lien alive for certain purposes, to prevent a merger of the mortgage lien with the fee. This he may do to protect his title by cutting off intervening claims which are liable to come between the mortgage and the conveyance in fee, but in such cases there must be an intention to prevent a merger, and in the absence of such intention a merger will be presumed: *Hester v. Frary*, 99 Ill. App. 51. Thus, a mortgage may be kept alive, even after payment in full, if such is the intention of the parties, or if there are any interests which require it for their protection; but if a mortgagor procures the payment of a first mortgage with his own money, it

extinguishes that mortgage, in law and in equity, as between it and a second mortgage, and the latter takes its place: *Loverin v. Humboldt Safe Deposit Co.*, 113 Pa. St. 6, 4 Atl. 191. In the absence of an intent to the contrary, if the owner of a one-third interest in land takes up an encumbrance thereon, such encumbrance as to his third is destroyed and merged in his legal estate: *Singleton v. Singleton*, 60 S. C. 216, 38 S. E. 462. If a partnership holds a fee simple title to certain mortgaged lands, and the mortgage thereon is assigned to a member of the firm, and the amount thereof is paid by the firm, who hold the mortgage for several years, the mortgage becomes merged in the legal title, the payment of the mortgage being a part of the consideration for the land, and it cannot be enforced by the assignee thereof: *Fretwell v. Branyon*, 67 S. C. 95, 45 S. E. 157.

LAND v. LAND.

[206 Ill. 288, 68 N. E. 1109.]

MARRIAGE—Validity of Presumed.—If both parties are married in the honest belief, founded on an apparently good reason, that they are capable of entering into the marriage contract, when in fact one of them is not, and they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law presumes a common-law marriage. (p. 173.)

MARRIAGE—When Valid.—If both parties are married in good faith, in ignorance of the fact that the wife's decree of divorce, recently granted, has not been recorded, the marriage is valid where the parties continue to cohabit as husband and wife after the decree of divorce has been entered and recorded. (p. 175.)

C. S. Beattie and H. Vincent, for the appellants.

Cratty Brothers and Jarvis & Latimer, for appellees.

291 Per CURIAM. In its opinion deciding this case the appellate court say:

"The principal and controlling question, presented by the briefs of counsel and the oral arguments of the cause, is as to whether said Nellie M. and Frank E. Land were lawfully married during the lifetime of the former, and, if they were, then the decree is correct. . . . It is apparent from the evidence she (Nellie M. Land, formerly Nellie M. Tuttle) began the divorce proceedings, which resulted in the decree mentioned, for the purpose of marrying said Frank; and it seems a fair and reasonable inference from the evidence that she intended.

when she procured the divorce, to marry him and pursue thereafter a different and respectable life, and did so, as the evidence tends to show, from the time they commenced to live at the Park avenue house until Land failed in business, about two years afterward. There is no evidence, which has been called to our attention, or which we have been able to discover, of any divided reputation as to the relations between said Nellie and Frank while they lived at the Park avenue house. On the contrary, during the whole of this period their ostensible relation was that of husband and wife, they being known as such among friends and acquaintances; and he introduced and spoke of her as his wife, and she introduced and spoke of him as her husband. During this period, and as late as the year 1891, Nellie M. Land, by that name, signed and acknowledged divers conveyances of real and personal property to different persons, and received conveyances under that name, in some of which she is described as the wife of Frank E. Land, and in others Frank E. Land is described as her husband.

"On February 3, 1889, she procured a judgment in the name of Nellie M. Land against Frank E. Land, a written satisfaction of which she acknowledged on January 30, 1891, before a notary public, under the same name. Under date of January 15, 1894, she executed her last ^{and} will, under which the appellants in this case claim their rights, by the name of Nellie M. Land.

"The clear preponderance of the evidence is, that the said Nellie and Frank fully believed, on April 14, 1887, that she had been divorced from said Tuttle, and that they in good faith intended, by virtue of said marriage ceremony, to contract a legal marriage, and would have done so but for the fact that her decree of divorce had not been entered of record. It does not appear that during her lifetime either she or said Frank had any knowledge that the divorce decree had not been entered at the time of the marriage ceremony. He testifies that he did not know of that fact until after her death.

"By decree of the county court appellant William B. Land was, February 3, 1883, upon the petition of Nellie M. Tuttle and Ralph S. Tuttle, legally adopted under the name of William Bliss Tuttle, by which name he seems to have been known and called up to the time the said Nellie M. and Frank E. Land began living together as husband and wife. From that time he became and was known and called William B. Land.

"It is claimed on behalf of appellants, and numerous authorities are cited in support of the contention, that said Nellie did not become the lawful wife of said Frank, mainly because of the fact that, at the time of the marriage ceremony, her divorce decree from Ralph S. Tuttle had not been entered—that this attempted marriage was void, and, being void, their subsequent life, as is shown by the evidence, was not such as to create a valid common-law marriage. Especial reliance is placed upon the case of Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737, in which the court uses the following language: 'Where both parties are married in the honest belief, founded on an apparently good reason, that they are capable of entering into the marriage contract, when in fact one of them is not, if they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law ²⁰³ will presume a common-law marriage by the acts of the parties, in the absence of any evidence to prevent such presumption. In such a case there are many strong and cogent reasons for presuming a new marriage after the removal of the impediment, even though the parties may not have known of its removal. There the cohabitation, in ignorance of facts rendering it illegal, is not to be regarded as meretricious or criminal until the parties have knowledge of such facts. Their purpose in such a union is honorable marriage, which the law favors, and not mere illicit intercourse.'

"It is argued that there was no 'honest belief, founded upon an apparently good reason,' using the language of the supreme court, on the part of those parties for believing at the time of the marriage ceremony a divorce from Tuttle had been granted—that they should have looked to the court record instead of relying upon what the judge said, and the publication of the daily press. We think the parties were justified, under the circumstances above detailed, in believing that the divorce had been granted, and therefore the Cartwright case is not controlling.

"We are also of opinion that the contention of appellants' counsel, that their cohabitation was illicit in its inception, is not supported by the evidence, and, therefore, what was said in the Cartwright case in that regard does not avail appellants."

The appellate court, in its said opinion, makes reference to the cases, decided by this court, of Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631, and Manning v. Spurck, 199 Ill. 447, 65 N. E. 342, and then proceeds as follows:

"In the last case cited [Manning v. Spurck, 199 Ill. 447, 65 N. E. 342] the court in its decision makes reference to both the Cartwright and Robinson cases, and makes use of the language quoted below, which, considered with reference to the facts of the case at bar, is controlling and decisive. The court say: 'The petitioner in this case presents a much ²⁰⁴ stronger and more meritorious case than was made in that one [referring to the Robinson case]. She has been guilty of no wrong or immorality, and did not enter into an adulterous and meretricious relation with James Selby. It is beyond question that there never was a doubt in her mind as to the propriety or legality of her relation to him, and that she was wholly innocent of any intent to do wrong. . . . It is probably a safe rule to say that, if parties to a marriage, in the beginning, desire and intend marriage in good faith, as a matter of fact, but an impediment exists, and the desire and intention continue after the impediment is removed, and the parties continue in the relation of husband and wife and cohabit as such, it is sufficient proof of a marriage. It cannot be doubted that both James Selby and Sarah Jane Selby believed, at the time of this marriage, that he had been divorced from her. It is not reasonable to suppose from the manner in which the parties lived, the prominence of James Selby as a well-known citizen and the presence of his former wife in the same city, that he willingly incurred the risk of a criminal prosecution with knowledge, in fact, that the divorce was void. It is true that a relation which is illicit and meretricious in its inception is presumed to continue of the same character, and there must be evidence in such a case that there has been a change, and the relation has become matrimonial in intent and character. In this case, the original relation between these parties was not meretricious in its inception, which means merely lustful and pertaining to the character of prostitution. It is not possible to conceive that they intended anything except marriage when it was solemnized at Quincy, and from that time to the death of James Selby. When he procured the decree of divorce in Allen county, Indiana, it was not done with any intention of entering into any relation with the petitioner. Eight years elapsed between the divorce and their marriage, during which time there was no relation ²⁰⁵ between them, and there is no evidence that they even met during that time. There was no necessity of any change to a new relation after the death of Sarah Jane Selby, and there necessarily could not be any such

proof from the fact that there was never any question of the legality of the marriage. It was not necessary, as it was in *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631, to prove that the cohabitation had lost its lustful character and become matrimonial in character. The relation of the parties after the impediment was removed by the death of Sarah Jane Selby was matrimonial in fact, as it had been in the honest belief and intent of the parties before that time. We think that the evidence proves a common-law marriage, and that the master and chancellor were right in their conclusion that the petitioner was the wife of James Selby at the time of his death.'

"It seems to us unnecessary, in view of the decision in the *Manning* case, which is so closely analogous in its facts to this case, to discuss the other claims of counsel or the application of the various other authorities referred to by him.

"We are of opinion that the evidence in that regard shows that said Nellie and Frank intended, at the time of the marriage ceremony, to enter into the marriage relation, and having lived together continuously as husband and wife for two years after the entry of the decree of divorce in favor of said Nellie from said Ralph S. Tuttle, it cannot be said that their relation was meretricious, but it was matrimonial in character; that, as soon as the impediment against said Nellie's entering into the marriage contract was removed by the divorce, their relation became, as is said by the court in the *Manning* case, 'matrimonial in fact, as it had been in the honest belief and intent of the parties before that time.'

"We think the evidence clearly sustains the decree of the chancellor, and it is therefore affirmed."

²⁹⁶ We concur in the views above expressed by the appellate court, and adopt the same as the opinion of this court. Accordingly, the judgment of the appellate court is affirmed.

A Marriage void because one of the parties is under a legal disability may be good as a common-law marriage if they continue to live together as husband and wife after the removal of the disability: Poole v. People, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025; Barker v. Valentine, 125 Mich. 356, 84 Am. St. Rep. 578, 84 N. W. 297. Thus, where a woman procures a divorce, but marries again before the expiration of the time limited by statute within which she may lawfully contract a second marriage, but thereafter, learning of the invalidity of their marriage, the parties determine to live together as husband and wife, their cohabitation constitutes a common-law marriage: Schuchart v. Schucart, 61 Kan. 597, 78 Am. St. Rep. 342, 60 Pac. 311. But see Collins v. Voorhees, 47 N. J. Eq. 315, 24 Am. St. Rep. 412, 20 Atl. 676; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737.

VILLAGE OF LEE v. HARRIS.

[206 Ill. 428, 69 N. E. 280.]

EJECTMENT for Street or Alley.—A city or village may maintain ejectment to regain possession of any part of a street or alley which is unlawfully withheld from it, whether it has the legal title thereto or not. (p. 178.)

EJECTMENT to Recover Easement.—An easement cannot be the subject matter of an action of ejectment. (p. 179.)

MUNICIPAL CORPORATIONS—Extension of Street by User. The extension of a street by a municipality may be effected by the actual prolongation of the street by its travel and use by the public for the requisite period and its acceptance as thus used by the city. (p. 179.)

EJECTMENT by City—Possession of Street.—The right acquired by a city from travel upon and use of land as a street for the requisite period, involves the right to the exclusive possession thereof, and the right to recover such possession by an action of ejectment. (p. 179.)

MUNICIPAL CORPORATIONS—Acceptance of Streets.—Acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless an intention to limit the acceptance is shown. (p. 180.)

MUNICIPAL CORPORATIONS—Acceptance of Streets.—Immediate opening and use by the public of all the streets in ground laid out and platted into lots, for their entire length, or an immediate formal acceptance by some competent public authority, is not necessary to give effect to the dedication of the land to the public use as a street, by the making of a town plat and the selling of lots with reference thereto. (pp. 180, 181.)

MUNICIPAL CORPORATIONS—Opening Streets.—Public authorities are entitled to such reasonable time for opening and improving public streets after the land is dedicated to that purpose as their resources and the public necessity may allow and require. (p. 181.)

DEDICATION OF STREETS by Plat.—An intention on the part of the owner of land to make a dedication to the public by his plat of the streets and alleys is shown when spaces upon such plat claimed as streets are given names thereon as such, and places claimed as alleys appear on the plat as strips between the lots in the different blocks platted. (p. 181.)

DEDICATION OF STREETS.—A survey and plat are sufficient to constitute a dedication of streets and alleys, if it is evident from the face of the plat that it was the intention of the owner of the land to set apart certain grounds or strips of land shown on such plat for a public use. (p. 181.)

DEDICATION—Vacation.—An attempted vacation of a portion of a plat containing a dedication of land to a public use is ineffectual if all of the owners of lots sold with reference thereto do not join in the proceeding. (p. 181.)

MUNICIPAL CORPORATIONS.—Adverse Possession of a Street or a portion thereof by a lot owner, however long continued,

does not, by virtue of limitation, bar the right of the public to be restored to possession of the street to its full width, nor is such right precluded by mere nonuser, no matter how long continued. (p. 182.)

MUNICIPAL CORPORATIONS—Possession of Street—Es-toppel.—A municipal corporation is estopped to assert its right to the possession of a street which has been allowed to remain in a private person, only when the latter, acting under the belief that the possession of the street has been permanently abandoned by the city, has erected structures or made such valuable improvements that to permit the city to regain possession would cause such private person great pecuniary loss. (p. 182.)

JUDGMENTS—Affirmance in Part.—In an action by a city to recover independently of each other distinct parcels of land, being portions of different streets and alleys, the judgment may be affirmed in so far as it is correct, and reversed in other respects. (p. 184.)

Jones & Rogers, for the plaintiff in error.

Carnes, Dunton & Faissler, for the defendant in error.

432 BOGGS, J. The plaintiff in error village brought an action of ejectment against defendant in error to recover premises as follows: That part of East street lying between blocks 3 and 4 and the south fifteen feet of East street and the alley lying adjacent to and south of blocks 3 and 4, all in Hinckley & Boyles' first addition to the village of Lee; also that part of First street lying between blocks 12 and 14 and between block 13 and lot "A," in the original town of Lee; also that portion of "D" street lying between lot "A" and out-lot "F," in the original town of Lee, being the south end of "D" street; also that part of "B" street lying adjacent to and west of blocks 12 and 14, in the original town of Lee; also the part of Third street lying between "C" street and the railroad across block 5, in the original village of Lee, and also of the alley between lots 1 and 2, in block 13, in the original village of Lee. A jury was waived and the cause was heard by the court. The defendant in error was found guilty of unlawfully withholding the premises last and next last above described and found not guilty as to all other parcels. The village sued out this writ of error, and both parties have assigned errors.

The grounds of defense were: 1. That neither the plat of the original town nor the plat of the addition thereto was acknowledged in compliance with the statute in force at the times of their execution, respectively, and for that reason the village did not become invested with the fee to the streets and alleys; 2. That even if the plats were sufficient to show a common-law

dedication, the village did not accept the dedication of the particular parts of the streets and alleys here involved, and consequently possessed no interest or right whatever in them; 3. That it does not appear from the plat that Third street, as platted by the proprietors, extended from "C" street across block 5 to the railroad, and that the only right or interest claimed or proven (if any) in ⁴³³ that area is a mere easement in the public arising from the alleged use of the same as a passageway or road for thirty years, and that the action of ejectment will not lie to recover a mere easement.

The right of a city or village which possesses the fee to the streets and alleys to maintain an action of ejectment against one who has intruded upon or occupies any portion of a street or alley seems never to have been doubted, but where the fee remained in the proprietor of the abutting property, that fact was thought to present a technical objection to the successful prosecution of the action. The right to the possession, use and control of all highways, including streets and alleys, rests primarily in the state in its sovereign capacity, and the state having, by the express grants set forth in various subdivisions of section 1 of article 5, chapter 124, entitled "Cities," etc. (1 Starr & Curtis' Annotated Statutes of 1896, p. 689), vested in the cities and villages of the state the possession, use and control of their respective streets and alleys, the right of possession, use and control is regarded by the courts as a legal and not a mere equitable right, and in that view no cause or reason exists why the action of ejectment may not be maintained though the city or village has not the legal title to the street or alley: *City of Chicago v. Wright*, 69 Ill. 318; 10 Am. & Eng. Ency. of Law, 2d ed., 475; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *Klinkener v. McKeesport*, 11 Pa. St. 444. A city or village may therefore resort to the action of ejectment to regain possession of any part of a street or alley which may be unlawfully withheld from it.

The plaintiff in error village claimed that for more than thirty years the public had continuously, and with the knowledge and acquiescence of the owner of the fee, and with the claim of right, traveled over and used, as a part of Third street, the lots or parts of lots in block 5, in the original village, situate between the west line of the intersection of Third and "C" streets and the railroad, ⁴³⁴ and that by prescription said Third street as a public highway had been extended and continuously used for said period of time by the public as a street,

and that the same had been in the possession, use and control of the said village as a street for said period of time, and that the defendant in error had erected a platform, scales and other obstructions upon the area of the street so extended. The court held this contention to be sustained by the proof to the extent such area was shown to have been actually used, and awarded judgment accordingly that defendant in error was guilty of unlawfully withholding that portion occupied by his platform, scales, etc. Defendant in error insists that this recovery is for a mere easement—an incorporeal hereditament—and cites authorities to support his further contention that the action of ejectment cannot be maintained for an easement.

An easement, which is but a mere intangible right or license appurtenant to land, and does not include the right to the possession of the land, cannot be the subject matter of an action of ejectment, for the reason there is nothing tangible on which the writ of restitution could operate—nothing which the sheriff can take under such a writ and deliver to the plaintiff in the action. But the locus in quo here is an extension of Third street. The village, by virtue of the seventh subdivision of section 1 of said article 5 of chapter 24, entitled "Cities," possessed the power to extend its streets, and became vested, by virtue of the various grants of power enumerated in said section 1, with the right to the exclusive possession, use and control of any street so extended. We see no reason why the extension of a street may not be effected by the actual prolongation of the street by travel and use of the same by the public for the requisite period, and the acceptance by the village of the public way thus created as an extension of the street.

But it is contended that the right remains but an easement, and that ejectment cannot be maintained for ⁴²⁵ that reason. It is a public easement, and the possession thereof is exclusive of any interference by the owner of the fee for its improvement, regulation or enjoyment as one of the streets of the village. Such right of possession is in the village by force of the statute. It is not a mere intangible right or license, but is a legal right to the actual and exclusive possession of the locus in quo, and the action of ejectment furnishes an appropriate remedy, it seems to us, for the recovery of such possession. In *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 544, it was said: "Where the public easement is such that possession, exclusive of any interference by the owner of the fee, is essential for its im-

provement, regulation and enjoyment, the only appropriate action to obtain the possession is ejectment."

It is contended by the defendant in error that neither the acknowledgment of the plat of the original village of Lee, nor the acknowledgment of the plat of the addition thereto, in which the streets and premises here involved are located, was in conformity with the statutes in force at the time of the execution and acknowledgment of such plats, and that there was, therefore, but a common-law dedication of the streets and alleys, and that proof was lacking of the acceptance by the village of those parts of the streets and alleys here involved. The further contention in the same behalf is, that in the absence of an acceptance the plats are but a mere offer of dedication, and that the village has no legal right of possession or other legal interest in the streets or alleys, or parts thereof, which have not been accepted.

It was abundantly proven, and, as we understand it, was not disputed, that the village accepted a number of the streets and alleys in both the original village and the addition thereto, and opened the same up to public use, and maintained the same for the use of the public, as streets and alleys of the village. But it is insisted that an acceptance of some of the streets and alleys of ⁴³⁶ a plat does not constitute an acceptance of the whole, and that proof of the acceptance of a part is not sufficient to vest the village with right to the use, possession and control of all the streets and alleys shown on a plat. We do not so understand the law, but, on the contrary, hold the true rule and doctrine to be, that an acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless the intention to limit the acceptance is shown. In *Village of Augusta v. Tyner*, 197 Ill. 242, we said (p. 246, 64 N. E. 378): "It is true that a street may be accepted in part and the remainder rejected, if it is proved that such was the intention of the public authorities. An acceptance of some of the streets named in a plat will not constitute an acceptance of the whole, if it is shown that there was an intention to limit the acceptance." There is no proof in this record that the village declined to accept any portion of either plat, and that being true, the acceptance of a part was an acceptance of the whole plat. The immediate opening and use, by the public, of all the streets in ground laid out and platted into lots, for their entire length, or an immediate formal acceptance by some competent public

authority, is not necessary to give effect to the dedication of land to the public use, of a street, by the making of a town plat and the selling of lots with reference to the plat. The public authorities must be allowed a reasonable time for opening and improving public streets, as their resources and the public necessity may allow and require: *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269; *Elliott on Roads and Streets*, 2d ed., sec. 118, p. 138, and cases there cited.

There is no force in the contention that the plats are insufficient to show an intention on the part of the proprietors thereof to dedicate to the public use the spaces claimed to be streets and alleys. The strips shown upon the plats and claimed as streets are given names, as ⁴⁸⁷ such, on the plats. The spaces claimed as alleys appear upon the plats as strips between the lots in the different blocks, and, we think, sufficiently manifest the intention of the proprietors of the plats. In *Clark v. McCormick*, 174 Ill. 164, we said (p. 170, 51 N. E. 215): "It was not necessary that a declaration, either oral or written, should be established in order to show it was the intention of the proprietor to dedicate the strips to such uses. Such intention may be established in any conceivable way by which it may be made manifest. A survey and plat alone are sufficient to establish a dedication, if it is evident from the face of the plat it was the intention of the proprietor to set apart certain grounds for public use."

There was some proof produced relative to an attempt made by the defendant in error and one Bridget Kennedy, on the fifteenth day of April, 1885, to procure a vacation, under the statute, of a portion of the plats, including some of the premises here involved. Counsel for defendant in error, in their brief, however, say that they do not contend that the attempted vacation was in compliance with any law. Before this attempted vacation, lots shown on said plats had been sold, and the owners of all the lots in each of the plats did not join in the attempted vacation. Such attempted vacation did not, therefore, become effective: 3 *Starr & Curtis' Annotated Statutes of 1896*, c. 109, sec. 6, p. 2964.

The fact that a number of the streets and alleys had never been improved by the village and had been for some years within the inclosure of private persons had no potency to defeat the action of the village. Whether the interests of the public require that a street or alley shall be improved or that repairs thereon are necessary is committed to the judgment and dis-

cretion of the governing board of the city or village. Mere adverse possession by a lot owner of a portion of a public street, however long continued, does not, by virtue of the statute or its limitations, bar the right of the public to be restored to possession of the street to its full width: *City of De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036. Mere nonuser of a street or alley, no matter how long continued, does not deprive the city or village, as the representative of the public, of the right to take possession thereof and improve the same. The doctrine of equity that a city or village may be deemed estopped, under some circumstances, to assert a right to the possession of a portion of a street or alley which has been permitted to remain in the possession of a private person, has application only when such private person, acting on the faith of the belief that the street or alley has been permanently abandoned by the municipality, has, with the acquiescence of those representing the municipality (as was said in *City of De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036), "erected structures on the street, or made improvements thereon of such lasting and valuable character that to permit the public to assert the right to repossess itself of the premises would entail such great pecuniary loss and sacrifice upon the private property holder that justice and right would demand that the public be estopped." No such state of case appeared with reference to any of the premises here under consideration. The finding of the court was, that an easement of passage and use as a street or highway situated over the lots in block 5 of the original town, between the intersection of "C" and Third streets and the railroad, had been established by the evidence; that an extension or prolongation of Third street had been thus effected, and that the village had accepted the same, by user, as part of Third street, and that the defendant in error had placed and was maintaining in the traveled way of the street as so extended a platform and scale, and that he was guilty of withholding that portion of the extension of Third street occupied by said platform and scale, and the court also found that the defendant in error had erected a shed, the east end whereof extended four and six-tenths feet into the alley between lots 1 and 2, in block 13, of the original town.

⁴³⁹ Much testimony bearing upon the facts involved in each of these findings was produced, but there is but little conflict in the proof. Prior to 1871, before the original plat of the village was executed, two buildings stood, one on either side

the space now declared to constitute the prolongation of Third street. The public passed between these buildings to and from the depot of the railroad, using the same as a public road. After the making of the plat the public traveled over the passageway as before, and it came into use as a prolongation of Third street and constitutes one of the principal parts of that street. It reached the railroad tracks where a plank crossing had been put in to accommodate the passage of teams, vehicles and pedestrians, and the railroad company maintained a sign there warning travelers to "look out for the cars." A sidewalk ran along the south side of the extended street when defendant in error placed his platform and scales in the traveled way. Defendant in error petitioned the village to construct this sidewalk and assisted in building it, and the village board, at his request, at other times made repairs, filled holes, etc., therein. The evidence shows the traveled way became, in fact, an extension of Third street from "C" street to the railroad tracks, and had been used as such for more than twenty years after the organization of the village. It is insisted it was, however, a mere permissive use or license from the owners of the soil. The trial court was justified in holding to the contrary. The use by the public was with the acquiescence and knowledge of the owners. It was exclusive and uninterrupted, and the proof indicated an intention on the part of the owners to dedicate the premises to the use of the public as a prolongation of Third street. We also find the holding of the trial court that the shed protruded in the alley between lots 1 and 2, in block 13, supported by the proof.

It appears from the rulings made in passing upon the propositions of law that the court held the view that ⁴⁴⁰ while user by the village authorities of a street or alley evidenced an acceptance of the dedication, still the acceptance was limited to the extent of the user. Influenced by this conclusion the court denied to the plaintiff in error village the right to recover the different parts of the streets and alleys to which the user had not extended and as to which the verdict for the defendant in error was entered. As we have seen, the acceptance of some of the streets and alleys shown on a plat, or parts of such streets and alleys, is an acceptance of the entire system of streets and alleys appearing on the plat, unless an affirmative official declination of the remaining streets and alleys is shown. There was no proof that the village elected to limit its acceptance, and the court was in error in holding that the dedica-

tion of any part of any street or alley shown on either of the plats, the original or the plat showing the addition to the village, had not been accepted. The action was for the recovery of distinct parcels of land—parts of different streets and alleys. The recoveries sought were independent each of the other. The judgment may therefore be affirmed in so far as it is correct and reversed and remanded for a new trial as to the other matters involved: 3 Cyc. 447, 448.

The judgment adjudging the defendant in error guilty of unlawfully withholding that part of Third street, as extended across block 5 in the plaintiff in error village, which is occupied by the defendant in error by a platform, scales, etc., and also guilty of withholding that part of the alley between lots 1 and 2, in block 13, in the original village which is occupied by the projection of a shed to the distance of four and six-tenths feet on the south side of said alley, is affirmed. In all other respects the judgment is reversed, and the cause will be remanded for such other and further proceedings as to law and justice shall appertain. The costs will be taxed to the defendant in error.

Title to a Public Street cannot be acquired by a private individual, according to the better rule, either through the operation of the statute of limitations or the doctrine of equitable estoppel. The authorities on this question, however, are not entirely harmonious: See the monographic notes to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-495; *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 778-780.

Ejectment will not lie, it has been held, to recover an incorporeal hereditament, a right of way, or an easement: *Hancock v. McAvoy*, 151 Pa. St. 460, 31 Am. St. Rep. 774, 25 Atl. 47; *Louisville etc. R. R. Co. v. Massey*, 136 Ala. 156, 96 Am. St. Rep. 17, 35 South. 896. But see *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317, 3 S. E. 710. Yet ejectment may be maintained by a city to recover a street dedicated to a public use, whether it or the adjacent proprietor owns the fee: *San Francisco v. Grote*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127.

Dedication of Property to a public use is discussed in the monographic note to *State v. Trask*, 27 Am. Dec. 559-570. As to what amounts to a dedication, see *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56, 34 South. 624; *Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E. 538; *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236; *San Francisco v. Grote*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127; *Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185, 48 N. E. 927; *Louisville etc. Ry. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303, 29 S. W. 14. And as to the acceptance of dedications, see *Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E. 388; *Prescott v. Edwards*, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178; monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 752-757, on highways by user.

LONDON GUARANTEE AND ACCIDENT COMPANY v. HORN.

[206 Ill. 493, 69 N. E. 526.]

MASTER AND SERVANT—Liability for Procuring Discharge of Servant.—If an employer's guaranty contract provides for its cancellation only upon notice, a threat by the guarantor to immediately cancel such contract unless the employer discharges a certain employé at once, is a threat to do a legal wrong, which renders the guarantor liable to the servant in case he is thus discharged from his employment. (p. 190.)

MALICE, in a Legal Sense, means a wrongful act done intentionally, without just cause or excuse, or, in other words, the willful violation of a known right. (p. 190.)

MASTER AND SERVANT—Liability for Procuring Discharge of Servant.—If a third person induces an employer to discharge his employé, who is working under a contract, terminable at will, but which may continue indefinitely, except for such interference, and the only motive moving such third person is a desire to injure the employé and to benefit himself at the latter's expense by compelling him to surrender an alleged cause of action not depending upon and not connected with the continuance of such employment, and for the satisfaction of which such third party is liable, in whole or in part, he is liable to the employé for thus procuring his discharge. (p. 194.)

J. F. Canty and J. A. Bloomington, for the appellant.

C. A. Vogel and D. V. Gallery, for the appellee.

⁴⁹⁷ SCOTT, J. As we understand the record in this case, appellee was in the employ of Arnold, Schwinn & Co., a corporation, under a contract terminable by either party at any time, but under which the employment would have continued for an indefinite period had appellant not caused Arnold, Schwinn & Co. to discharge appellee for the purpose of compelling appellee to surrender and release a cause of action which he claimed, and for the satisfaction of which, if it existed, appellant was liable up to the amount of five thousand dollars, and as a result of which discharge appellee ⁴⁹⁸ was without employment for several considerable periods, and sustained financial loss and injury consequent upon such discharge.

Under these circumstances, does a cause of action exist in favor of appellee and against appellant? The result of this suit depends upon the answer to this question.

We have been favored with most elaborate and exhaustive briefs by counsel for both parties. The case principally relied upon by counsel for appellant is that of *Allen v. Flood*, 67 I. J.

Q. B. 119, decided by the house of lords in 1897. This case has excited a wide discussion, and was considered at length by this court in *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524. In this English case certain boiler-makers, members of a trade union, in common employment with the plaintiffs, who were shipwrights, members of a rival organization, working on wood, objected to working with the latter on the ground that in a previous employment they had been engaged on iron work, it being contrary to the regulations of the union to which the boiler-makers belonged for shipwrights to do work of that character. Allen, as a representative of the boiler-makers, saw the manager of their employer, to whom he stated that if the shipwrights, who were engaged from day to day, were not dismissed, the boiler-makers would leave their work or be called out by their union. The shipwrights were thereupon discharged and brought an action against Allen. Their right to recover was denied, principally upon the ground that every workman has a right to exercise his own option with regard to the persons in whose society he will agree or continue to work, and that when the employer was confronted with a situation where he would lose the services either of the boiler-makers or the shipwrights, he had the right to elect which class of workmen to discharge, and electing to discharge the shipwrights, both he and the boiler-makers were within their legal rights and no cause of action arose.

⁴⁹⁹ In *Mogul Steamship Co. v. McGregor*, 21 Q. B. Div. 544, the plaintiffs and defendants were rival ship owners. The defendants offered certain inducements to secure the shipping of freight from those who might otherwise have patronized the plaintiffs. The right of action was denied, on the ground that the situation was the result of lawful competition between the parties.

Huttly v. Simmons, 67 Q. B. Div. 213, is a case where the plaintiff was a cab-driver and the defendants were members of a cab-drivers' trade union. All parties to the suit were engaged in business in the same city. The defendants induced a cab proprietor to refuse to engage the plaintiff to drive a cab for him or to let a cab to the plaintiff to be driven by him. It will be observed that in this case the plaintiff in his employ would come in competition with the union to which the defendants belonged, and in holding that no cause of action existed it was said that none of the acts done or agreed to be done gave the plaintiff any right of action for injury, in

law, to any legal right of his, following the case of *Allen v. Flood*, 67 L. J. Q. B. 119.

In *Quinn v. Leatham*, [1901] App. Cas. 495 (decided by the house of lords), Lord Macnaghten, in speaking of *Allen v. Flood*, 67 L. J. Q. B. 119, stated that its headnote might well have run in these words: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent," and in this case last referred to it is said, that "it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference."

We are of opinion that the contention of appellant in the case at bar, to the effect that competition in trade, employment or business is such a justification, is in accord with the authorities. This view finds support in the case of *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165, 15 S. W. 57, where it was held that a party to a contract for the sale of goods cannot maintain an action against one who maliciously, and with design to injure him and to benefit himself by becoming ⁵⁰⁰ a purchaser in his stead, advises and procures the other party to break the contract.

In *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882, 35 Atl. 53, the superintendent of a stone quarry had given one Libersont leave to go upon the quarry and cut some of the poorer granite. Libersont employed the plaintiff to assist in this work. Defendant had a right to terminate Libersont's license at any time, and Libersont's employment of plaintiff could be terminated by either of the parties thereto at any time. The defendant had a personal difficulty with the plaintiff and thereupon induced Libersont to discharge him, threatening if Libersont did not do so, he (the defendant) would revoke the leave which Libersont had to take granite. The court holds that no right of action existed, putting the conclusion on the ground that the defendant had the undisputed right to determine who might remain and work upon the quarry, and that he could have revoked Libersont's license for the express purpose of removing the plaintiff, and that being true, he could also lawfully require Libersont to discharge the plaintiff or leave the quarry; but it is said that "the authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat aliunde the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersont, maliciously or un-

lawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor." The decision plainly proceeds upon the theory that the defendant had a right superior to the right of Libersont to determine who should be employed at the quarry in question.

In our judgment the cases cited by appellant, in so far as they lend support to its theory, will be found to be cases where the party who secured the discharge of the employé was in some way in competition with that ⁵⁰¹ employé in the business or work in which the employé was then engaged, or was a member of some organization which was in competition with the employé or some organization to which that employé belonged, and the fact that such competition existed has been treated by some of the courts as justification for the act of the defendant in bringing about the discharge. In fact, appellant seems to take this view, for it devotes a considerable portion of its argument to an attempt to show that plaintiff and defendant were in competition with each other, in that appellant desired to secure or satisfy the alleged right of action of appellee for the least possible sum, while appellee desired to secure for that right of action the greatest possible sum. Counsel seem to have been impelled to this view of the matter by the dissenting opinion of Mr. Justice Holmes in *Vegelahn v. Gunter*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, where, in discussing the proposition that one man may set up a business in competition with another with the intention and expectation of ruining another already engaged in that business in that locality, and if he succeed in his intent is not held to act unlawfully and without justifiable cause, Justice Holmes used this language: "If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly, the policy [that of permitting free competition] is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests." While it is true that the temporal interests of Horn and appellant were involved in the negotiations between them, we believe that the authorities which took upon competition as a justification for the act of one party in securing the discharge of an employé have regarded the term in a more restricted sense, and given to the term "competition"

its ordinary meaning and signification. This conclusion is certainly warranted by the reasoning in *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, ⁵⁰² where this court discusses competition as a defense to an action of this character. It cannot be held that appellee and appellant were, in any ordinary sense of the term, in competition with each other. It is also to be observed that the injury which it was sought to visit upon Horn was not primarily to subject him to a deprivation of his employment, but was to compel him to surrender a right not connected with his employment. If the only object of appellant had been to secure appellee's discharge for the purpose of obtaining his position for another, or for the reason that the employment of appellee by Arnold, Schwinn & Co. in some way conflicted with the right of appellant, or some organization to which it belonged, to obtain the same or similar employment, a very different question, and one not now before this court, would be presented, and *Allen v. Flood*, 67 L. J. Q. B. 119, and other cases of that character cited by appellant, would then be worthy of greater consideration.

It is further contended on the part of the appellant, that while the evidence may have shown that it was animated by malice, in the ordinary acceptation of the term, toward Horn, the proof fails to show any legal malice. In this connection it is argued that appellant had the right to have Horn discharged under the terms of the contract, or if it did not have that right, that it seriously and in good faith believed that it had, and that it is thereby relieved of any imputation of malice. There is no provision in the policy which by the wildest stretch of the imagination could be held to give any such right to appellant, and its conduct in attempting to secure a settlement of this claim shows it to have been animated by a wanton disregard of the rights of appellee. He was first told by the attorney of appellant that unless he settled for a trifling amount appellant would have him discharged by Arnold, Schwinn & Co.—a threat to do that which this attorney must have known his client had no right to do. Afterward Robinett, the agent for the ⁵⁰³ company, made the same threat, and upon his attention being called to the fact that the policy gave him no power to require Horn's discharge, he said to Arnold, Schwinn & Co: "If you don't discharge him I will have to cancel this policy to-day. I am here to bring this case to a focus to-day; and if you refuse to lay him off I will

cancel it." When Mr. Robinett made this treat, which resulted in appellee's discharge, he was making a threat to do an unlawful thing—to do a thing which appellant, by the terms of the contract, had no right to do. The contract provided only for its cancellation upon five days' notice. It is not pretended that any such notice had been given, but Robinett secured Horn's discharge by threatening to cancel the contract "to-day." We think it perfectly apparent that the attorney for appellant, and its agent, Robinett, each sought to bring about, and finally did bring about, the discharge of appellee by threatening to do acts which each, respectively, knew he had no right to do.

Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse; the willful violation of a known right: 19 Am. & Eng. Ency. of Law, 2d ed., 623. Were the acts of appellant wrongful?

In *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289, 59 N. E. 125, it is said: "We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant, who has controlled the employer's action to the plaintiff's harm."

In *Hollenbeck v. Ristine*, 114 Iowa, 358, 86 N. W. 377, it is stated that the contention of appellant "is bottomed on the thought that he did not act unlawfully in inducing Mr. Hall to ⁵⁰⁴ discharge the plaintiff, and therefore no action will lie." This position is said to be incorrect, and it is held to be unlawful to induce another to discharge an employé without just cause.

In *Quinn v. Leathem*, [1901] App. Cas. 495, it was said: "It is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."

This gives rise to the question, What is sufficient justification?

As we have already seen, the ends of competition have been deemed sufficient. No doubt the fact that the employé was inefficient, untrustworthy, dishonest or dissolute would

be deemed a legal justification, but certainly a desire to compel the employé to surrender a cause of action wholly disconnected with the continuance of his employment does not afford justification for interference by a third party, who desires the satisfaction of the alleged liability.

"If the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it": *Bowen v. Hall*, 6 Q. B. Div. 333.

The right to maintain an action can be sustained upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other or to obtain a benefit for himself, does the other an actionable wrong: *Gore v. Condon*, 87 Md. 368, 67 Am. St. Rep. 352, 39 Atl. 1042.

It follows, therefore, that the act of the defendant complained of was wrongful, and, in the legal sense of the term, malicious.

Arnold, Schwinn & Co. had the undoubted right to discharge *Horn* whenever it desired. It could discharge him for reasons the most whimsical or malicious, or for no reason at all, and no cause of action in his favor would ⁵⁹⁸ be thereby created; but it by no means follows that while the relations between *Arnold, Schwinn & Co.* and *Horn* were pleasant, and while, as the evidence shows, it was the expectation of the company that *Horn* would continue in its employ "all the year around," that the interference of appellant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of appellant, it would not have exercised, is not actionable.

In *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96, the conclusion of the court is, "that wherever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employé whom he would otherwise have retained."

In *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South. 934, it is said: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it, but so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

⁵⁰⁶ This question has frequently been before courts of last resort in this country. The view taken in the two cases last cited finds support in the following authorities: *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289, 59 N. E. 125; *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297; *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882, 35 Atl. 53; *Lucke v. Clothing Cutters*, 77 Md. 396, 39 Am. St. Rep. 421, 26 Atl. 505; *Hollenbeck v. Ristine*, 114 Iowa, 358, 86 N. W. 377; and also in *Blumenthal v. Shaw*, 77 Fed. 954, decided by the third circuit court of appeals.

In our own state, the case of *Doremus v. Hennessy* is first reported in 62 Ill. App. 391. Plaintiff there kept a laundry office, where she received clothing which her patrons desired to have laundered. She would then procure persons operating laundries to do the work and return the garments to her for delivery to her customers. The defendants were members of the Chicago Laundrymen's Association. She charged, by her declaration, that the defendants, by false representations and by threats and intimidation, induced certain parties who had been doing the work for her to break their contracts and engagements with her. The appellate court, after stating that it is now well established that in civil actions the conspiracy is not the gravamen of the charge but may be pleaded and proved in aggravation of the wrong, declares the law to be, that an action may be maintained for the malicious interference with the business of another, his occupation, profession or way of obtaining a livelihood, and affirmed a judgment of six thousand

dollars in favor of the plaintiff. The case came to this court, where it is reported in 176 Ill. 608, 68 Am. St. Rep. 202, 52 N. E. 924, 54 N. E. 524. The judgment of the appellate court was affirmed, and it appears from the statement of facts made by this court that with some of the persons who did work for her the arrangement was that they would do her work as long as the laundry association did not interfere, and that these persons, among others with whom she had contracts for specific periods, were induced by threats made by the laundry association to cease connection in business with appellee. Appellants contended that their ⁵⁰⁷ acts were not mere malicious acts, done solely with the intent to injure plaintiff's business, but were in the line of legitimate competition. It was there said by this court (p. 614 of 176 Ill., 68 Am. St. Rep. 203, 52 N. E. 925): "No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss." It is true that in the additional opinion delivered upon the petition for rehearing Mr. Justice Phillips distinguishes the case of *Allen v. Flood*, 67 L. J. Q. B. 119, by pointing out the fact that in the latter case there was no contract the breach of which was induced by the defendant, while in the *Doremus* case contracts existed in which the plaintiff had a property right and which were broken as a result of the actions of the defendants; but, as we have already seen, the clear weight of authority is to the effect that where the contract is one of employment, it is immaterial whether it is for a fixed period or is one which is terminable by either party at will, both parties being willing and desiring to continue the employment under that contract for an indefinite period.

We therefore conclude, both upon reason and authority, that where a third party induces an employer to discharge his employé who is working under a contract ⁵⁰⁸ terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, except for such interference, and where the only motive moving the third party is a desire to injure the employé and to benefit himself at the expense of the employé by compelling the latter to surrender an alleged cause of action, for the satisfaction of which, in whole or in part, such third party is liable, and where such right of action does not depend upon and is not connected with the continuance of such employment, a cause of action arises in favor of the employé against the third party.

Appellee asked no instruction on the trial in the superior court. In addition to the instructions given at the request of appellant the court gave one instruction of its own motion. In this instruction the word "plaintiff" was in one instance inadvertently used instead of the word "defendant," but we do not think the jury could have been misled thereby.

Other objections are made in reference to the action of the court in passing upon instructions and the admission of evidence. We have carefully considered these, and are of the opinion that the appellant sustained no wrong of which it can complain here.

It is urged that the verdict is excessive in amount. We have frequently held that this question is conclusively determined by the judgment of the appellate court.

The judgment of the appellate court will be affirmed.

Justices Wilkin and Cartwright Dissented, and contended that the guarantee company had an unconditional right to terminate its contract of guaranty at will, with or without any reason therefor, and that its threat to cancel it at once was not a threat to do a legal wrong for which it was answerable to the discharged employé.

The above-named justices said: "The cause, and only cause, of the discharge of appellee was the threat of appellant's agent, Robi-nett, to exercise the right reserved in the policy and cancel it, unless the appellee should be discharged. We see no justification for saying that the threat was to cancel the policy in any different way from that provided in it. Having an absolute legal right to cancel the policy at its own election, the threat of appellant to do it was not a threat to do a legal wrong. If there was a legal right to cancel the policy it was not unlawful to declare an intention to do so, and if the right was not affected by the reasons influencing ap-

appellant's action, the motive was immaterial. The motive which actuated Robinett in threatening to exercise the legal right of appellant secured to it by its contract, and terminate the insurance, was to force a settlement of the suit and to prevent the insured from furnishing appellee with lucrative employment while carrying on the suit, which was, in effect, against appellant. If there was any legal liability for appellee's injuries the liability was upon appellant to the extent of five thousand dollars, and it was bound by the policy to defend the suit or settle it at its own cost. There was no evidence tending to prove that the officers or agents of appellant did not honestly believe that there was no legal liability for such injuries. So far as appeared, the position of appellant that appellee had no legal claim against it or Arnold, Schwinn & Co. was assumed in entire good faith and on sufficient grounds. . . . It was held in *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 182, 35 Atl. 53, that 'if one, in the exercise of a lawful right, threatens to terminate a contract between himself and another, unless the latter discharges his employé not engaged for any definite time, the discharged employé has no right of action for damages against the party making the threat, although his motive in procuring the discharge may have been inspired by malice.'

The learned justices quoted from the decision in *Perkins v. Pendleton*, 90 Me. 258, 60 Am. St. Rep. 252, 38 Atl. 96, to the effect that: "We think that the important question in a case of this kind is as to the nature of the defendant's act and the means adopted by him to accomplish his purpose. Merely to induce another to leave an employment or to discharge an employé by persuasion or argument, however whimsical, unreasonable or absurd, is not, in and of itself, unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employé who he desires to retain and who would have retained except for such unlawful threats, is an actionable wrong. Nor do we differ from the recent decision of the Vermont court in the case above referred to, which holds that a threat to do what the defendant had a right to do would not be such a one as to make the defendant liable in an action of this kind."

In conclusion they said: "We think the conclusion must be that the evidence produced upon the trial, with all its legal intendments, not only failed to fairly tend to prove that the plaintiff's discharge was accomplished by the illegal acts of the defendant, but that it affirmatively showed that it was accomplished by threatening to do that which it had the lawful right to do, and therefore the trial court erred in refusing to give the peremptory instruction asked to return a verdict of not guilty."

An Employé may maintain an action for damages against a third person who maliciously procures his employer to discharge him (Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South 934; Moran v. Dunphy, 177 Mass. 485, 83 Am. St. Rep. 289, 59 N. E. 125), even when the contract of service is such that the employer may dismiss his employé at pleasure: Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96. As to the liability to an employer of a third person inducing an employé to quit the service, see the monographic note to Webber v. Barry, 11 Am. St. Rep. 474-478. And as to actions generally for inducing one to break his contract, see the monographic note to Raymond v. Yarrington, 97 Am. St. Rep. 923-928.

MAMEROW v. NATIONAL LEAD COMPANY.

[206 Ill. 626, 69 N. E. 504.]

GUARANTY—Continuing—Limit of Indebtedness—Sales on Credit.—A contract of guaranty executed by directors and stockholders in a corporation reciting that they desire the obligee to continue to sell goods to their corporation, and guarantee "payment upon demand of all moneys, debts, obligations, and demands, of whatever nature and character, now due, or which may thereafter become due," from such corporation to the obligee, is not limited to the indebtedness then existing, but covers that and all sales thereafter made to the corporation by the obligee, on credit in the due course of business. (p. 198.)

GUARANTY—Continuing—Must be Reasonable as to Time and Amount.—If a contract of guaranty is continuing or unlimited, as to period of time or amount, such time and amount must be reasonable under the circumstances of the particular case. (p. 200.)

GUARANTY—Continuing—Revocation.—A contract of guaranty entered into to induce the obligee to continue to sell goods to the obligor and guaranteeing payment of all debts now due, or which may thereafter become due from the latter to the former, may be revoked or withdrawn at any time upon notice to the obligee, and the obligor's liability will then cover only such indebtedness on sales as are made previous to such notice. (p. 200.)

GUARANTY—Default of Principal—Notice.—If a contract of guaranty is a collateral continuing one, the guarantor is entitled to reasonable notice of the default of the principal debtor, but failure of the obligee to give such notice can be availed of only to the extent of actual loss or damage suffered by the guarantor therefrom. (p. 201.)

GUARANTY—Default of Principal—Burden of Proof.—If a guarantor seeks to relieve himself from liability upon the ground that notice of the default of the principal debtor was not given him in a reasonable time, the burden of proof rests upon him to show failure to give notice and consequent injury by the loss of the whole or a part of the debt for which he stood as surety. Such failure to give notice resulting in damage is matter of defense. (p. 202.)

GUARANTY.—Notice of Default of Principal Debtor need not be given by the obligee in a contract of guaranty to the obligor

when the latter has notice from an independent source, or where it is his duty under the law to take notice. (p. 203.)

CORPORATIONS—Knowledge of Directors—Presumption.—Directors in a corporation are conclusively presumed to know its condition financially, its business, its receipts and expenditures, and all the general facts which go to make up its condition and business as shown by the entries on its regular books. (p. 203.)

GUARANTY—Directors of Corporation as Guarantors When Chargeable with Notice.—Directors of a corporation as guarantors of all indebtedness which thereafter might become due from their corporation to the obligee in the contract of guaranty are chargeable with notice of the financial condition of their corporation, the extent of the indebtedness under their contract, and of the default of the corporation. (p. 203.)

B. Landon, for the plaintiff in error.

Tenney, McConnell, Coffeen & Harding, for the defendant in error.

*** RICKS, J. Plaintiff in error's contention is, that the superior and appellate courts erred in construing the guaranty to cover purchases made by the Berner-Mayer Company after March 19, 1897—the date of the guaranty. This question was raised by a holding presented to the court and refused, to the effect that the guaranty only covered all indebtedness existing at the time of its date. This ⁶³¹ contention, we think, is without merit. The preamble of the instrument recites that the parties to the guaranty "desire that the said National Lead Company shall continue to sell goods to the said Berner-Mayer Company, and have requested it so to do," and the language of the guaranty itself purports to cover all debts, of whatever nature or character, "now due or which may hereafter become due from said Berner-Mayer Company to the said National Lead Company." As was said by the appellate court: "Looking at the instrument as a whole, it is certainly open to the construction that it was intended to cover debts not only due but which might become due thereafter, in pursuance of the express wish of the guarantors that the lead company should continue to sell goods to the Berner-Mayer Company. It cannot fairly be said that the recitals limit the guaranty to said present indebtedness, as counsel contends."

It is next urged that the guaranty in question does not apply to or cover sales made by the defendant in error to the Berner-Mayer Company upon thirty days' credit, and that as the entire demand is for goods so sold, the defendant in error ought not to recover on the guaranty. This question was raised in the trial court by plaintiff in error requesting the court to

hold, as a matter of law, that plaintiff in error was not liable to defendant in error "for goods sold and delivered by said National Lead Company to the Berner-Mayer Company upon thirty days' credit." This holding the court refused. In support of this contention plaintiff in error cites *Miller v. Stewart*, 9 Wheat. 680, *Shreffler v. Nadelhoffer*, 133 Ill. 536, 23 Am. St. Rep. 626, 25 N. E. 630, and other cases, wherein the propositions are announced and held that the "liability of a surety is not to be extended by implication beyond the terms of the contract," and that the surety or guarantor will not be held answerable unless the contract is strictly pursued. We are unable to see how this court is aided or plaintiff in error benefited by the rules here invoked. ⁶³² They can only be applied when it is determined what is the legal effect of the guaranty in question, or, in other words, the scope of the undertaking of the guarantors. The contract must be construed by and from its own terms and provisions, as far as they furnish a guide, and in aid thereof the circumstances of the making of the contract may be taken into consideration. By the express words of the contract the makers guarantee the "payment, upon demand, of all moneys, debts, obligations and demands, of whatever nature or character, now due or which may hereafter become due from the Berner-Mayer Company." The language is broad, and if given the interpretation it would usually import, must be held to cover not only the indebtedness existing at the time of the execution of the guaranty and might then be due or might thereafter become due, but also such indebtedness as might, in due course of trade, thereafter be created and become due. If a guaranty is clear in its terms it must be interpreted and construed according to the language used; "that is to say, the parties must be presumed to have meant that which their language clearly imports. It is not what one of the parties may have intended, but what is shown by the contract to have been the intention of both parties": *Peoria Sav. etc. Trust Co. v. Elder*, 165 Ill. 55, 45 N. E. 1083.

Upon examination of the contract in question it appears, from its recitals, that defendant in error had sold and delivered goods to the Berner-Mayer Company on open account, and that the latter owed the defendant in error for goods so sold and for other accounts. It also appears that the guarantors were "interested in the said Berner-Mayer Company, as stockholders and directors thereof"; that defendant in error had refused to permit the indebtedness of the Berner-Mayer Com-

pany to increase until the present indebtedness was amply secured; that the guarantors desired that the defendant in error should continue to sell goods to the said Berner-Mayer Company, ⁶³³ and so requested; that the guarantors agreed to furnish to defendant in error security of all accounts, "due and to become due." From these recitals it is evident that plaintiff in error and his coguarantors knew, not only that defendant in error had been selling the Berner-Mayer Company goods upon open account, but that these accounts so existing comprised both classes of debts—that is, those that were due and those that were not due but were to become due. Furthermore, as directors of the Berner-Mayer Company it was the duty of the guarantors to have knowledge of its affairs and the nature, extent and character of its indebtedness, and the recitals of their undertaking tend most strongly to show that they did know. They desired defendant in error to continue to extend credit to the Berner-Mayer Company, and agreed that they would, on demand, pay defendant in error all moneys, debts, obligations and demands, of whatever nature or character, then due or that might thereafter become due. Their guaranty was not, by such language, limited to sales on open account that should be payable by the Berner-Mayer Company upon demand of defendant in error, but "moneys, debts, obligations and demands, of whatever nature or character"; nor such debts or obligations, only, as defendant in error could any moment demand and thereby make due, but the guarantors would, on demand, pay the debts, obligations and demands due and thereafter to become due. The general, and we may say the sole, object of the guarantors was to obtain from defendant in error the further continuation of sales to the Berner-Mayer Company on time. Defendant in error needed no guaranty if it was to sell for cash, and the use of the words "obligations and demands, of whatever nature or character," in conjunction with the words "all moneys, debts," would seem useless and meaningless unless the parties contemplated that the goods to be sold on credit would be upon the usual terms of credit, or that notes or other evidences ⁶³⁴ of the indebtedness arising from such sales might be taken by defendant in error, otherwise "all moneys and debts" would have, according to plaintiff in error's contention, been descriptive of the full extent of their undertaking of payment.

Counsel for plaintiff in error says that the guarantors should have had the right to go to defendant in error at any time

and require defendant in error to demand payment, and if not paid by the Berner-Mayer Company the guarantors should have had the right to pay at once and be subrogated. They might have had that right if they had so contracted, but we are unable to construe the contract before us as so providing or intending.

It is said in support of this contention, that if this contract is held to be a continuing guaranty and to be applicable to sales upon thirty days' credit, then, in law, there is no protection to the guarantor, and that defendant in error might as well have sold on ten or thirty years' time as upon thirty days' time. This contention is not sound. We think the greater weight of authority is agreed that where the guaranty is a continuing one, and is unlimited as to duration and amount for which the guarantor will be liable, such time and amount must be reasonable, under the circumstances of the particular case: *Lehigh Coal Co. v. Scallen*, 61 Minn. 163, 63 N. W. 245; 14 Am. & Eng. Ency. of Law, 2d ed., 1140. The guarantors could have limited their undertaking both as to time and amount had they seen fit to do so, but from a reading of the guaranty it would seem that their desire and intention were that both should be unlimited.

Nor were the guarantors without reasonable protection against the acts of the Berner-Mayer Company under the contract as it is construed by us. As to all the indebtedness created after the execution of the guaranty the undertaking was collateral and continuing, and could be revoked or withdrawn at any time thereafter upon notice to defendant in error, and the guarantors' liability ^{was} would, in such case, only cover the sales made pursuant to it and before the notice: 14 Am. & Eng. Ency. of Law, 2d ed., 1160, and authorities cited.

The case of *Hunt v. Smith*, 17 Wend. 179, 31 Am. Dec. 296, is mainly relied on by plaintiff in error in support of his contention. We have examined that case and do not think it applicable to the guaranty before us. In the case cited the guaranty was an express undertaking to pay for goods that might be furnished a proposed purchaser to the amount of seventy dollars, and concluded with the expression, "and I will be responsible to you for that sum." Goods were sold, relying on that guaranty, on thirty days' credit, and the court held that the guaranty did not cover such sales. A marked difference will be found between the guaranty there and the one at bar. In *Hunt v. Smith* there was a direct and absolute undertaking to

pay to the amount in the guaranty, and the guaranty was an accommodation one, in which the guaranty had no show of interest, while in the case at bar the guarantors, as shown by the recitals in the instrument of guaranty, were in fact, though not in law, the persons to whom and for whose benefit the sales were to be made. They were both directors and stockholders of the Berner-Mayer Company, and were making a personal, strenuous effort and extending their personal credit in their endeavor to carry the failing business of the Berner-Mayer Company. Its credit was then impugned and impaired, and they were vitally interested in maintaining and continuing the credit, and, as it seems to us, the whole consideration to the guarantors was that defendant in error should sell to the Berner-Mayer Company on credit.

Plaintiff in error contends that he was entitled to timely notice of the default of the Berner-Mayer Company, and that as notice was not given for about a year and a half after the failure and assignment of said company, he is released. Plaintiff in error offered a holding that it was the duty of defendant in error to give him ⁶³² "notice of the default of the Berner-Mayer Company within a reasonable time," and also offered another holding to the effect that although plaintiff in error was a stockholder and director of the Berner-Mayer Company, such fact would not relieve defendant in error from its duty to give timely notice of the default; and further asked the court to hold that the burden of proof was upon the defendant in error to show that it had given notice of default within a reasonable time. The court refused these holdings.

The general rule undoubtedly is, that where the guaranty, as here, is a collateral, continuing one, the guarantor is entitled to reasonable notice of the default of the principal debtor: *Taussig v. Reid*, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918. The purpose of this notice is to enable the guarantor, if he elects to pay the guaranty and at once proceed against the principal debtor, to reimburse himself for the moneys thus paid. The right to this notice is not an absolute right, however, in the sense that the failure to give it will, in all cases and under all circumstances, release the guarantor, but it is a relative right, and the failure to give it can only be availed of when it is made to appear that the guarantor has suffered loss by such failure: *Taussig v. Reid*, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918. If at the time of the default of the principal debtor the latter is insolvent, so that the creditor

cannot collect his debt or any part thereof, the failure to give notice of the default can work no injury to him, and therefore such failure would be no defense. There must not only be a want of notice within a reasonable time, but also some actual loss or damage thereby caused to the guarantor, and if such loss or damage does not go to the whole amount of the claim, but is only to a part, the guarantor is not wholly discharged, but only pro tanto. Before a guarantor can be discharged by the failure of the creditor to give notice, it is incumbent upon the guarantor to show that he is prejudiced by such failure: *Rhett v. Poe*, 2 How. 457; 14 Am. & Eng. ⁶³⁷ Ency. of Law, 2d ed., 1152. Such being the rule, it would seem that the question of notice or want of notice is a matter of defense. The guarantee has made a case by showing a guaranty broad enough to cover the transaction, and a sale or sales in compliance with and in reliance upon the guaranty and the default of the principal, and if the guarantor seeks to relieve himself from the liability, and upon the ground that notice of the default was not given him within a reasonable time, the burden rests upon him to show the failure to give the notice, and the consequent injury by the loss of the whole or a part of the debt for which he stood as surety: *Furst etc. Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504; *Rhett v. Poe*, 2 How. 457; *Voltz v. Harris*, 40 Ill. 155; *Farmers' etc. Bank v. Kercheval*, 2 Mich. 505.

In *Furst etc. Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504, the court say: "The failure to give notice, and the resulting damages, were, however, matter of defense." In the case at bar evidence was offered by plaintiff in error for the purpose of showing failure to give notice of default and consequent injury. The evidence was objected to and the objection sustained.

The entire offer as made by plaintiff in error was, that he had no notice until December, 1898, that credit had been extended by defendant in error to the Berner-Mayer Company subsequent to the date of the guaranty sued on, and had no notice of the default of the Berner-Mayer Company until the same date; that the Berner-Mayer Company was in possession of a large amount of goods, and continued to do business in Chicago, New York and Brooklyn until December 17, 1897, and was in possession of enough goods during all the time that intervened from the making of the guaranty until December 17, 1897—the date upon which it made an assignment—to have satisfied the claim of defendant in error.

A creditor is not required to give notice of default to a guarantor where the guarantor has notice from an independent ³³³ source, or where it is his duty, under the law, to take notice, or, in other words, where, in law, he is chargeable with notice. The law does not require a useless act. In the case at bar the guarantors, by their written guaranty, styled themselves as both directors and stockholders of the Berner-Mayer Company. As directors it was their duty to know the liability and financial condition of the company, and from the recitals in the guaranty they did know, at the time the guaranty was made, that the company was in debt to defendant in error to such an extent, and its financial condition and character had then become such, that defendant in error would not extend it further credit without the guaranty in question. In *Rhett v. Poe*, 2 How. 457, in discussing a similar question to the one here presented, it is said (p. 483): "If the drawer of the bill was in truth the partner of the acceptor, either generally or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill by the holder to the drawer need not have been given. The knowledge of one partner was the knowledge of the other, and notice to one notice to the other." Mr. Thompson, in his work on Corporations, in speaking of the duties of directors of corporations, uses the following language: "It is a sound view, at least in so far as the question respects the rights of third parties, that the directors of a corporation are in law conclusively presumed to know its condition, its business, its receipts and expenditures, and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. The reason of this is, that it is their duty to know these things in the exercise of their official functions. This doctrine is said to be one founded in public policy, essential to the safety of third persons in their dealings with corporations, and to the protection of stockholders interested in the welfare and safe management of corporations": 4 Thompson on Corporations, 4024. To the same ³³³ effect is the case of *United Society of Shakers v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731.

We think, under the facts disclosed by the record in this case, that the rule announced by Mr. Thompson, *supra*, is applicable. Plaintiff in error, by his written guaranty, declared himself both a stockholder and a director of the defaulting company. He knew, then, that it was in embarrassed circumstances and that it required the guaranty of the men compos-

ing its directorate to enable it to continue its business. It would seem, too, from the express language of the guaranty, that the recitals and undertakings of the guarantors in that instrument were the consideration upon which defendant in error accepted the guaranty and continued the sales under it. The record showing, as we think it does, that the sales made after the guaranty were in the due course of business and within the terms of the guaranty with defendant in error, it is our duty to hold that plaintiff in error was bound to take notice, and will be presumed to have had notice, of the extent of the purchases made by the Berner-Mayer Company under the guaranty, and of its default in payment.

In this view of the case, the refusal of the court to admit the evidence offered, if error at all, was harmless. The record shows that the last item of defendant in error's account did not become due until December 9, 1897, and on the 17th of the same month—eight days after the default—the Berner-Mayer Company made an assignment for the benefit of its creditors and less than nine per cent of its indebtedness was realized from its assets. The duty of defendant in error to make demand of payment and give notice of default did not, if at all, arise until within a reasonable time after the transactions with the Berner-Mayer Company, based upon the guaranty, were closed: *Ferst v. Blackwell*, 39 Fla. 621, 22 South. 892; *Douglas v. Reynolds*, 7 Pet. 113; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. Rep. 508. The day after the assignment defendant in error began ⁶⁴⁰ an attachment against the Berner-Mayer Company, but received nothing by it, receiving only its per cent of the general distribution under the assignment. Under such conditions we would not be prepared to say that the offer made by plaintiff in error as to the financial condition of the Berner-Mayer Company between the date that the debts became due, December 9, 1897, and the date of the assignment of the company (the 17th), was sufficient evidence upon that question to relieve him from liability, even if the plaintiff in error had been entitled to notice. The rule is, that the plaintiff in error must have shown the Berner-Mayer Company had sufficient goods between those dates that plaintiff in error, by receiving notice, could have realized the debt, or some portion of it, that was lost by the failure to give the notice. The mere offer to show that it was in possession or goods of a large or small amount, taken in connection with its failure and the payment of but so small a per cent of its indebtedness under the

assignment, would contradict any presumption, arising from the mere possession of a large amount of goods, that plaintiff in error could have realized the debt by timely notice and action, or that plaintiff in error, by notice, could have paid and saved himself.

The judgment of the appellate court is affirmed.

A Contract of Guaranty must be construed by the same rules which are applied in the construction of other written agreements, although the guarantor is entitled to stand upon the strict terms of his contract: London etc. Bank v. Parrott, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; Hooper v. Hooper, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508; Crane Co. v. Specht, 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1015. As to what amounts to a continuing guaranty and as to what does not, see *Sherman v. Mulloy*, 174 Mass. 41, 75 Am. St. Rep. 286, 54 N. E. 345; *First Commercial Bank v. Talbert*, 103 Mich. 625, 50 Am. St. Rep. 385, 61 N. W. 888; *Tausig v. Reid*, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918; *Mathews v. Phelps*, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 108; *Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. Dec. 713; note to *Columbus Sewer-Pipe Co. v. Ganser*, 55 Am. Rep. 701-703. And as to the necessity of giving notice of default, see *Welch v. Walsh*, 177 Mass. 555, 83 Am. St. Rep. 302, 59 N. E. 440; *Tausig v. Reid*, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918; *German Sav. Bank v. Drake Roofing Co.*, 113 Iowa, 184, 34 Am. St. Rep. 335, 83 N. W. 960; *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. Rep. 437, 37 N. E. 665.

PEOPLE v. MOIR.

[207 Ill. 180, 69 N. E. 905.]

DOMICILE—Presumption of Continuance of.—When a residence is once established, the presumption is that it continues, and the burden of proof is on the party who claims that it has been changed. (p. 206.)

DOMICILE OR RESIDENCE—Evidence of Change of.—Where the declarations of a party are admitted in evidence to show a change of residence, they are not considered as a high class of evidence and are entitled to little weight when his acts are not consistent with them. (p. 206.)

DOMICILE OR RESIDENCE.—To Bring About a Change of Residence, an intention to change is not sufficient, but the change must be actually made, which can only be by abandoning the old and permanently locating in the new place of residence. (p. 207.)

DOMICILE OR RESIDENCE—When not Changed.—Though a person intends to change his residence from A to B in the near future, yet if his going from the former to the latter place is because of his sudden illness and in order that it may be better treated, and such illness proves fatal in a few days, no change of residence is effected, and he must be regarded as a resident of A at the time of his decease. (p. 209.)

INHERITANCE TAXES—Property Conveyed in Lifetime, when Subject to.—If real property is conveyed with a parol agreement or understanding that the grantor shall retain the right of possession and enjoyment of the whole or some part thereof during his life, it is, after his death, subject to the inheritance tax to the extent of the part so retained. (p. 210.)

INHERITANCE TAXES on Lands Placed by the Grantor in a Partnership.—If a father and his sons form a partnership and on the same day he conveys real property to them, the income from which is ever afterward during his life carried to the partnership account, such lands, after his death, are subject to the inheritance taxes to the extent of his interest or share in such partnership. (p. 210.)

Appeal from a judgment of the county court of Henderson county holding that the estate of Robert Moir was not subject to inheritance taxes, on the ground that he died a resident of Burlington, Iowa.

H. J. Hamlin, attorney general, and J. W. Gordon, state's attorney, for the appellant.

H. B. Safford and R. J. Grier, for the appellee.

186 HAND, C. J. The controlling questions of law and fact arising on this record lie within a very narrow compass.

1. Was Robert Moir a resident of Henderson county at the time of his death? Mr. Moir had lived in that county for many years, and when a residence is once established the presumption is that it continues, and the burden of proof is upon the party to show a change who claims a residence once established has been changed: 10 Am. & Eng. Ency. of Law, 2d ed., 6. In this case the evidence relied upon to show a change of residence of Mr. Moir from Oquawka to Burlington consisted wholly of the proven declarations of the deceased. While such declarations are admissible in evidence, they are not considered a high class of evidence, and when the acts of the party are inconsistent with his declarations the declarations are entitled to but little weight: *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232. The record is voluminous, and to set out in this opinion the declarations of Mr. Moir testified to by the numerous witnesses who testified upon that subject would serve no useful purpose. Suffice it to say, it is clear therefrom that the deceased had made up his mind to go to Burlington and make his home with his daughter at that place at some time in the future not far remote from the time when he actually went to Burlington. The evidence of all the witnesses on that point, with one or two exceptions, agrees, however, that at the several times upon which he spoke upon the

subject he said he would go to Burlington when the business with which he was then connected was closed up. The business ¹⁸⁷ of himself and sons at Oquawka, during the fall of 1901, was in process of settlement preparatory to the contemplated change. No new goods were being bought for the store which they were carrying on at that place, and the depositors in the bank were being paid off preparatory to transferring the assets of the bank to a national bank which was being organized at Oquawka to take on its business. The business was not, however, closed up at the time the deceased went to Burlington, and it is admitted that the various enterprises in which Mr. Moir was engaged continued to be carried on by his sons until some weeks after the death of Mr. Moir. The time, therefore, when the deceased had determined to change his residence had not arrived at the time he went to Burlington. To bring about a change of residence it is necessary that there be not only an intention to change the residence, but the change must actually be made, which can only be effected by abandoning the old and permanently locating in the new place of residence. We are strongly impressed that the deceased intended to make the change so soon as his business was closed up, but are equally clear that such intention was never executed by a permanent abandonment of the old and the selection of a new place of residence by Mr. Moir. It appears that he was at his home in Oquawka on the 7th of December, 1901; that he was indisposed; that his daughter was with him; that Mr. Tracy came from Burlington on the afternoon of that day to Oquawka, expecting to spend the following day, Sunday, at the home of the deceased; that during the afternoon Dr. Fleming was telephoned to come to Oquawka; that he did so and met Dr. Hanson at the residence of the deceased; that after consultation they determined that Mr. Moir was mainly suffering from an ulcerated tooth, and that it was desirable he should see his dentist at once, who resided in Burlington; that thereupon Mr. and Mrs. Tracy returned home, the deceased going with them; that the ¹⁸⁸ dentist was sent for and met him at the house of his daughter, and that other complications arising and Mr. Moir growing worse, he remained at the Tracy home until his death, which occurred December 19, 1901. It is plain that Mr. Tracy and wife did not return to Burlington in company with Mr. Moir by reason of the fact that after Dr. Fleming and Dr. Hanson arrived at the home of the deceased it was then agreed the time had come when the contemplated change

of residence should be made, but that they returned to their home and took the deceased with them in order that the deceased might readily receive the medical attention which it was thought he needed. To have effected a change of residence at that time it was necessary that Mr. Moir should have gone to Burlington with the fixed intention of changing his residence—that is, with the intention of abandoning his old residence and taking up a new residence in Burlington. The clear inference to be drawn from the evidence is, that the deceased went to Burlington for the purpose of receiving medical treatment, and not with the intention of effecting a change of residence. His business not having been closed up, he left his home, and all that was in it, as it had existed for years, his unmarried daughter, who was his housekeeper, and his servants, remaining. After his death his remains were taken back to the old home and a funeral was there held. All the facts show that he went to Burlington for a temporary purpose, and not with the intention of making said city his permanent future residence.

The terms "residence," "abode," "domicile," and kindred terms, differ somewhat in meaning, but when used in statutes similar to the one in force in this state providing for an inheritance tax, have frequently been held to be synonymous: 10 Am. & Eng. Ency. of Law, 2d ed., 9; Cooley on Taxation, 2d ed., 369; *Thorndike v. City of Boston*, 1 Met. 242. In *Hayes v. Hayes*, 74 Ill. 312, on page 316, it is said: "To effect a change of ¹⁸⁹ domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home."

In *Du Puy v. Wurtz*, 53 N. Y. 556, on page 561, the court say: "To effect a change of domicile for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicile and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect per se, though it may be most important as a ground from which to infer intention. Length of residence will not alone effect the change; intention alone will not do it, but the two taken together do constitute a change of domicile."

In *Thorndike v. City of Boston*, 1 Met. 242, which was an action to try the question whether the plaintiff, who had left the country with his family, was liable afterward to be taxed as an inhabitant of the place of his former residence, the court, speaking through Chief Justice Shaw, said (p. 245): "The questions of residence, inhabitancy or domicile—for although not in all respects precisely the same they are nearly so and depend upon much the same evidence—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole, taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course, it follows that his existing domicile continues until he acquires another; and vice versa, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances ¹⁸⁰ must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places, and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fix it, beyond question, in another. So, on the contrary, very slight circumstances may fix one's domicile if not controlled by more conclusive facts fixing it in another place."

We are of the opinion the county court erred in holding that Robert Moir was a resident of the state of Iowa at the time of his death.

2. Was the real estate conveyed by the deed on June 1, 1898, subject to an inheritance tax? The solution of that question depends upon whether said conveyance was intended to take effect in possession or enjoyment after the death of Robert Moir. If it was, the lands transferred by said deed are subject to an inheritance tax, otherwise not. The evidence shows that the deed and the copartnership agreement were executed simultaneously; that the real estate was not a partnership asset, but that the profits from the real estate were carried into the copartnership account, and that Robert Moir, as a member of said firm, received, from the time of the execution of the deed to the time of his death, one-half of the rents of said lands. If the rents from the lands had been reserved by Robert Moir, during his life, in the deed or by other writ-

ing, it would be plain that the deed was not intended to take effect in possession or enjoyment during the life of the grantor. If that was the intention of the parties to the deed, can an inheritance tax on said lands be defeated by reason of the fact that the intention to postpone the possession or enjoyment of the lands until after the death of the grantor is not evidenced in writing? We think not. If the failure to evidence such intention in writing would defeat the ¹⁸¹ inheritance tax, such tax could be defeated in every case by the parent executing a deed to his children and prospective heirs, relying upon their parol promises to account to him for the rents of the lands conveyed during the life of the grantor. In this case the grantor, by virtue of the partnership with his sons, who were the grantees in the deed, did not postpone the possession or enjoyment of all the lands until after the death of the grantor, but only the one-half part thereof. As to one-half of said lands the possession and enjoyment thereof were postponed during the life of Robert Moir, and we think, by reason of that fact, said one-half was subject to the payment of an inheritance tax. In *Reish v. Commonwealth*, 106 Pa. St. 521, a deed in fee simple was executed and a bond taken for the payment to the grantor, during his life, of one-half of the net income, and it was held the deed was intended to take effect in possession or enjoyment after the death of the grantor, and the estate was subject to an inheritance tax. In *Appeal of Seibert*, 110 Pa. St. 329, 1 Atl. 346, a will was made devising real estate, and the testator then made a deed conveying his lands to persons named, to be disposed of as directed in his will. The land was held subject to an inheritance tax. In volume 24 of the first edition of the *American and English Encyclopedia of Law* (page 464) it is announced that the policy of the law will not permit the owner of an estate to defeat the plain provisions of an inheritance law by any device which secures to him, for life, the income, profits and enjoyment of the estate. It must be by such a conveyance as parts with the possession, the title and the enjoyment in the grantor's lifetime.

The judgment of the county court is reversed and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

The Taxation of Inheritances is discussed in the monographic note to *State v. Hamlin*, 41 Am. St. Rep. 580-585. An inheritance tax is not on property, but on the succession: *Matter of Dows*, 167 N. Y. 227, 82 Am. St. Rep. 509, 60 N. E. 459. As to the necessity of

uniform operation of inheritance tax laws on different persons and properties, see *Estate of Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424; *State v. Bazille*, 87 Minn. 500, 92 N. W. 415, 94 Am. St. Rep. 718, and cases cited in the cross-reference note thereto.

A Change of Domicile is largely a matter of intention, and declarations of the person connected with the act of going from one place to another are often admissible as showing such intention: *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; *Kreitz v. Behrensmeier*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232; *Viles v. Waltham*, 157 Mass. 542, 34 Am. St. Rep. 311, 52 N. E. 901; monographic note to *Berry v. Wilcox*, 48 Am. St. Rep. 715. A residence once acquired continues until proved to have been lost or changed; and the burden of proving the loss or change is on the party asserting it: Note to *Berry v. Wilcox*, 48 Am. St. Rep. 713. As to the distinction between residence and domicile, see *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952, 65 S. W. 423.

RUDOLPH v. RUDOLPH.

[207 Ill. 266, 69 N. E. 834.]

A WILL Takes Effect at the Death of the Testator. (p. 212.)

WILLS, Who Participate in.—Where a devise is to a class, those remaining alive at the death of the testator are ordinarily entitled to take. (pp. 212, 213.)

WILLS are Presumed to be Made in View of Statutes then Existing and with the intent that such statutes shall prevail. (p. 215.)

WILLS—Devise to Children, when Includes Children of a Deceased Child.—Though a testator devises his property to his children as a class without naming any of them, and one dies before the testator, leaving children, such children take his share of the estate, if there is a statute providing that whenever a devisee or legatee, being a child or grandchild of the testator, dies before him, and no provision is made for such a contingency, the issue, if any there be of such child or legatee, shall take the estate such devisee or legatee would have done had he survived the testator. (p. 219.)

Suit for the partition of lands which in his lifetime belonged to F. W. Rudolph, deceased. The only question in controversy was whether under his will such land passed to his surviving children or to them and the issue of a deceased child. The trial court decided against such issue, and they appealed.

William P. Launtz and William U. Halbert, for the appellant.

R. W. Ropiequet, for the appellees.

MR. MAGRUDER, J. The question presented by the record is whether or not the circuit court decided correctly in holding

that Herman, Edgar and Minnie Rudolph, the children of the testator, Frederick William Rudolph, who were living at the time of his death, were each entitled to one-third of the premises sought to be divided, subject to the life estate of the widow, Eliza A. Rudolph, and in holding that Aurelia Rudolph and Corinne Rudolph took nothing under said will. In other words, the contention of the appellant is that Herman, Edgar and Minnie Rudolph inherited each an undivided one-fourth of the premises, ²⁷⁰ subject to the life estate of the widow, Eliza A. Rudolph, and that Aurelia Rudolph and Corinne Rudolph, the children of the deceased son, Henry Rudolph, inherited the other one-fourth thereof, each being entitled to an undivided interest of one-eighth. The decision of the question involved requires a construction of the will, and of section 11 of chapter 39 of the Revised Statutes, being "An act in regard to the descent of property."

By clause 4 of the will of Frederick William Rudolph, it is provided as follows: "After the death of my said wife, Eliza A. Rudolph, I give and devise all my real and personal estate and property, money, goods, chattels, demands and claims, to my beloved children, as their absolute property in fee simple, to be equally divided between them." When the will was made in 1875, the testator, Frederick William Rudolph, had four children, to wit, Herman Rudolph, Edgar W. Rudolph, Minnie A. Rudolph and Henry Rudolph. But Henry Rudolph died in 1900, two years before his father, Frederick William Rudolph died, so that, at the time of the death of the latter, there were only three children, instead of four, to wit, Minnie, Edgar and Herman. The question is, Did the children of Henry Rudolph who died before his father, to wit, Aurelia Rudolph and Corinne Rudolph, take under the will the same interest, which their father, Henry Rudolph, would have taken, if he had lived until after the death of his father, the testator, Frederick William Rudolph?

On the part of the appellees it is claimed that, by section 4 of the will, the devise was to a class, to wit, the children of the testator, without a statement of the names of the children. The general rule is that, where the devise is to a class, the remainder vests in the survivors of that class who are alive at the death of the testator, as the estate vests and the class is determined at that time. A will takes effect at the death of the testator: *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351.

²⁷¹ "It is believed to be universally true that, where there is a simple devise to a class, and the will does not, expressly or by necessary implication, fix the time when the objects of the gift are to be ascertained or when distribution is to be made, the law itself will fix it at the testator's death, that being the time when the will first speaks. . . . Strictly speaking, in contemplation of law, the class to whom a gift or devise is limited consists, in all cases, exclusively of such persons, coming within the description of the class, as are in esse at the time the gift or devise, by its own limitation, takes effect in interest, and such as are born before distribution, where distribution is deferred to a subsequent period. Those, that die before the gift takes effect in interest, are not regarded as having ever belonged to the class. . . . Where the gift or devise is to a class none will be permitted to take, except such as are in esse at the time of distribution": *McCartney v. Osborn*, 118 Ill. 403, 9 N. E. 210. Under the common law as interpreted by this court, the whole estate in such case inures to the survivors of the class: *Lancaster v. Lancaster*, 187 Ill. 540, 79 Am. St. Rep. 234, 58 N. E. 462.

These principles are said to be applicable to the facts of the present case, and it is said that, the devise being to a class, to wit, the children of Frederick William Rudolph, those who belonged to that class at the time of his death took the property as the survivors of the class; that although there were four children in existence at the time the will was made in 1875, to wit, Henry, Herman, Minnie and Edgar, yet, when the testator died in 1902, there were only three children living, Henry having died before the death of his father, to wit, in 1900; and that the class, which at the time of the making of the will consisted of four children, consisted, at the time of the death, only of three children. It is then argued that, inasmuch as the class is the devisee which takes, and not the individuals of the class, the three children, who were survivors at the death of the testator, took ²⁷² the property to the exclusion of the children of the son, who died before his father died.

There is no doubt that the position thus taken by the appellees is correct, unless section 11 of the statute of descent modifies it. Section 11 of the statute of descent is as follows: "Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take

the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate": 2 Starr and Curtis' Annotated Statutes, 2d ed., 1433.

The language of the statute is, "whenever a devisee or legatee. . . . being a child or grandchild of the testator shall die before such testator," etc. It is said that the section contemplates a case where the legatee or devisee, who dies before the testator, is an individual, and as such is mentioned by name.

In some of the states courts have held that statutes for the prevention of lapses, such as section 11 of our statute in regard to descents, do not affect the pre-existing rule upon the subject of gifts to classes; that is, that the whole estate inures to the survivors of the class, and that the will creates a vested remainder in those of the children, who are alive at the death of the testator, the class being determined at that time. This is the common-law rule, and, in support of its continuance notwithstanding the statute for the prevention of the lapse, the doctrine is invoked that statutes are to be construed in accordance with the principles of the common law, and that the legislature will not be presumed to have intended to make any innovation upon the common law further than the case absolutely requires: *Smith v. Leatsch*, ²⁷³ 114 Ill. 271, 2 N. E. 59; *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; and it is insisted that, in this class of cases, the common-law rule continues to exist as to devises to classes; and that the statute must be construed to refer only to cases where the individuals of a class are mentioned by name. This construction seems to have support in the language of the section, which refers to "a devisee or legatee."

In *Page on Wills*, section 551, after mentioning the common-law rule that, when a member of a class of beneficiaries dies before the time fixed under the will for determining the members of that class, the children and descendants of such deceased member could not take in place of their ancestor, it is said: "This rule is further modified by statutes, which have been passed in different jurisdictions, providing that, if certain named beneficiaries die before testator or before their interests vest, their descendants shall take the share to which their ancestor would have been entitled. These statutes apply

generally when the beneficiary is a descendant or blood relative of testator. In some states it has been held that these statutes do not affect the pre-existing rule upon the subject of gifts to classes. The reason which the courts give for this rule is that indicated by the preceding note, that is, that the statutes against lapse apply only where something is given by will to one who dies before testator, and, therefore, have no application to gifts to a class, where the gift is in legal effect only to the members of the class in existence at a designated time."

In the same section, however, the same author makes the following statement: "In most states these statutes are held to apply to gifts to classes, as well as to gifts to individuals. It makes no difference whether the bequest is such to a relative by name, or whether he is designated in the will only by his relationship." A large number of authorities are referred to in the notes which sustain the view that these statutes apply to gifts to ²⁷⁴ classes, as well as to gifts to individuals, and the great weight of authority seems to be in favor of this construction.

In 18 American and English Encyclopedia of Law, second edition, 757, it is said: "In the United States it is generally considered that statutes for the prevention of lapses apply in the case of a legacy or devise to several, as a class, though none be mentioned by name. . . . Statutes for the prevention of lapses are intended, not to defeat the will, but to supplement it, and ought not to control if it be inconsistent with the will to have them control. But it must be presumed that the testator made the will in view of the statute, and that he intended to have the statute prevail, unless the contrary appears. The burden of showing the contrary is on the party claiming that the statute does not apply, and this burden is not lifted when it is made to appear that the legacies were prompted by personal regard for the legatees, for the fact that they were so prompted is not at all inconsistent with an intent to have them go to the descendants of the legatees, in case the legatees themselves die before the testator. The person claiming that the statute does not apply must go further and make it appear that the legacies were not only prompted by personal regard, but that they were intended to be purely personal gifts, and were intended not to go to the descendants of the legatees under the statute."

In the case at bar, section 11 of the statute in regard to descents was in force when Frederick William Rudolph made his will in 1875, and it must be presumed that he made his

will in view of the statute, and that he intended to have the statute prevail. Nothing to the contrary appears in the will. On the contrary, it would appear that it was the intention of the testator that his four children should take. At the time he made his will he had four children, because at that time Henry was alive. He says: "After the death of my said wife, Eliza A. Rudolph, ²⁷⁵ I give and devise all my real and personal estate, etc., to my beloved children as their absolute property in fee simple to be equally divided between them." The words, "to be equally divided between them," have a significance here, as indicating that the intention was to give the property to the individuals who constituted his children at that time. The case of *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704, is referred to by counsel for appellee, as indicating that the word "children" denotes immediate offspring and will not be construed to mean grandchildren, unless a strong case of intention or necessary implication requires it. But the case of *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704, has no application here, for the question is not in regard to the sense in which the word "children" is used in the will, but the question is as to the meaning of section 11 of the statute in regard to descents, which provides that the issue, if any there be of such devisee or legatee, shall take the estate devised whenever such devisee or legatee, being a child or grandchild, shall die before the testator and no provision shall be made for such contingency. No provision is made in the will in the case at bar for the contingency of the death of one of the legatees, before the death of the testator. The four children of the testator were well known to him when he made his will, and are spoken of by him as his "beloved children." It does not appear that it was necessary to mention the four children by name, in order to indicate the persons who were to be the subjects of his bounty. Certainly, justice and equity would require that the children of the deceased child should take the same interest in the property as the three children living at the death of the father would take.

In *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183, the statute of Michigan there under consideration provided that, "when a devise or legacy shall be made to any child or other relative of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the ²⁷⁶ testator, such issue shall take the estate, so given by the will, in the same manner as the devisee or legatee would have done if he had

survived the testator, unless a different disposition shall be made or directed by the will"; and it was there held that, under a will devising real estate in equal shares to the brothers and sisters of the testator, and to those of his wife, without naming them, the issue of the deceased brothers and sisters of the testator, who survived him, took the estate devised to their parents respectively, such a devise being governed by the Michigan statute above quoted. It will be observed that the Michigan statute is similar in terms to our own statute, and we see no reason why the doctrine announced in the case of *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183, should not be applied to the case at bar.

In *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183, the case of *Moses v. Allen*, 81 Me. 269, 17 Atl. 66, is referred to and commented upon, where it was held that it could make no difference, in the application of the rule, whether relatives were referred to by name, or described by their relationship to the testator.

In *Woolley v. Paxson*, 46 Ohio St. 307, 24 N. E. 599, in commenting upon the statute for the prevention of lapses, the court said: "The fact, that the child or relative is not mentioned by name, should not defeat the application of the statute where the language, applied to the facts as they were at the execution of the will, designates a child or relative as an object of the testator's bounty with as much certainty as if it were mentioned by name. . . . They were all adults and their names well known to him; and the devise that he makes is to Isaac for life, and then to his children in fee simple. This, in the light of the circumstances, must be taken in a distributive sense, and is a devise to each of Isaac's children of the fee simple in remainder, as definitely as if it had been to each by name. . . . Hence, as under a devise to a class, each member who survives the testator would, independent of the statute, take an aliquot part of the devise as ²⁷⁷ a tenant in common with the other survivors, therefore, under the statute, in such case the issue of a deceased member of the class surviving the testator must take what the deceased would have taken had he survived. Any other construction would render the statute nugatory in a large class of cases to which its provisions are by its terms directly applicable."

In *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183, it was further said: "The devisees, at the time of the execution of the will, were all known to the testator. They had matured.

The 'class' was liable to diminution only. The fact that the brothers and sisters of the testator were not named does not take them out of the statute. Indeed, under the authorities, the question 'whether a gift is one to a class does not depend upon the fact that the devisees are not named individually, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons.' Here, the body of persons was not uncertain in number. The gift was to a certain number in 'equal shares.'"

So, in the case at bar, the body of persons was not uncertain in number, because Frederick William Rudolph, at the time he made his will, had exactly four children, who were all well known to him at that time, and his gift is "to my beloved children as their absolute property in fee simple to be equally divided between them"; that is to say, the gift here, as in *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183, is to a certain number in equal shares. If the number of children had been uncertain at the time of the making of the will, and to be ascertained at a future time, so that the share of each would be dependent as to its amount upon the ultimate number of persons, a different case would be presented, but no such case is shown by the present record. See also in support of ²⁷⁸ these views the following cases: *Stockbridge*, Petitioner, 145 Mass. 517, 14 N. E. 928; *Bradley's Estate*, 166 Pa. St. 200, 31 Atl. 26; *Cheney v. Selman*, 71 Ga. 384; *Yeates v. Gill*, 9 B. Mon. 203; *Moore v. Weaver*, 16 Gray, 305; *Guitar v. Gordon*, 17 Mo. 408; *Moore v. Dimond*, 5 R. I. 121.

In *Missionary Society v. Pell*, 14 R. I. 456, the statute under consideration was as follows: "Whenever any child, grandchild, or other person, having a devise or bequest of real or personal estate, shall die before the testator, leaving a lineal descendant, such descendant shall take the estate, real or personal, as devisee or legatee, in the same way and manner as such devisee or legatee would have done in case he had survived the testator"; and it appearing there that the legatees died before the testator leaving lineal descendants, it was held that the will must be presumed to have been made in view of the statute, the court saying: "We think it must be presumed that the testator made the will in view of the statute, and that he intended to have the statute prevail unless the contrary appears.

The burden of showing the contrary is on the plaintiff, and we do not think the burden is lifted when it is made to appear that the legacies were prompted by personal regard. The fact that legacies are prompted by a personal regard for the legatees is not at all inconsistent with an intent to have them go to the descendants of the legatees in case the legatees themselves die before the testator. The plaintiff must go further and make it appear that the legacies were not only prompted by personal regard, but that they were, as he claims, intended to be purely personal gifts, i. e., that they were intended not to go to the descendants of the legatees under the statute." In the case at bar, it is said that the use of the words, "my beloved children," indicated that the legacies were prompted by a personal regard for those children, and, therefore, that it could not have been the intention of Frederick William Rudolph that the property should go to the issue of the ²⁷⁹ legatees. But we are of the opinion that, even if the words used in the will do indicate that the testator was prompted by personal regard for his children, that fact is not at all inconsistent with an intent to have the property go to the issue of the children, in case any of the devisees or legatees should die before the testator.

Inasmuch as the construction of said section 11, as applying to gifts to classes, as well as to gifts to individuals, conforms to the construction, given to similar statutes in a large majority of the states, and harmonizes with the great weight of authority upon the subject, we are inclined to hold such construction to be the correct one; and we are of the opinion that the children of Henry Rudolph, to wit, Aurelia and Corinne Rudolph, are entitled to take the same interest in the estate as their father, Henry Rudolph, would have taken, if he had not died before his father died, notwithstanding the fact that Henry Rudolph was not referred to in the will by name, but only as one of the testator's children, and as belonging to the class designated as children. The adoption of this construction gives to Aurelia and Corinne Rudolph an undivided one-fourth interest in the property, or to each of them an undivided one-eighth interest in the property. As the decree of the court below gave them nothing, it is erroneous in that respect under the views above expressed. It is correct, however, in holding that neither the widow of Henry Rudolph, nor his divorced wife, is entitled to dower, as he was not seised of any portion of the premises during his marriage with either of them.

Accordingly, the decree of the circuit court of St. Clair county is reversed and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Testamentary Gifts to a class of persons, and who are entitled to take thereunder, are discussed in the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 413-440. According to *Downing v. Nicholson*, 115 Iowa, 493, 91 Am. St. Rep. 175, 88 N. W. 1064, a statute providing that if a devisee dies before the testator his heirs inherit the property unless a contrary intent appears from the will, applies to devises to a class as well as to devises where the devisees are specifically named.

KLOSS v. WYLEZALEK.

[207 Ill. 323, 69 N. E. 863.]

HOMESTEAD—Widow's Abandonment of After Her Second Marriage.—If a widow marries and removes with her husband to his homestead, she thereby irrevocably abandons her previous homestead, though when she so removes she has an intention of returning thereto if she cannot get along with her husband. Her subsequent abandonment of her husband and his home cannot revive her right to claim her former interest. (p. 222.)

HOMESTEAD ABANDONMENT.—One Ceasing to Occupy His Homestead, with an Intention to Return or not, depending on future conditions and circumstances, loses his homestead right. (p. 222.)

HOMESTEAD—Existence of Two at the Same Time.—A party cannot have two homesteads at the same time. This rule applies to a widow who, having a homestead, marries and removes with her husband to his. (p. 223.)

HOMESTEAD—Abandonment of, Effect upon Children's Rights.—The abandonment of a homestead by a mother who is a widow terminates her children's homestead rights in the same property. (p. 223.)

H. Clay Horner, for the plaintiff in error.

Gordon & Irose, for the defendants in error.

220 **WILKIN, J.** Emanuel Wylezalek was the owner of the northwest quarter of the southwest quarter and the west fractional half of the northwest quarter of section 24, etc. He, together with his wife, Michalena, mortgaged both tracts to plaintiff in error, releasing, we assume, their right of homestead, which, however, is immaterial in the decision of this case. Afterward the husband died intestate, leaving surviving him Michalena, his widow, and six children. The widow gave

a second mortgage to plaintiff in error on the same land. She, of course, had no right in the fee at that time which she could mortgage, but thereafter two of the children died intestate and unmarried, and she inherited their undivided interest, being one-ninth thereof, which, by virtue of the last-named mortgage, with its covenants of warranty, inured to the plaintiff in error and became subject to his second mortgage. Whether the homestead right was released in that mortgage does not appear. After the death of the two children he filed a bill to foreclose both mortgages in one proceeding, and a decree of sale was rendered in pursuance thereof, under which the first piece of land above described was sold to satisfy the first mortgage and the one-ninth of the second tract was sold to satisfy the second mortgage. Plaintiff in error obtained a deed for said undivided one-ninth and then filed this bill to partition the said fractional quarter. By his bill he sets up title to the undivided one-ninth thereof in himself and to two-ninths in each of the four surviving children, their interest subject to their mother's dower. Decree for partition was rendered finding all interests as set up in the bill, but decreeing the eight-ninths owned by the children subject to a homestead right in their mother as well as dower. Commissioners were appointed to set off the ²⁰⁰ dower and homestead and make partition, but they reported that dower and homestead could not be assigned and partition made, appraising the value of the premises at three hundred dollars. The court approved their report and entered a decree ordering the land sold subject to said dower and homestead, and from that decree plaintiff in error has sued out this writ.

There is but one controversy between the parties in this court, and that is, whether or not the circuit court committed error in adjudging homestead to the surviving wife of Emanuel Wylezalek in the eight-ninths of said land and ordering the same sold subject thereto. There was, in fact, no issue in the court below on that question raised by the bill and answer, but it seems that this omission is not insisted upon in this court.

The testimony shows that the widow, after the death of her husband, remarried, and is known in this record as Mrs. Gorzney. She testified as follows: "After marrying said Gorzney I left my said homestead of my deceased husband and went to reside on a lot in Chester, Illinois, on which lot said Gorzney resided. Said lot was, and yet is, owned by said Gorzney and occupied by him as a homestead, and was so owned by him prior to our marriage. I lived with him on said lot in Chester for

about six months, when, as we could not agree, I went back to the real estate sought to be partitioned in this suit, and have resided thereon with my children ever since. I am still the wife of Stanislaus Gorzney and he still lives on said lot in Chester. My children did not live on the premises sought to be partitioned while I was living with said Gorzney. Some of my children went with me to Chester, some did not. Some remained in the country. I did not move all my things to Chester, but left some of them on the place. We moved to Chester with the intention of trying it and to see if we could get along and like it, and if we did not we could move back. We could not get along and moved back."

321 It was insisted in the court below, and is again urged here by counsel for the plaintiff in error, that upon this testimony, which was all that was introduced on that subject, the widow had abandoned whatever homestead rights she had in the premises in question, and we think the position well taken. When she married her second husband and removed with him to his homestead in Chester, she unquestionably intended to, and did, at least for the time being, abandon her home on this land. She does not claim that she did so with a purpose and intention of returning and reoccupying the old home. All that she claims is, that she went to Chester with the intention of trying it, and to see if she could get along and like it, and if not, could move back, and then says, "we could not get along and moved back." For anything appearing in her testimony she may at any time again change her mind and return to her husband's homestead and continue to live there, and there is nothing whatever in this record to show that it is not her duty, as his wife, to do so. "Where there is a removal from the homestead premises it will be taken as an abandonment, unless it clearly appears that there is the intention to return and occupy it": *Jackson v. Sackett*, 146 Ill. 646, 35 N. E. 234, and cases cited. An equivocal intention to return is not sufficient: *Cabeen v. Mulligan*, 37 Ill. 280, 87 Am. Dec. 247. In other words, a person cannot cease to occupy a homestead with the intention that he or she may or may not return, depending upon future conditions or circumstances, and still retain the homestead right.

The case of *Buck v. Conlogue*, 49 Ill. 391, is somewhat similar in its facts to the case at bar, with the distinction that it there appeared that after her second marriage Mrs. Morse (the party claiming the homestead and removing with her husband

to property owned by him in Sterling) still entertained the intention of returning with her husband to the former home in La Salle, but when that intention was to be executed did not appear, ³³³ and she had not returned at the time the action was brought in which she attempted to set up her homestead rights. We there announced the uniform holding of this court to be, "that where the husband removes from the homestead with his family and acquires another home, the right is lost"—citing *Moore v. Titman*, 43 Ill. 169, and *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247. And we further said: "From the evidence in the cause we are satisfied that there was such an abandonment by the widow as precludes her from asserting the right. Her husband's home is her home, and she cannot insist that she has not acquired a new one, and by its acquisition she lost the right of homestead."

That a party cannot, under our statute, have two rights of homestead at the same time is too well settled to need the citation of authority, and we are at a loss to perceive how the claim of Mrs. Gorzney to a homestead in this land can be sustained without violating that well-settled principle. The fact that she had returned to the premises before this proceeding was begun is, we think, unimportant. As already said, for anything appearing in this record she may at any time lawfully and with perfect right return to the home of her husband, and she does not even say that she does not intend to do so. His home being her home, and it being her duty, as his wife, to live with him, every presumption must be that she will perform her duty in that regard. If the husband should die, she could unquestionably, on the facts in this record, claim and maintain her right of homestead in the Chester property. Having an undisputed right of homestead there she cannot have it here. That her abandonment terminated the right of homestead in her children has also been repeatedly decided. Although infant children have rights in the homestead, they are necessarily under the control of their parents during the joint lives of the latter, and as the mother becomes the head of a family upon the death of the father, her abandonment of ³³³ the homestead will deprive such children of their homestead rights: *Shepard v. Brewer*, 65 Ill 383.

It is insisted, however, by counsel for defendants in error, that under his bill and the decree of the circuit court plaintiff in error cannot question the decree below in adjudging homestead. Their position is that, inasmuch as he claims by his

bill but one-ninth of the property in fee, and the decree gave him that, he has received all he asked for, or that as the homestead is decreed only against the eight-ninths he cannot complain. However plausible the contention may at first impression seem to be, we do not regard it as sound. The interests as set up in the bill, though distinct, were held by the parties in common, and, as shown by the report of the commissioners, with the homestead upon the undivided eight-ninths, could only be served by a sale of the premises. Had the court decreed the eight-ninths to the children subject only to dower, as averred in the bill, the sale might have been, and presumably, in the absence of proof to the contrary, would have been, void and the tenancy in common severed by partition. The law favors partition of land among tenants in common rather than a sale thereof and a division of the proceeds, and it is only when the land itself cannot be partitioned that a sale may be ordered. In this view of the law we think the decree of the court below erroneously adjudging homestead to Mrs. Gorzney was harmful to plaintiff in error, and therefore he has the right to complain.

The power to order a sale subject to the homestead is not involved here. That and other questions which might arise upon the record are waived by counsel and not here considered.

For the reason stated the decree of the circuit court will be reversed and the cause remanded to that court, with directions to proceed in accordance with the views herein expressed.

A Homestead is not abandoned by a temporary absence therefrom with an intention of returning: *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110; 55 N. E. 838; *Bunker v. Coons*, 21 Utah, 164, 81 Am. St. Rep. 680, 60 Pac. 549; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019. Homestead rights must be upheld unless clearly shown to have been abandoned; continued personal occupation of the premises is not essential to the preservation of the right: *Lyons v. Audry*, 106 La. Ann. 356, 87 Am. St. Rep. 299, 31 South. 38. Of course, a homestead may be abandoned by moving elsewhere and occupying other land: *House v. Caton*, 168 Mo. 288, 90 Am. St. Rep. 456, 67 S. W. 578. If the owner removes therefrom with the intention and expectation of selling it, and making his home in another place, this has been regarded as an abandonment, although he intends to return if he does not sell. *Conway v. Nichols*, 106 Iowa, 358, 68 Am. St. Rep. 311, 106 N. W. 681.

Two Homesteads cannot be held by a person at the same time: *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831. The acquisition of a new homestead elsewhere is regarded as conclusive evidence of abandonment: See the monographic note to *Taylor v. Har-*

gous, 60 Am. Dec. 610. The law tolerates but one head and one exemption for one family: *Ness v. Jones*, 10 N. Dak. 587, 88 Am. St. Rep. 755, 88 N. W. 706. And a husband and wife while living together cannot each have a separate homestead: *Rouse v. Caton*, 168 Mo. 188, 90 Am. St. Rep. 456, 67 S. W. 578.

STRONG v. DIGNAN.

[207 Ill. 385, 69 N. E. 909.]

CONSTITUTIONAL LAW—Legislation, When Special.—An Act Applying Only to Counties of a Specified Population, there being but one such in the state, is special legislation. (p. 227.)

CONSTITUTIONAL LAW—Special Legislation, Devices to Evade Constitutional Prohibitions Against.—The designation of counties as a class according to population, which makes it absolutely certain that but one county in the state can avail itself of the benefits of the act, can but be regarded as a mere device to evade the constitutional provision forbidding special legislation. (p. 228.)

CONSTITUTIONAL LAW—Special Statute Regulating the Practice in Courts of Justice, What is.—The appointment of an administrator and the mode of selecting him constitute a part of the practice in probate courts, and a statute providing for the appointment of public administrators in a single county is invalid, under a constitution prohibiting special legislation regulating the practice in courts of justice. (pp. 228, 229.)

CONSTITUTION—Classification of Counties, When Prohibited. A classification of counties by population as a basis for legislation is not valid, unless there is some reasonable relation between the situation of the counties classified and the purposes and objects to be attained. (pp. 228, 229.)

STATES OF DECEDENTS—Administrator, Right of Non-resident to Nominate.—Under a statute requiring administration to be granted to the surviving husband or wife or next of kin of the deceased, or to some person nominated by her or them, but declaring that a nonresident of the state cannot be appointed administrator, the nonresidence of the surviving husband or wife or next of kin does not disqualify him or her from nominating an administrator. (p. 230.)

CONSTITUTIONAL LAW—Statute Void in Part may be Valid as to the Residue.—Though a statute provides that in certain cases the widow or next of kin may nominate an administrator, and that in counties of a specified population the public administrator must be appointed, yet if the latter provision is unconstitutional as special legislation, it may be disregarded, and the balance of the statute given effect, and the widow or next of kin be permitted to nominate an administrator. (pp. 231, 232.)

Appeal from an order of the probate court of Cook county revoking letters of administration on the estate of Jeremiah Ahearn, deceased, and granting letters de bonis non to Peter A. Dignan. The petition for such revocation and appointment was filed by Mary Lavis, a sister of the decedent, a resident of Massachusetts. The letters revoked had been issued to the

public administrator, and their revocation was ordered on the ground that the statute under which the appointment was made, is unconstitutional. This statute is quoted in full in the opinion of the court and is therefore omitted from this statement. The public administrator appealed.

Burras & McKenzie, for the appellant.

John S. Huey, for the appellee.

³⁸⁷ MAGRUDER, J. Two questions are presented by this record: 1. Is that portion of section 18 of the administration act of this state, which is set forth in the statement, preceding this opinion, constitutional? and 2. Did Mary Lavis, sister of the deceased intestate, being a resident of Massachusetts, have the right, under the provisions of said section, to nominate a competent person to act as administrator of the estate?

Section 18 of chapter 3 of the Revised Statutes, entitled "An act in regard to the administration of estates," as amended in 1897, is as follows: "Administration shall be granted upon the goods and chattels of decedent to the surviving husband or wife, or to next of kin to the intestate, or some of them, if they will accept the same, or the court may grant letters of administration to some competent person who may be nominated to the court by either of them, but in all cases the surviving husband or wife or the persons so nominated by him or her, respectively, shall have the preference, and if none of the persons hereinbefore mentioned applies within sixty days from the death of the intestate, the county court may grant administration to the public administrator of the proper county, or to any creditor who shall apply for the same. If no creditor applies within fifteen days next after the lapse of sixty days as aforesaid, administration may be granted to any person whom the county court may think will best manage the estate; provided, that in ³⁸⁸ all counties having a population of two hundred thousand inhabitants or over, it shall be the duty of the county court to commit the administration of such estate to the public administrator of the proper county. In all cases where the intestate is a nonresident, and in all cases where the intestate is without a widow, next of kin or creditors in this state, but leaves property within the state, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over. And in all cases where any contest shall arise between the widow, heirs at law, next of kin, or creditors of the intestate, in relation to the grant of letters

of administration, and it shall appear to the court that the estate of said intestate is liable to waste, loss or embezzlement, administration to collect shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over; provided, that no administration shall, in any case, be granted until satisfactory proof be made before the county court to whom application for that purpose is made, that the person in whose estate letters of administration are requested is dead, and died intestate. And provided further, that when the heirs are resident of this state, and the estate is solvent and without minor heirs, and it is desired by the parties in interest to settle the estate without administration, this law shall not apply. And provided further, that no nonresident of this state shall be appointed administrator, and no nonresident shall be appointed or act as executor": 4 Starr and Curtis' Annotated Statutes, 32.

1. The third sentence of section 18, as above quoted, is claimed to be unconstitutional as being local or special legislation. The provisions of the constitution, which it is said to contravene, are section 22 of article 4, and section 29 of article 6 of the constitution: 1 Starr and Curtis' Annotated Statutes, 2d ed., 134, 158. Section 22, ³²⁰ so far as it is necessary to quote the same in the present case, provides that "the general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . regulating the practice in courts of justice. . . . In all other cases where a general law can be made applicable, no special law shall be enacted." The portion of said section 29 which is applicable here is as follows: "All laws relating to courts shall be general and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." The sentence in question, in providing that "in all cases where the intestate is a nonresident, and in all cases where the intestate is without a widow, next of kin or creditors in this state, but leaves property within the state, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over," is certainly special legislation, because it can only apply to Cook county, inasmuch as Cook county is the only county in the state,

which has a population of two hundred thousand inhabitants. We have held that a designation of counties as a class according to a minimum population, "which makes it absolutely certain but one county in the state can avail of the benefits of the law applicable to such class, cannot but be regarded as a mere device to evade the constitutional provision forbidding special legislation": *Devine v. Commissioners of Cook County*, 84 Ill. 590; *Cummings v. City of Chicago*, 144 Ill. 563, 33 N. E. 854. The third sentence of said section 18, being the one here under consideration and quoted in the statement preceding this opinion, in excepting Cook county from its operation, rests upon no just or reasonable basis of classification. There is no reason why administration should be granted to the public ³⁹⁰ administrator in Cook county, and not to the public administrator in any other county, where the intestate is a nonresident, or dies without a widow, next of kin or creditors in Illinois, and leaves property within Illinois. If, in such case, it is proper to select the public administrator as the person to administer upon the estate in Cook county, it would be equally proper to select the public administrator to administer upon such an estate in any other county.

The appointment of an administrator, and the mode of selecting an administrator, certainly constitute a part of the practice in probate courts, which are courts of justice. A law, which provides a different mode of appointment or selection, for a county having a population of two hundred thousand inhabitants or over, from that which provides for such appointment or selection in counties having a less number of inhabitants, is a special law regulating the practice in courts of justice. It makes the practice as to the mode of appointing and selecting administrators different in one county from what it is in other counties, without resting such difference upon any reasonable basis of classification. Under section 29 of article 6 of the constitution above quoted, the "proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." This provision of the constitution is violated, where one mode of appointing and selecting administrators prevails in the probate court of one county, and a different mode prevails in the probate courts, or county courts having probate jurisdiction, of the other counties. While it is true that a classification of the counties of the state by population, as a basis for legislation, is valid, yet all legislation on that subject

must be by uniform and general laws. There must also be some reasonable relation between the situation of counties classified and the purposes and objects to be attained. ³⁹¹ In other words, as has been said, "there must be something in the nature of things which in some reasonable degree accounts for the division into classes": *People v. Martin*, 178 Ill. 611, 53 N. E. 309; *Knopf v. People*, 185 Ill. 20, 76 Am. St. Rep. 17, 57 N. E. 22; *People v. Board of Supervisors*, 145 Ill. 288, 56 N. E. 1044; *People v. Knopf*, 183 Ill. 410, 56 N. E. 155. It is difficult to conceive of anything in the nature of things, which, in any reasonable degree, accounts for the division of counties into classes, having populations exceeding two hundred thousand inhabitants and having populations less than two hundred thousand inhabitants, so as to make it proper to appoint the public administrator in counties of the former class and some other person in counties of the latter class, where the intestate dying is a nonresident, or has no widow, or next of kin, or creditors in this state.

We are, therefore, of the opinion that the probate court of Cook county decided correctly in holding that the clause of section 18 here under consideration is unconstitutional, as being special legislation. A general law, applicable to all the counties in the state, could as well have been passed, as the special law here attacked as unconstitutional.

2. The next question is, whether or not the nonresident sister of the deceased intestate, Jeremiah Ahearn, had the right to nominate to the probate court a competent person to act as administrator. Mary Lavis, the sister, did nominate the appellee to the probate court to be so appointed, and the probate court appointed appellee in accordance with her nomination.

Section 18 provides that "administration shall be granted upon the goods and chattels of decedent to the surviving husband or wife, or to next of kin to the intestate, or some of them, if they will accept the same, or the court may grant letters of administration to some competent person, who may be nominated to the court by either of them," etc. The nomination of appellee was made within sixty days after the death of decedent, such ~~was~~ being the time required by the statute. The words, "who may be nominated to the court by either of them," refer back "to the surviving husband or wife or to next of kin to the intestate." The next of kin to the intestate can nominate a competent person to the probate court to act as administrator. Here, Mary Lavis, the decedent's sister, was one

of the next of kin to the intestate. It is true that she was a resident of the state of Massachusetts, and not of Illinois, but the language of the first sentence of section 18 is broad enough to include a person occupying the position of next of kin who is a nonresident, as well as a person who is a resident. It is true, also, that, in a subsequent part of the section, no person who is not a resident of the state can be appointed administrator; but there is no statement anywhere in the section that a nonresident next of kin may not nominate a person to act as administrator, provided such person is a resident of Illinois. The reasons which would militate against the appointment of a nonresident as administrator would not apply to the selection of a resident administrator by a nonresident kinsman. The court could not call a nonresident administrator to account, as could be done in the case of a resident administrator, nor could the court exercise over a foreign administrator the same degree of control in the management of the estate, as it could exercise in the case of a resident administrator. But whatever advantage would be secured to the estate by the selection of a resident administrator would be gained, as well when such resident administrator, if otherwise competent, was nominated by a nonresident kinsman of the deceased, as when he was nominated by a resident kinsman. In other words, it could make no difference in the character of the administration, whether the person, nominating the administrator, was a resident of the state or not, provided the administrator was a resident of this state and a competent person to act.

³⁹³ In *Branch v. Rankin*, 108 Ill. 444, this court had under consideration the construction of section 46 of the administration act, which provides that: "Whenever any person dies seised or possessed of any real estate within this state, or having any right or interest therein, has no relative or creditor within this state, who will administer upon such deceased person's estate, it shall be the duty of the county court, upon application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county"; and it was there held that the words, "any person interested," were not limited to a person residing in this state, but were general and applicable to a nonresident creditor, it being there said: "This section, in its language, fully covers the present case. It is said, 'any person interested' means such a person residing in this state; but there is no such restriction

to be found in the language of the section—the words are general, with no limitation in this respect.”

In *Estate of Cotter*, 54 Cal. 215, it was held that the surviving husband or wife of a deceased person, though incompetent to serve on account of nonresidence, nevertheless was entitled to nominate a suitable person for administrator.

It has been held in North Carolina that, where the next of kin reside abroad, the court will grant administration to the nominee of such next of kin: *Smith v. Munroe*, 1 Ired. (23 N. C.) 345; *Little v. Barry*, 94 N. C. 433.

It is true that the third sentence of section 18 provides that in all cases where the intestate is without a widow, next of kin or creditors in this state, but leaves property within this state, administration shall be granted to the public administrator only when such county contains a population of two hundred thousand, or over. But the third sentence of the section makes no reference to the nomination to the probate court of any competent person to act as administrator. Although ³⁸⁴ the provision is that, when an intestate dies without a widow, next of kin or creditors in this state, leaving property here, administration shall be granted to the public administrator, yet there is no provision that, if the intestate dies without a widow, next of kin or creditors in this state, and no competent person is nominated by the next of kin, the public administrator is to act. In other words, the provision, that a competent person may be nominated to the court by a non-resident next of kin, would remain and be applicable to all the counties of the state, including Cook county, even though the third sentence of the section were eliminated. As the third sentence now stands, and if it were permitted to remain as a part of the section, it would involve and imply an exception, so far as the nomination of an administrator to the court by a nonresident next of kin is concerned. If the third sentence had provided that, in all cases where the intestate is without a widow, next of kin or creditors in this state, and where no next of kin, either resident or nonresident, nominates a person to act as administrator to the probate court, then a different question would arise, but such is not the language of the section.

We are, therefore, of the opinion that, notwithstanding the elimination of the third section as being unconstitutional, the clause, which authorizes a next of kin, whether resident or

nonresident, to nominate an administrator to the probate court, remains and is valid.

Taking this view, that is, that the nonresident sister had a right to nominate the administrator, the probate court of Cook county revoked the letters, issued to the public administrator, and appointed the appellee. We think that this action of the probate court was correct and authorized by the language of the section.

Accordingly, the judgment or order of the probate court is affirmed.

Mr. Justice Wilkin, dissenting.

Special and Class Legislation is discussed in the monographic note to *Sanitary District v. Ray*, 93 Am. St. Rep. 106-113; *State v. Ellet*, 21 Am. St. Rep. 780-789. Differentiations and classifications, to be upheld, must be reasonable and based upon real differences in the situation, condition, and tendencies of things: *State v. Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887. As to the validity of classifications of municipalities on the basis of population, see *Murray v. Board of Commrs.*, 81 Minn. 359, 83 Am. St. Rep. 379, 84 N. W. 103; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175; *Knapf v. People*, 185 Ill. 20, 76 Am. St. Rep. 17, 57 N. E. 22; *Wanser v. Hoot*, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449. And as to the validity of a classification that applies only to one municipality, see *State v. Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818; *Boorum v. Connelly*, 66 N. J. L. 197, 88 Am. St. Rep. 469, 48 Atl. 955; *State v. Jones*, 66 Ohio St. 453, 90 Am. St. Rep. 592, 64 N. E. 424.

A Statute may be Void in Part and valid as to the remainder: *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 93 Am. St. Rep. 431, and cases cited in the cross-reference note thereto. It is otherwise, however, when the valid and invalid parts are so intimately connected and mutually dependent as to warrant the belief that the legislature intended them as a whole: *Ballentine v. Willey*, 3 Idaho, 496, 31 Pac. 994, 95 Am. St. Rep. 17, and cases cited in the cross-reference note thereto; *State v. Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887.

HERSCHBACH v. COHEN.

[207 Ill. 517, 69 N. E. 932.]

RES JUDICATA.—Parol Evidence is Admissible to show what was involved in the issues made in a trespass suit and what actually came into question upon the trial for the purpose of proving that the title or the boundaries was the question tried and determined therein. (p. 234.)

RES JUDICATA.—A Judgment in Favor of the Defendant in an Action of Trespass *quare clausum fregit* wherein the defense *liberum tenementum* was pleaded is conclusive against plaintiff's title in a subsequent action of ejectment, if, in the first action, the question tried was the title of the property or its boundaries. (pp. 234, 236.)

TRESPASS.—Questions Involved in Actions of.—A plea of *liberum tenementum* is proper in an action of trespass *quare clausum fregit*, and it admits such possession in the plaintiff as would enable him to maintain an action against a wrongdoer, and asserts a freehold in the defendant with a right to the immediate possession as against the plaintiff. (p. 234.)

TRESPASS.—Pleadings in Action of, When Tender an Issue of Title.—An allegation in a complaint that the defendant destroyed timber growing upon certain lands of the plaintiff amounts to an averment that the plaintiff is the owner of such lands. (pp. 238, 239.)

Ejectment for certain lands. Judgment in favor of the defendant on the ground that the title had been determined to be in him in a preceding action of trespass *quare clausum fregit* between the same parties. The plaintiff appealed.

R. E. Sprigg and A. E. Crisler, for the appellant.

H. Clay Horner, for the appellee.

⁵²⁰ **MAGRUDER, J.** The defense, made by the appellee upon the trial below, was that the judgment in the trespass suit between the same parties was *res judicata* as to the title involved in this suit. The trial court sustained the defense, so ⁵²¹ made by appellee, and entered judgment accordingly. The question of law, presented by the record, is this: If, in an action of trespass *quare clausum fregit*, the defense pleaded is *liberum tenementum*, can the judgment therein rendered be set up as *res judicata*, when an attempt is afterward made to establish title in another proceeding between the same parties, the close described in the second action being the same as that described in the first?

It appears from the statement of facts preceding this opinion that, in the trespass suit, the plea of *liberum tenementum* was filed. It also appears from the testimony that, upon

the trial of the trespass suit—which was brought to recover damages for the cutting of timber upon the land claimed by the appellant—the defendant therein, the present appellee, did not deny the cutting of the timber, but that the object of the evidence in the trespass suit was to ascertain whether the timber cut was cut on the land of the plaintiff in that suit, the present appellant, or upon the land of the defendant in that suit, the present appellee. It appears, therefore, that the main issue tried in the trespass suit was as to the ownership of the same portion of the surveys as is here in controversy, or, perhaps, as to the location of the western boundary line of the two surveys, owned by the present appellant.

It is not necessary to say, nor do we so hold, that the judgment rendered in the trespass suit is necessarily conclusive as to what appears from the record, but it may be shown by parol, and it has been here shown by parol, what was involved in the issues made by the pleadings in the trespass suit, and what actually came in question upon the trial of that suit. This being so, we see no reason why the plea of *res judicata* was not a good defense, and why the action of the trial court in sustaining it was not correct.

We have held that the plea of *liberum tenementum* is a proper plea in an action of trespass *quare clausum fregit*, 523 and that it is error to instruct the jury to disregard the same when pleaded; that the plea, as one of confession and avoidance, in legal effect admits such a possession in the plaintiff as would entitle him to maintain an action against a wrongdoer, and asserts a freehold in the defendant with a right to immediate possession as against the plaintiff: *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 56 Am. Rep. 133, 3 N. E. 272. In *Dean v. Comstock*, 32 Ill. 173, this court, speaking through Mr. Justice Breese, said (p. 179): "Trespass being a possessory action, it is not at all necessary that the right should come in question. But if it does come in question, as it did in this case, by the plea of *liberum tenementum*, and the defendant has shown, as he did show, that he owned the premises in fee, he cannot, on any principle of law with which we are acquainted, be rendered responsible to a person having neither a right to the property nor to the possession."

We have held that, where in an action of trespass *quare clausum fregit* the defense pleaded is *liberum tenementum*, the judgment rendered upon the issue thereby made will not be regarded as conclusive, yet it may be shown by parol evidence,

or otherwise, that the question of title was actually tried and passed upon in the action of trespass; and that such a judgment is necessarily conclusive as to what appears from the record, or is shown by parol to have been involved in the issues, made by the pleadings in the suit, and to have actually come in question on the trial: *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207; *Rhoads v. City of Metropolis*, 144 Ill. 580, 36 Am. St. Rep. 468, 33 N. E. 1092.

If, in an action of trespass *quare clausum fregit* to recover damages for the cutting of timber upon the plaintiff's land, the plea is the general issue, or not guilty, and the defendant denies that he cut the timber, then the issue is one of fact, presented to the jury, as to whether or not the defendant did cut the timber, and as to how much the defendant should pay as damages for the timber so cut. In the case of such an issue in the action of ⁵²³ trespass, the judgment of course decides nothing as to title. If, however, the defendant in the action of trespass, so brought, admits that he cut the timber, but claims that he had the right to do so because the land was his own land, then an issue is made as to the ownership of the land. The ownership of the land must be determined, in order to decide whether the defendant had the right to cut the timber or not. In the case of such an issue being made the question of ownership or title is directly involved, and where the testimony shows that it was so involved, we see no reason why the judgment rendered cannot be pleaded as *res judicata* in any subsequent proceeding between the same parties, involving the title to the same land. In *Hawley v. Simons*, 102 Ill. 115, we said (p. 118): "A judgment at law, whether in an ejectment suit or in some other form of action, is conclusive on the parties upon all questions, titles and rights involved in the litigation and passed upon by the court, which the court had power and jurisdiction to hear and determine, and nothing more; and whenever the same questions or the same rights or titles are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them." In the case at bar, the parties in the trespass suit were exactly the same parties as the parties in this ejectment suit, and the issue, as has already been shown, in the trespass suit was the same as the issue here, to wit, the ownership of the eighteen and twenty-four hundredths acres of ground between the two sloughs, mentioned in the statement preceding this opinion. The appellant,

plaintiff below, "admitted that the land sued for in this case is the same land that was involved in an action of trespass commenced by Mr. Herschbach, the plaintiff, against Mr. Cohen, the defendant." This disposes of the contention, made by the appellant, that a judgment in trespass *quare clausum fregit*, where the issue relates only to a particular spot of the premises described ⁵²⁴ in the declaration without evidence as to the exact locality of the trespass, cannot conclude either party as to the question of title: 2 Waterman on Trespass, sec. 1119. In the case at bar, the evidence does show the exact locality of the trespass, not only by virtue of the admission above set forth, but by reason of the oral testimony, which shows that the timber was cut on the land between the two sloughs, that is to say, the eighteen and twenty-four hundredths acres. It follows that the trespass is exactly located, as having occurred upon the eighteen and twenty-four hundredths acres here involved.

Even if the question involved in the trespass suit was merely a question of the true boundary between the land of the appellant and the land of the appellee, yet the evidence shows that that question was decided in the trespass suit in favor of the present appellee; and the judgment in the trespass suit must be regarded as *res judicata* as to the question of boundary. In *Mueller v. Henning*, 102 Ill. 646, where a decree, on a bill to correct a mistake in the description of land in a deed, found that the place at which the survey was commenced was not the correct one, but that the survey should have commenced at another point, it was held that, in an action of ejectment between the parties, the question of boundary was *res judicata*, and the decree was conclusive upon them as to its correctness. A judgment, in an action brought solely to determine a boundary line, although brought in the form of an action of trespass to try title, is *res judicata*: 24 Am. & Eng. Ency. of Law, 2d ed., 825, and cases recited in note.

"Where, in an action of trespass, the title is actually in issue, and that is a part of that upon which the judgment is based, and the plaintiff prevails, it is conclusive as against an action of ejectment": 21 Am. & Eng. Ency. of Law, 244, 245, and cases in notes.

Freeman in his work on Judgments (vol. 1, 4th ed., sec. 311), after referring to the conflict among the decisions in the various states upon this subject, says: ⁵²⁵ "The title cannot in some of the states be regarded as in issue except upon a special plea of soil or freehold, or some other equivalent pleading; but

when such plea is interposed, or when without any special plea the rules of practice in the state permit the title to be received in evidence and to be considered by the court or jury, and it is in fact received, considered and made the basis of a verdict and judgment, then that is as conclusively settled as if it had been drawn in question and decided in some other action." This language applies exactly to the course of decision in this state, and to the facts in the case at bar. Here, a special plea of soil or freehold, to wit, the plea of liberum tenementum, was filed in the action of trespass, and the proof shows that the title was received in evidence in the action of trespass, and considered, and made the basis of the verdict and judgment therein.

Waterman, in his work on Trespass (vol. 2, sec. 1119), speaking of the action of trespass *quare clausum fregit*, says: "Yet the title may be litigated as a matter directly involved in the issue, and when that question is adjudicated and a judgment rendered in this form of action by a court of competent jurisdiction, the judgment will conclude the parties, and operate as an estoppel if the matter appears on the face of the record, or as evidence conclusive in relation to the title, in any subsequent litigation of the matter between them. But when the defendant in ejectment seeks to show title in himself to the premises in dispute by means of the estoppel, created by the recovery in the former action, he is bound to show affirmatively that the title to those premises was passed upon in that action. When it has been apparently necessary to pass upon that question before the judgment could have been given, the record will be *prima facie* evidence for the defendant, and will be conclusive as an estoppel against the plaintiff, unless evidence has been given on his part to contradict and overcome this presumption." 520 Wells, in his work on *Res Adjudicata* and *Stare Decisis*, section 287, says: "Where a plaintiff brings an action of trespass *quare clausum fregit*, and the defendant under the general issue litigates the question of title, and the verdict on that issue is rendered against him, and afterward the plaintiff brings a direct action to try the title, the former judgment will be conclusive, and the defendant will not be allowed to dispute the title."

Counsel for appellant lay great stress upon the case of *Keyser v. Sutherland*, 59 Mich. 455, 26 N. W. 865, where it was held by the supreme court of Michigan, that a judgment in trespass cannot be a bar to a subsequent ejectment suit for the same premises, even though the parties in both suits are the

plaintiff below, "admitted that the land sued for in this case is the same land that was involved in an action of trespass commenced by Mr. Herschbach, the plaintiff, against Mr. Cohen, the defendant." This disposes of the contention, made by the appellant, that a judgment in trespass *quare clausum fregit*, where the issue relates only to a particular spot of the premises described ^{§24} in the declaration without evidence as to the exact locality of the trespass, cannot conclude either party as to the question of title: 2 *Waterman on Trespass*, sec. 1119. In the case at bar, the evidence does show the exact locality of the trespass, not only by virtue of the admission above set forth, but by reason of the oral testimony, which shows that the timber was cut on the land between the two sloughs, that is to say, the eighteen and twenty-four hundredths acres. It follows that the trespass is exactly located, as having occurred upon the eighteen and twenty-four hundredths acres here involved.

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Freeman in his work on Judgments (vol. 1, 4th ed., sec. 311), after referring to the conflict among the decisions in the various states upon this subject, says: ^{§25} "The title cannot in some of the states be regarded as in issue except upon a special plea of soil or freehold, or some other equivalent pleading; but

when such plea is interposed, or when without any special plea the rules of practice in the state permit the title to be received in evidence and to be considered by the court or jury, and it is in fact received, considered and made the basis of a verdict and judgment, then that is as conclusively settled as if it had been drawn in question and decided in some other action." This language applies exactly to the course of decision in this state, and to the facts in the case at bar. Here, a special plea of soil or freehold, to wit, the plea of *liberum tenementum*, was filed in the action of trespass, and the proof shows that the title was received in evidence in the action of trespass, and considered, and made the basis of the verdict and judgment therein.

Waterman, in his work on Trespass (vol. 2, sec. 1119), speaking of the action of trespass *quare clausum fregit*, says: "Yet the title may be litigated as a matter directly involved in the issue, and when that question is adjudicated and a judgment rendered in this form of action by a court of competent jurisdiction, the judgment will conclude the parties, and operate as an estoppel if the matter appears on the face of the record, or as evidence conclusive in relation to the title, in any subsequent litigation of the matter between them. But when the defendant in ejectment seeks to show title in himself to the premises in dispute by means of the estoppel, created by the recovery in the former action, he is bound to show affirmatively that the title to those premises was passed upon in that action. When it has been apparently necessary to pass upon that question before the judgment could have been given, the record will be *prima facie* evidence for the defendant, and will be conclusive as an estoppel against the plaintiff, unless evidence has been given on his part to contradict and overcome this presumption." 520 Wells, in his work on *Res Adjudicata* and *Stare Decisis*, section 287, says: "Where a plaintiff brings an action of trespass *quare clausum fregit*, and the defendant under the general issue litigates the question of title, and the verdict on that issue is rendered against him, and afterward the plaintiff brings a direct action to try the title, the former judgment will be conclusive, and the defendant will not be allowed to dispute the title."

Counsel for appellant lay great stress upon the case of *Keyser v. Sutherland*, 59 Mich. 455, 26 N. W. 865, where it was held by the supreme court of Michigan, that a judgment in trespass cannot be a bar to a subsequent ejectment suit for the same premises, even though the parties in both suits are the

same, upon the ground that a party is entitled to but one trial, as a matter of right, in Michigan in an action of trespass, while in ejectment, upon the payment of costs of the first trial, he has an absolute right to another trial; and it is said that the statute, allowing a second trial in an action of ejectment upon the payment of costs, is substantially the same in Illinois as in Michigan. What is said upon this subject in *Keyser v. Sutherland*, 59 Mich. 455, 26 N. W. 865, is mere dictum, as it appeared that the title was not passed upon in the action of trespass. But, independently of this consideration, we are not disposed to accept the reasoning of the Michigan court upon this subject as sound. The statute of Illinois provides that at any time within one year after a judgment, either upon default or verdict, in the action of ejectment, the party, against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new trial granted in the cause: 2 Starr and Curtis' Annotated Statutes, 2d ed., 1621. This is so, no matter what the defense may have been upon the first trial of the cause. In the Michigan decision referred to, the court says that it will not allow the right to two trials in ejectment to be taken away by allowing one trial in trespass to be ~~set~~ used as a former adjudication. We see no reason why the result here deplored should necessarily follow. The fact that, upon the first trial of the ejectment suit, the judgment in the trespass suit is pleaded as *res judicata*, does not deprive the defeated party of a second trial in the ejectment suit. There might be other defenses upon the first trial of the ejectment suit equally as good as the defense of *res judicata*, and yet, if the defeated party chooses to pay up the costs within the time specified, and take his chances upon a new trial, he has a right to do so. The character of the defense made on the first trial does not deprive him of his right to a new trial. Any defense made upon the first trial, if good and valid and supported by the evidence, whether the defense of *res judicata* or something else, would lessen the probability of the defeated party's success upon a second trial if the same defense is set up in the second trial, but in no way interferes with his right to such second trial.

It is said by counsel for appellant that the declaration in the action of trespass does not aver that the plaintiff therein was the owner of the premises. The declaration in the trespass suit avers that the defendant destroyed the timber of the

plaintiff, then growing "upon certain lands of the plaintiff." This averment is the usual one, which is made in declarations in trespass *quare clausum fregit*. The cases in Illinois, referred to by counsel for appellant, which require the plaintiff in actions, brought to recover damages for cutting timber, to aver that he is the owner of the land, upon which the timber is cut, were cases arising under a special statute, imposing a penalty for cutting timber. This statute, which was entitled "An act to prevent trespassing by cutting timber," provided that any person who cuts trees growing upon land belonging to another person without first having obtained permission so to do from the owner of such land should forfeit and pay for each tree a certain penalty therein named; and it was held in the cases referred ~~to~~ to by counsel, that, in an action of debt brought by the owner to recover the penalty given by the statute, he must aver in the declaration that he was the owner: *Wright v. Bennett*, 3 Scam. (Ill.) 258; *Whiteside v. Divers*, 4 Scam. (Ill.) 336; *Jarrot v. Vaughn*, 2 Gilm. (Ill.) 132. These decisions, being founded upon a special statute, have no application in the present case.

For the reasons above stated, the judgment of the circuit court is affirmed.

The Rules of Res Judicata are stated in *Garden City v. Merchants' etc. Nat. Bank*, 65 Kan. 345, 93 Am. St. Rep. 284, 69 Pac. 525; *White v. Ladd*, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739; *La Follett v. Mitchell*, 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916; *Hurxthal v. Boom Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520. Judgments in ejectment as *res judicata* are discussed in *Sanford v. Herron*, 161 Mo. 176, 61 S. W. 839, 84 Am. St. Rep. 708, and cases cited in the cross-reference note thereto. It has been held that if in an action of *trespass quare clausum fregit* against a city for removing soil from an alleged street, the defendant pleaded that the locus in quo is a public highway, that the locus in quo is the property of the defendant, and the statute of limitations, and evidence was offered by both parties on all the issues, a general verdict in favor of the defendant is, in a subsequent action between the same parties, *prima facie* evidence that all the issues were found in favor of the defendant: *Rhoades v. Metropolis*, 144 Ill. 580, 36 Am. St. Rep. 468, 33 N. E. 1092. On the proof of *res judicata*, see the monographic note to *Fahy v. Esterly Machine Co.*, 44 Am. St. Rep. 562-572. When the plea of *res judicata* is set up as a defense, oral evidence has been held admissible to show the facts upon which the former judgment was founded: *State v. Meek*, 112 Iowa, 338, 84 Am. St. Rep. 342, 84 N. W. 3.

KELLYVILLE COAL COMPANY v. HARRIER.

[207 Ill. 624, 69 N. E. 927.]

CONSTITUTIONAL LAW—Statutes Denying Right of Setoff as Against Employers.—A statute denying to employers the right of setoff or of counterclaim in actions brought by their employes to recover for wages, but exempting from its provisions the business of farmers or farm laborers and servants, is unconstitutional in discriminating against employers who are not farmers. The provision respecting them cannot be disregarded for the purpose of sustaining the statute. (p. 242.)

H. M. Steely, for the appellant.

W. T. Gunn, for the appellee.

⁶²⁶ CARTWRIGHT, J. Appellee brought this suit before a justice of the peace of Vermilion county, against appellant, to recover for wages due him as a miner. On appeal to the circuit court a jury was waived and the cause was submitted to the court for trial. There were no disputed facts. Defendant owed plaintiff for wages and plaintiff was indebted to defendant for groceries and household supplies purchased by him. The only controversy was as to the right of defendant to set off the amount due from plaintiff against his demand for wages, defendant claiming that right and admitting that it owed plaintiff the balance. Plaintiff claimed the right to recover the whole ⁶²⁷ amount of wages earned, and disputed the right to set off against the same the amount due from him to defendant.

Plaintiff's claim was based on sections 3 and 4 of an act entitled, "An act to provide for the payment of wages in lawful money, and to prohibit the truck system, and to prevent deductions from wages except for lawful money actually advanced," in force July 1, 1891: Laws 1891, p. 212. The first and second sections of said act were declared in the case of *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, to be repugnant to the constitution of the state, and void. Those sections prohibit an employer engaged in mining or manufacturing from keeping or being interested in a store for furnishing supplies, tools, clothing, provisions or groceries to his employes, and declare every person, company, corporation or association violating that prohibition to be guilty of a misdemeanor and liable to a fine. Sections 3 and 4 are as follows:

"Sec. 3. It shall be unlawful for any person, company, corporation or association, employing workmen in this state, to

make deductions from the wages of his, its or their workmen, except for lawful money, checks or drafts actually advanced without discount, and except such sums as may be agreed upon between employer and employé, which may be deducted for hospital or relief fund for sick or injured employés.

"Sec. 4. Any deductions made from the wages of any workman in this state, except as provided in section three (3) of this act, may be recovered in any appropriate action before any court of competent jurisdiction, together with such reasonable attorney's fee as the court in its discretion shall think proper, and no offset or counterclaim of any kind shall be allowed in such action or proceeding."

On the trial of this case defendant submitted to the court a number of propositions of law asking the court to hold that defendant, under the law and its charter, has a legal right to keep a store and furnish and sell to ^{and} its employés supplies, tools, clothing, provisions, groceries, and such other articles as its employés see fit to purchase from it, and that so far as the act in question attempts to deprive defendant of the right to set off against the demand of plaintiff for wages any demand owing by plaintiff to defendant for groceries, merchandise or other articles purchased at its stores, when it allows such right of setoff to farmers as against their employés, is repugnant to the constitution of the United States and the constitution of the state of Illinois. The court held the first proposition to be the law, to the effect that the defendant had the right to keep the store and sell such goods to its employés as they choose to purchase, but refused to hold that the third and fourth sections were in violation of the constitution, or that the act was rendered unconstitutional by the provision that nothing contained in it should be construed to include the business of farmers or farm laborers or servants. The court held that an employer may sell goods to an employé, but if he is a miner or manufacturer he cannot lawfully secure payment by way of setoff. Accordingly the court found the issues for the plaintiff and entered judgment in his favor for the whole amount of his demand, which was twenty-one dollars and twenty-seven cents, and costs of suit, together with twenty dollars attorney's fees, as provided by said section 4.

It is, of course, conceded that sections 1 and 2 of the act are in violation of the constitution, but it is insisted that sections 3 and 4 should be upheld. We do not see how that can be done, and must hold that the whole act is void. Section 6

of the act is as follows: "Nothing in this act shall be so construed as to include the business of farmers, or farm laborers, or servants." A large proportion of the employers of labor in the state are farmers, and the valuable right of setoff is allowed to them while it is denied to the miner or manufacturer. A farmer whose employé is indebted to him, if sued by the employé, may set off the amount of such indebtedness ⁶²⁰ against the demand of the employé for wages, and the recovery can only be for the balance due. The employé of a miner or manufacturer is not limited to the recovery of the balance due him, but may have a judgment for the whole amount of his wages, and the employer is relegated to a separate action at law to collect what is justly due him, if he can. By this discrimination the miner and manufacturer are deprived of the equal protection of the laws guaranteed to them by the federal constitution. It is too plain for argument that the exemption of farmers, farm laborers and servants was a material consideration with the legislature in the passage of the act, and that it would not have been enacted if they had not been excluded in its operation and protected from its provisions. The whole act is therefor void: *Connelly v. United States Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431; *Mathews v. People*, 202 Ill. 389, 95 Am. St. Rep. 241, 67 N. E. 28.

Furthermore, it is not within the power of the legislature to provide that one who is possessed of property may not sell it to another and agree with the purchaser to work for him in payment for it. The privilege of contracting is both a liberty and a property right: *Frorer v. People*, 141 Ill. 171, 31 N. E. 395. The laborer has a right to contract with respect to his labor and to make such terms and agreements as may be mutually agreeable to him and his employer. They may agree that the labor of one shall be paid for with the property of the other, or the laborer may agree to work in payment of a pre-existing debt, and in either case the rights of the parties are free from interference by the legislature: *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624.

The judgment of the circuit court is reversed and the cause is remanded to that court for further proceedings not inconsistent with the views herein expressed.

A Statute prohibiting the assignment of future wages has been upheld as constitutional: *International Text-book Co. v. Weissinger*, 160 Ind. 349, 98 Am. St. Rep. 334, 65 N. E. 521. So has a statute limiting the number of hours per day which certain classes of em-

ployés may labor: See the monographic note to Booth v. People, 78 Am. St. Rep. 245; State v. Buchanan, 29 Wash. 602, 92 Am. St. Rep. 930, 70 Pac. 52. Compare Cleveland v. Clements Bros. Construction Co., 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885. A minimum wage law has been pronounced unconstitutional: Street v. Varney Elec. Supply Co., 160 Ind. 338, 98 Am. St. Rep. 325, 66 N. E. 895. So has a statute forbidding an employer to impose a fine, or withhold any part of the wages of an employé, for an imperfection in the product of his labor: Commonwealth v. Perry, 155 Mass. 117, 51 Am. St. Rep. 533, 28 N. E. 1126. And so has a statute forbidding an employer from discharging an employé because he is a member of a labor organization: State v. Kreutzberg, 114 Wis. 530, 91 Am. St. Rep. 934, 90 N. W. 1098. A statute in effect prohibiting an employé from assuming the risk of hazardous appliances is constitutional: Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531. So, also, is a statute changing, as to railroad and other corporations, the common-law liability of employers for the acts of coemployés: Pittsburgh etc. Ry. Co. v. Montgomery, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582; Callahan v. St. Louis etc. R. R. Co., 170 Mo. 473, 94 Am. St. Rep. 746, 71 S. W. 208. Compare Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 95 Am. St. Rep. 476, 34 South. 533. On the protection of corporations from special and hostile legislation, see the monographic note to St. Louis etc. Ry. Co. v. Paul, 62 Am. St. Rep. 165-182.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

STATE v. WALTERS.

[31 Ind. App. 77, 66 N. E. 182.]

LIMITATION OF ACTION Against a Recorder for Negligence.—If a recorder registers a mortgage so that the record does not constitute notice, neither he nor the mortgagee becoming aware of the error until after the execution of a second mortgage, a cause of action accrues against him at the time of the erroneous registration. (p. 247.)

LIMITATION OF ACTIONS—Concealment, What is not.—Neither the ignorance of a person of his right to bring an action, nor the mere silence of the person liable to the action, prevents the running of the statute of limitations. (p. 248.)

J. W. McGreevy and G. E. Ross, for the appellant.

J. C. Nelson, Q. A. Myers and D. D. Fickle, for the appellees.

78 **BLACK, P. J.** This was an action commenced February 10, 1900, on the official bond of Henry Hubler, recorder of Cass county. The proceeding was commenced as a claim against the estate of the principal, deceased, and in the circuit court the sureties were brought in as additional defendants. December 7, 1889, one William Murphy executed his mortgage on certain land in that county to the relatrix to secure the payment of his promissory note for six hundred and eighty-three dollars and two cents, payable to her two years from that date. On the same day she presented the mortgage to the intestate, then county recorder, for recording, paying him the recorder's fee therefor. In recording the mortgage, the recorder negligently failed to copy correctly the description of the land, so

that instead of a certain part of the northwest quarter of a specified section, as described in the mortgage, the record of the mortgage described a like part of the northeast quarter of the same section. He returned the mortgage to the relatrix, having indorsed thereon the time of the receipt of the mortgage for record, and the words: "Recorded in record 14, page 240," signed by him as recorder of that county. When the recorder delivered the mortgage to the person who called for it, a month or two after it was left for record, in answer to the question of that messenger as to whether it would be necessary to compare the mortgage and the record said: "No; that is all ⁷⁹ right." The land so mortgaged to the relatrix was again, March 2, 1896, mortgaged by Murphy to secure the payment of a note for fifteen hundred dollars to the Mortgage and Trust Company of Pennsylvania, by which this mortgage was taken without notice of the former mortgage. The second mortgage was duly recorded. In 1897 the relatrix brought suit against Murphy and said company to foreclose the first mortgage, and in that suit it was by the court decreed that the second mortgage was a prior and senior lien on the land mortgaged to the relatrix, and thereby she lost her security for her note. She caused execution to issue against Murphy, but was unable to realize anything, for the reason that he was insolvent, and had no property out of which the debt could be collected. Neither the relatrix nor the recorder knew of the error in recording until after the execution of the second mortgage. Henry Hubler, the recorder, died in 1898.

The controlling question is whether or not the action was barred by the statute of limitations, and the determination of this matter depends upon the solution of the question as to when the cause of action accrued on the recorder's official bond for the breach alleged; that is, When could the recorder first have been sued for the official error charged? Our statute (Burns Rev. Stats. 1901, sec. 294) provides: "All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty," shall be commenced within five years after the cause of action has accrued, and not afterward. It was the statutory duty of the county recorder to record the mortgage for the relatrix in its order; and if not recorded in forty-five days from the execution thereof, the mortgage was liable to be defeated in favor of any subsequent pur-

chaser, lessee, or mortgagee in good faith and for a valuable consideration: ⁸⁰ Burns' Rev. Stats. 1901, sec. 3350, 8007; United States Sav. etc. Co. v. Harris, 142 Ind. 226, 237, 40 N. E. 1072, 41 N. E. 451.

The misdescription of the land in the record of the mortgage rendered the recording worthless from the first. The debtor continued personally liable, and this liability became of no avail to the relatrix—not through the error of the recorder, but by reason of the debtor's insolvency. The security of the land continued available, notwithstanding the fault in the recording, until the execution of the second mortgage, which, because of the recorder's mistake, was a superior lien, and finally exhausted the security. The damage consisting of the loss of the security was a direct result of the incorrect copying of the description of the mortgaged land in recording the mortgage. If that damage had accrued and action therefor had been commenced within the period of the statute after the recording of the mortgage, there can be no doubt that damages for the loss thereby sustained might have been recovered.

The right of the relatrix to have the recording of her mortgage done correctly, so that the record would constitute constructive notice of all her rights as mortgagee, was as absolute as the right to have the mortgage recorded. As between her and the recorder, she was under no obligation to inspect the record of her mortgage to see that it was safely correct. By presenting a mortgage in due form, proper for recording, and paying the recorder's fee, she did all that was incumbent upon her to impose the duty upon the recorder. When the mortgage was recorded so incorrectly that the record was worthless as notice, there was at once a violation of official duty on the part of the recorder, and the relatrix was at once thereby deprived of a material and valuable right. She then had a cause of action against the recorder. If she had discovered the error before any subsequent conveyance or encumbrance, and the original mortgage were then still in existence and in her possession, she might have had it recorded again, at the ⁸¹ expense of the fee therefor, or, if in such case the original mortgage were lost, she perhaps might have procured a correction of the record; but in the meantime (at least, after the expiration of forty-five days from the execution of her mortgage) she would have been in the condition of a mortgagee whose mortgage, not being recorded, is liable to be cut off by intervening circumstances beyond her control. It might be difficult, in an action against

the recorder, brought before the accruing of any rights of others in the land, to say what considerations, other than the loss of the fee for recording, should enter into the assessment of the amount of the damages; but it must, we think, be said that a right having been violated, and she having suffered an individual wrong, some damage must be presumed, whether susceptible of proof or not: See Cooley on Torts, 2d ed., *383.

It cannot be doubted, it would seem, that a cause of action involving the essential elements of an actionable tort arose in favor of the relatrix against the recorder immediately upon the commission of the wrong of recording her mortgage incorrectly, the amount of the damage being determinable by a jury, under instructions. Such an action would not be like an action for a continuing nuisance, for which damages may be recovered from time to time as they have accrued; but it would be one in which all damages, past and future, so far as ascertainable would be recoverable.

The case before us is not governed by the principles of those wherein some act has been done, which, not being wrongful at the time, or not being wrongful then as to the plaintiff, furnishes an element of an action only after specific damage has resulted therefrom, and the right of action does not accrue until the special damage complained of has accrued. There, the damage being the gist of the action, the time runs only from ^{as} the actual happening of the damage. Here, however, there was both wrong and injury as soon as the error had been committed. The mistake in the recording was not, as to the mortgagee, something which might rightfully be done, and which could not be regarded as a thing amiss until some damage should actually accrue therefrom; but it was in itself a thing amiss. Where damage has so accrued, further consequential damage will not give rise to a fresh cause of action. We are constrained to hold with the court below that the statute of limitations barred the action.

There has been some discussion by counsel of the law relating to the concealment of the fact of liability to an action by one party, and the discovery of the cause of action by the other (Burns' Rev. Stats. 1901, sec. 301); but the case at bar affords no occasion for the postponement of the running of the statute of limitations on the ground of concealment. The fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not prevent the running of the statute, or postpone the commencement

of the period of limitation, until he discovers the facts or learns of his rights thereunder. Nor does the mere silence of the person liable to the action prevent the running of the statute. To have such effect, there must be something done to prevent discovery—something which can be said to amount to concealment: *Ware v. State*, 74 Ind. 181; *Schultz v. Board etc.*, 95 Ind. 323; *Pence v. Young*, 22 Ind. App. 427, 53 N. E. 1060; *Bower v. Thomas*, 22 Ind. App. 505, 54 N. E. 142.

To constitute the concealment which will postpone the operation of the statute of limitations, there must be more than mere silence or general declarations; there must be fraud in act or statement, intended to prevent knowledge of the existence of the cause of action, and operating to prevent discovery: *Jackson v. Jackson*, 149 Ind. 238, 47 N. E. 963.

Judgment affirmed.

The Liability of Recorders for negligence in the registration of instruments is discussed in the monographic note to *Worden v. Witt*, 95 Am. St. Rep. 85-89. On page 89 of this note it is stated that in an action against a recorder for a false certificate of search, in the absence of fraud, the statute of limitations begins to run from the time the search is given, and not when the damage arises; and the fact that the party paying for the search did not know of its falsity for six years makes no difference, as the cause of action is the issuing of the false certificate.

The Statute of Limitations may be prevented from running by a fraudulent concealment of the cause of action: *Eising v. Andrews*, 66 Conn. 58, 50 Am. St. Rep. 75, 33 Atl. 585; note to *Snodgrass v. Branch Bank*, 60 Am. Dec. 511-514. See, too, *McBride v. Burlington etc. Ry. Co.*, 97 Iowa, 91, 59 Am. St. Rep. 395, 66 N. W. 73. But a party cannot be guilty of fraudulent concealment of a matter of the existence of which he has no knowledge: *Wood v. Williams*, 142 Ill. 269, 54 Am. St. Rep. 79, 31 N. E. 681. And the ignorance of a plaintiff of his right to bring suit does not ordinarily affect the running of the statute of limitations: See the monographic note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 515, 516.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY v. MCGUIRE.

[31 Ind. App. 110, 65 N. E. 932.]

RAILWAY MORTGAGE of After-acquired Property.—Property acquired by a railroad company adjacent to a depot, which it leases for a store, barber-shop, postoffice, and other purposes foreign to the operation of the road, does not pass under a prior mortgage given by the company covering property thereafter acquired for purposes connected with or appertaining to the railroad. (pp. 251, 252.)

E. C. Field, W. S. Kinnan, G. W. Kretzinger, H. R. Kurrie, E. B. Sellers and W. E. Uhl, for the appellant.

C. C. Spencer, H. A. Steis, M. M. Hathaway and M. M. Winfield, for the appellees.

¹¹¹ HENLEY, J. This was an action commenced by appellant to quiet its title to a certain parcel of land situated in Pulaski county, Indiana. The cause was tried by a jury. After the evidence was concluded the trial judge instructed the jury to return a verdict for appellees. The question presented here arises upon the motion for a new trial, and questions the action of the trial court in so instructing the jury.

The facts upon which the instruction was based are not in dispute. Both appellant and appellees claim title through the Louisville, New Albany and Chicago Railway Company. Appellant claims title through certain mortgages given by the Louisville, New Albany and Chicago Railway Company which were foreclosed in the United States circuit court for the district of Indiana, and through which foreclosure, and other conveyances following it, its title became vested. Appellee's title is claimed as follows: On the 24th day of September, 1896, the appellee Patrick McGuire recovered judgment in the White Circuit Court of Indiana against the Louisville, New Albany and Chicago Railway Company for two thousand four hundred and sixteen dollars and twenty-three cents and costs. On the sixteenth day of October, 1897, the said McGuire caused an execution to be issued by the clerk of the White circuit court to the sheriff of Pulaski county. On the eighteenth day of October, 1897, the said sheriff levied the execution upon the real estate in dispute. On the thirteenth day of November, 1897, the sheriff sold this real estate at public sale, and the appellee Hathaway became its purchaser, and on the twenty-second day

of November, 1898, the sheriff of Pulaski county executed to him a deed. A transcript of the McGuire judgment had been filed in the Pulaski circuit court on the 28th of January, 1897.

It is contended by appellant that the real estate in controversy is a part of its depot grounds at Francisville, Indiana, and that the foreclosure and sale of the property of the Louisville, New Albany and Chicago Railway Company,¹¹² through which foreclosure and sale appellant obtained whatever title it may have in the disputed premises, carried with it the title to said disputed premises. The judgment of McGuire against the Louisville, New Albany and Chicago Railway Company was obtained after the execution of the foreclosed mortgages through which appellant claims title. The contention of counsel for appellees is that the disputed property was not embraced within the mortgages and foreclosure, and that the same was not covered by the clause inserted in each mortgage intended to cover after-acquired property, and, therefore, could not have been embraced within the foreclosure and sale under the proceedings in the United States court. An abstract question of law is therefore presented, as to whether or not the property in dispute passed by the foreclosure and sale. There were three mortgages executed by the Louisville, New Albany and Chicago Railway Company—one in 1886, one in 1890, and one in 1894, all being prior to the rendition of the McGuire judgment.

In the mortgage of 1886 the description of after-acquired property is as follows: "Which may at any time hereafter during the continuance of this trust be acquired by the said railroad company for purposes connected with or appertaining to the railroads or railways above mentioned or described." The description of the after-acquired property in the mortgage executed in 1890 was in the following words: "And all that it may in future add, construct, or acquire for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described." The description of the after-acquired property in the mortgage executed in 1894 was in the following words: "What may at any time before or after the date of this indenture be acquired by or for the said railway company for purposes connected with or appertaining to said railroads or railways hereby conveyed."

¹¹² The decree directing the sale of the Louisville, New Albany and Chicago Railway Company follows the description in the mortgage. The master's deed conveying the property

does not vary the description as to after-acquired property. The property in dispute was property acquired by the Louisville, New Albany and Chicago Railway Company after the execution of the above-described mortgages.

The trial court determined that the undisputed evidence established that the land levied upon and sold to satisfy appellees' judgment was not used by appellant for railroad purposes; that it was not needed for such purposes, and that it was not properly a part of the "layout" of the road; and that therefore the clauses in the mortgages covering after-acquired property did not cover the property in dispute. The evidence shows that the particular parcel of land in dispute has never been used by the railroad company for railroad purposes; that while it is contiguous to and adjacent to the depot grounds of appellant, it has buildings located upon it which have been leased to different parties, and occupied and used as a barber-shop, grocery, postoffice, and in other ways entirely foreign to the necessary means of operating the railroad.

In speaking of the property covered by the after-acquired clause in a mortgage given by a railway company, Mr. Short, in his excellent work on the Law of Railway Bonds and Mortgages, at section 209, says: "The lien will be confined to the lands which were prospectively necessary and convenient for the construction and future operation of the road, and will not embrace lands situated outside of the 'layout' of the road, which had been taken over by the company in order to acquire at a less cost the lands actually needed for the line itself."

A case very similar to the one under consideration is the case of *Seymour v. Canandaigua etc. R. R. Co.*, 25 Barb. 284. It involved a controversy between the judgment ¹¹⁴ creditors and the purchaser of railroad property at foreclosure sale, and in that case it was squarely held that all lands acquired by the railroad company after the execution of the mortgage, which were not used for railroad purposes, were not covered by the lien of the mortgage and did not pass by the foreclosure and sale to the purchaser, but were subject to a lien of the judgment creditors. The court in that case, at page 312, said: "It is in proof that some of the lands purchased in Batavia have never been used for railroad purposes. That in some instances whole lots were purchased to secure a right of way across them. If the railroad company for this purpose had purchased a lot of ten or one hundred acres, it cannot be that any more of such lots would be embraced in this mortgage to the plaintiffs than

was actually taken and required for the road. In respect to all such lands outside of the legal limits of their railroad track and branches, and excepting land used for shops, depots, stations, turnouts for wood or water, or other legitimate purposes, the lien of the defendants' judgments must prevail." To the same effect, see *New Orleans Pac. R. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364; *Boston etc. R. R. Co. v. Coffin*, 50 Conn. 150; *Mississippi Valley Co. v. Chicago etc. R. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348; *Eldridge v. Smith*, 34 Vt. 484; *Shirley v. Waco Tap Ry. Co.*, 78 Tex. 136, 10 S. W. 543; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779; *Dinamore v. Racine etc. R. R. Co.*, 12 Wis. 725; *Farmers' Loan etc. Co. v. Commercial Bank*, 11 Wis. 215; *Walsh v. Barton*, 24 Ohio St. 28.

We think the trial court was right in instructing the jury, upon the evidence submitted, to return a verdict for appellees. Judgment affirmed.

WHAT AFTER-ACQUIRED PROPERTY PASSES BY A RAILWAY MORTGAGE.*

- I. Validity and Effect of Mortgage.
 - a. In General.
 - b. Necessity of Words of Futurity.
- II. Property must be Necessary or Appurtenant to Road.
 - a. In General.
 - b. Land not Used in Connection with Road.
 - c. Terminal Facilities—Property Beyond Line.
 - d. Buildings—Elevators, Stores, Hotels, etc.
 - e. Personal Property and Articles of Equipment.
- III. Right of Way and Road to be Completed.
- IV. Acquired, Extended, and Consolidated Lines.
- V. Branch Lines and Spur Tracks.
- VI. Leases and Leased Roads.
- VII. Grants and Bonds in Aid of Road.
- VIII. Rolling Stock.
- IX. Earnings and Income.

I. Validity and Effect of Mortgage.

a. In General.—The law may be taken as well settled that a mortgage by a railroad company covering its after-acquired property is not, for that reason, invalid. The validity of such mortgages has been recognized in a great many cases, among which the reader is referred to the following: *Buck v. Seymour*, 46 Conn. 156, 170; *Bell v. Chicago etc. R. R. Co.*, 84 La. Ann. 785; *Omaha etc. Ry. Co. v. Wabash etc. Ry.*

*REFERENCE TO MONOGRAPHIC NOTE.

Claims which take precedence over railroad mortgages: 54 Am. St. Rep. 400-422.

Co., 106 Mo. 298, 18 S. W. 1101; *Baker v. Guarantees Trust etc. Co.* (N. J. Eq.), 31 Atl. 174; *Pierce v. Emery*, 32 N. H. 184; *Coe v. Columbus etc. R. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Philadelphia etc. R. R. Co. v. Woolpper*, 64 Pa. St. 366, 3 Am. Rep. 596; *Pennock v. Coe*, 64 U. S. (23 How.) 117; *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 94 Fed. 275. The rule is applicable when the property is acquired in its equitable title (*Central Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. Rep. 357), and when the mortgagor is a de facto corporation: *Georgia etc. R. R. Co. v. Mercantile Trust Co.*, 94 Ga. 306, 47 Am. St. Rep. 153, 21 S. E. 707. The mortgaging of future-acquired property by railway corporations, it is said, is sustained, either upon the ground that it is in the nature of accretions, or that the company has made an executory contract which in equity will be allowed to become effective when and as the property comes into existence: *Hodder v. Kentucky etc. Ry. Co.*, 7 Fed. 793, 797.

The lien of the mortgage attaches to the property the moment it is acquired, or as fast as it comes into existence by the process of construction and building: *Frost v. Galesburg*, 167 Ill. 161, 47 N. E. 357; *Williamson v. New Jersey etc. R. R. Co.*, 25 N. J. Eq. 13; *Platt v. New York etc. Ry. Co.*, 59 N. Y. Supp. 871, 17 Misc. Rep. 22; *Farmers' Loan etc. Co. v. Fisher*, 17 Wis. 114; *Bear Lake Irr. Co. v. Garland*, 164 U. S. 1, 15, 17 Sup. Ct. Rep. 7. But the mortgage attaches to the property in the condition in which it comes to the mortgagor, and does not displace liens and encumbrances then existing upon it, although they are junior in point of time to the mortgage: *Williamson v. New Jersey etc. R. R. Co.*, 28 N. J. Eq. 277, 29 N. J. Eq. 311, 317; *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Car Co.*, 99 U. S. 256; *Bear Lake Irr. Co. v. Garland*, 164 U. S. 1, 16, 17 Sup. Ct. Rep. 7. However, rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage are held by the lien of such mortgage in favor of bona fide creditors, as against a contract between the furnisher of the property and the railway company, stipulating that the title to the property shall not pass until the purchase is paid, and reserving to the vendor the right to remove the property: *Porter v. Pittsburg etc. Steel Co.*, 122 U. S. 267, 283, 7 Sup. Ct. Rep. 1206.

b. *Necessity of Words of Futurity.*—It has been thought that a railway mortgage will, on the theory of accretion, include property acquired subsequently to its execution, although there are no words of futurity in the instrument: 2 Elliott on Railroads, sec. 497. See, also, *Pierce v. Emery*, 32 N. H. 484; *Stevens v. Watson*, 45 How. Pr. 104; *Parker v. New Orleans etc. R. R. Co.*, 33 Fed. 693, 697. It is very doubtful, however, if such is the law: See *Mississippi Valley Co. v. Chicago etc. R. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348, 350; *Farmers' Loan etc. Co. v. Commercial Bank*, 11 Wis. 207; *Louisville Trust Co. v. Cincinnati etc. Ry. Co.*, 91 Fed. 699. In this last case

it is held that a clause in a mortgage embracing "all and singular the cars and rolling stock" of a railroad cannot be construed to include more than the cars and rolling-stock then owned; and that a clause embracing "all and singular its franchises and property, both real and personal," does not extend to property subsequently acquired in order to add to or extend its line.

II. Property must be Necessary or Appurtenant to Road.

a. **In General.**—Railway mortgages of after-acquired property are ordinarily restricted to such property as appertains to or is connected with the road, so that it is necessary or convenient in the construction, maintenance, or operation of the railway; and property not appurtenant to the road and acquired for other purposes than for use in the direct construction or operation of the railway does not pass under the mortgage: *Morgan v. Donovan*, 58 Ala. 241; *Mississippi Valley Co. v. Chicago etc. R. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348. In the Alabama case the property was an opposition line of steamers purchased with a view, not of employing, but of withdrawing them from the field of competition. In the Mississippi case the property was a hotel, a storehouse, some town lots, and a farm property somewhat similar to that involved in the principal case, ante, p. 249.

But the words "necessary" and "convenient" receive a liberal construction. They comprehend all property reasonably necessary or convenient for the successful operation of the road. They import more than property without which the road could not be operated at all, and include such property as it may be deemed best to acquire for the most profitable use of the franchise to itself and the most beneficial use of it to the public: *Buck v. Seymour*, 46 Conn. 156, 171; *Boston etc. R. R. Co. v. Coffin*, 50 Conn. 150, 155. However, in *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779, it is said that under the term "appurtenances" only such property passes as is indispensable to the use and enjoyment of the franchises of the mortgagor, and that it does not include property acquired simply because it may prove useful to the corporation and facilitate the discharge of its business, a distinction being made in such cases between what is indispensable to the operation of a railway and what is only convenient. The property in question in that case was a grain elevator.

If land is bought by a railroad corporation with the intention of using it in connection with the road in certain contingencies, it seems to be immaterial whether the contingencies do or do not arise. The mortgage attaches to the property the moment of its purchase and binds it, notwithstanding it proves unsuitable for railroad purposes and afterward is sold: *Hawkins v. Mercantile Trust Co.*, 96 Ga. 580, 29 S. E. 498.

b. Land not Used in Connection with Road.—Land purchased by a railroad company outside its lay-out, and not directly needed or used in its construction, maintenance or operation, does not pass by a mortgage of after-acquired property: *Boston etc. R. R. Co. v. Coffin*, 50 Conn. 150; *Seymour v. Canandaigua etc. R. R. Co.*, 25 Barb. 284, 14 How. Pr. 531; *Walsh v. Barton*, 24 Ohio St. 28; *Shirley v. Waco Tap Ry. Co.*, 78 Tex. 131, 10 S. W. 543. Thus, land purchased and laid off in town lots does not pass under such a mortgage (*Calhoun v. Memphis etc. R. R. Co.*, 2 Flip. 442, 9 Cent. L. J. 66, Fed. Cas. No. 2309); nor does property obtained for the purpose of subdivision and sale to employes (*Aldridge v. Pardee*, 24 Tex. Civ. App. 254, 60 S. W. 789; affirmed in *Pardee v. Aldridge*, 189 U. S. 429, 23 Sup. Ct. Rep. 514); nor does wood land, several miles from the road, purchased and used for obtaining timber and fuel for railroad purposes (*Dinsmore v. Racine etc. R. R. Co.*, 12 Wis. 650); nor a farm or town lots acquired by the corporation, and rented (*Mississippi Valley Co. v. Chicago etc. R. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348); nor land which the company has no right to accept: *Meyer v. Johnston*, 53 Ala. 237.

c. Terminal Facilities—Property Beyond Line.—When a railway company is incorporated to construct a road between two cities, a mortgage upon its line, constructed or to be constructed between the termini, together with all stations, depot grounds, buildings, etc., in any way now or hereafter appertaining to the road, creates a lien upon its terminal facilities in the two cities, and is not restricted to the part of the road lying between the city limits of the two places: *Central Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. Rep. 357. But it is held that a mortgage by a railway corporation of its main line from its eastern to its western terminus, and the franchises acquired and to be acquired, pertaining to that line, does not embrace lands and franchises thereafter acquired through an extension of the road from its eastern terminus easterly, the extension not being a part of the main road, nor pertaining thereto, although acquired for use in connection therewith: *Randolph v. New Jersey etc. R. R. Co.*, 28 N. J. Eq. 49. Canal boats purchased by a railroad company, and used in connection with the road, but beyond its terminus, do not pass under a mortgage clause, "and all other personal property in any way belonging or appertaining to the railroad": *Parish v. Wheeler*, 22 N. Y. 494.

d. Buildings—Elevators, Stores, Hotels, etc.—In the principal case (ante, p. 249), it is held that property adjacent to a depot, which the railroad company acquires subsequently to executing a mortgage, and leases for a store, barber-shop, postoffice, and other purposes foreign to the operation of the railroad, does not pass under a clause of the mortgage covering property thereafter acquired for the purposes connected with or appertaining to the railroad. A hotel carried on by a railroad company is not ordinarily appur-

tenant to the road, so as to be embraced in a mortgage of after-acquired property: *Mississippi Valley Co. v. Chicago etc. R. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348. And yet cases may arise where a hotel and eating-house conducted by a railway corporation for the accommodation of its employes, passengers, and other persons, may be considered an appurtenance, within the meaning of a mortgage embracing subsequently acquired property: *Omaha etc. Ry. Co. v. Wabash etc. Ry. Co.*, 108 Mo. 298, 18 S. W. 1101; *United States Trust Co. v. Wabash etc. Ry. Co.*, 32 Fed. 480. A grain elevator has been held not to be such an appurtenance: *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779.

e. **Personal Property and Articles of Equipment.**—A railway mortgage of after-acquired property may cover personal as well as real property; and if it covers personal property, it need not, in New York, be filed as a chattel mortgage: *Platt v. New York etc. Ry. Co.*, 41 N. Y. Supp. 42, 9 App. Div. 87, affirmed in 153 N. Y. 670, 48 N. E. 1106; *Coopers v. Wolf*, 15 Ohio St. 523. See, also, *Williamson v. New Jersey etc. R. R. Co.*, 26 N. J. Eq. 398, 403. Car-wheels, firewood for engines and coal for machine-shops are things incident and indispensable to the use and enjoyment of the rights and franchises of a railroad, and are included in a deed which purports to convey all its present and future-acquired property: *Phillips v. Winslow*, 57 Ky. (18 B. Mon.) 431, 68 Am. Dec. 729. But if the property cannot be considered appurtenant to the road, as in the case of chairs never used in the construction or operation of the railroad, it does not pass to the mortgagee, although possession of the road and mortgaged property is afterward surrendered to him: *Farmers' Loan etc. Co. v. Commercial Bank*, 11 Wis. 207. In *Bath v. Miller*, 53 Me. 308, where a railway company mortgaged all the property then owned by both the new and old portion of the road, it was decided that wood afterward bought with the earnings and for the use of the entire road did not pass to the mortgagee. If a railroad company becomes the owner of a cargo of iron for its track, subject to the lien of the United States for duties, the mortgage immediately attaches thereto, subject to the claim of the government: *Pierce v. Emery*, 32 N. H. 484. Machinery for "burnettizing" ties and timbers to make them more durable, which does not take the place of anything specified in the mortgage, is not included in a clause: "And all other personal property belonging to said company, as the same now is in use, or as the same may be hereafter changed or renewed": *Brainerd v. Peck*, 34 Vt. 496.

III. Right of Way and Road to be Completed.

A mortgage by a railway company of all its property, including its railroad, made and to be made, and its property pertaining to the road now owned or hereafter to be owned or acquired, and all real estate to which it might become entitled through the construe-

tion of the road, embraces land afterward granted to the mortgagor for a right of way, and stockyards: *St. Joseph etc. Ry. Co. v. Smith*, 170 Mo. 327, 70 S. W. 700. And where a railroad company executes a mortgage on its road, etc., and on "all future right thereto and interest therein to be acquired," the mortgage is a valid lien on all lands over which the road is at the time located, though the title thereto or right of way is not acquired until subsequently, and it is prior to the lien of the vendor of such right of way for the purchase money: *Pierce v. Milwaukee etc. R. R. Co.*, 24 Wis. 551, 1 Am. Rep. 203. A mortgage covering the whole line of a railroad is valid, although only a portion of the road is built at the time, and covers the entire road when completed: *Stevens v. Watson*, 45 How. Pr. 104; *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 89 Fed. 388. A mortgage by a railway company of its "road, built and to be built," only a part of the road then being constructed, has precedence of the claim of a contractor who, on the inability of the company to complete the road, has finished it under a contract that he shall have possession of the road, and apply its earnings to the discharge of the debt due him, and who retains such possession: *Dunham v. Cincinnati etc. Ry. Co.*, 68 U. S. (1 Wall.) 254. A mortgage on a projected railway, which describes the road according to the plans, will be enforced against the road as built, notwithstanding the route is changed: *Elwell v. Grand St. etc. R. R. Co.*, 67 Barb. 83. See, too, *Meyer v. Johnston*, 64 Ala. 603. And a mortgage on after-acquired property will attach to lands contracted for or purchased to obtain space for carhouses and other railway accommodations to which the company expected to build its road, and will continue thereon though the road is not built to such lands: *Hamlin v. European etc. Ry. Co.*, 72 Me. 83.

IV. Acquired, Extended, and Consolidated Lines.

A railway company having authority to construct a particular line of road, with general power to purchase all kinds of property, may purchase from another corporation a road constructed on that line, and a mortgage including after-acquired property which it already had executed will attach to the property purchased: *Branch v. Jesup*, 106 U. S. 468, 1 Sup. Ct. Rep. 495. And a mortgage on a street railway covering a contemplated extension, the right of way for which had been obtained, and the survey made, covers the extension, although it was finished by another company which afterward bought the line from the mortgagor railway: *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 867. But a mortgage covering all the rights and property "now possessed, or that hereafter may be acquired" by the mortgagor, "connected with, or issuing from, or relating to" the mortgaged railroad, does not extend to another road afterward purchased and not connected at the time of the purchase with the mortgaged road: *Murray v. Farmville etc. R. R. Co. (Va.)*, 48 S. E. 553. And an after-acquired property clause

in a mortgage is held not to include a line constructed by the mortgagor railroad without authority, or a line purchased from another corporation without the assent of a majority of its shareholders: *Hodder v. Kentucky etc. R. R. Co.*, 7 Fed. 793. A mortgage by a railroad company of "all and singular its franchises and property, both real and personal," cannot be construed to include property acquired afterward in order to add to or extend its line: *Louisville Trust Co. v. Cincinnati etc. Ry. Co.*, 91 Fed. 699. Where a mortgagor railway corporation is merged by consolidation into a new corporation, an after-acquired property clause will not cover equipment obtained by the consolidated company as against a mortgagee of such company: *New York Security etc. Co. v. Louisville etc. R. R. Co.*, 102 Fed. 382. So, a chattel mortgage on a street railway, including after-acquired property, does not embrace rolling stock and equipment purchased by another company, which purchased the mortgagor line for its entire road, of which the purchased line forms only a portion: *Hinchman v. Point Defiance Ry. Co.*, 18 Wash. 349, 44 Pac. 867.

V. Branch Lines and Spur Tracks.

If a railroad company mortgages all its property, including that which may thereafter be acquired, the mortgage covers branch roads subsequently built, although they were not in contemplation when the mortgage was executed: *Coe v. Delaware etc. R. R. Co.*, 34 N. J. Eq. 266; *Seymour v. Canandaigua etc. R. R. Co.*, 25 Barb. 284, 14 How. Pr. 531. But see *Meyer v. Johnston*, 53 Ala. 237. Such a mortgage will also extend to a branch line which is purchased as appropriate to the main road: *Central Trust Co. v. Washington etc. R. R. Co.*, 124 Fed. 813. "With reference to realities and lines of railway subsequently acquired, provided they are incidental to the purposes of the franchise, it is entirely unimportant whether they are obtained by purchase or construction, or by condemnation or deed": Justice Putnam in the last case cited.

If a railway company furnishes the ties and rails and lays a spur track upon a roadbed owned by another company, pursuant to an agreement between them, the track does not become a part of the realty, but remains the property of the first company, as between the parties, and passes by a sale under a previous mortgage embracing after-acquired property: *Mercantile Trust etc. Co. v. Roanoke etc. Ry. Co.*, 109 Fed. 3.

VI. Leases and Leased Roads.

If a railway leases another road to use in connection with its own, the leasehold will pass as after-acquired property under a prior mortgage: *Barnard v. Norwich etc. R. R. Co.*, 4 Cliff. 351, Fed. Cas. No. 1007; *Columbia Finance etc. Co. v. Kentucky Union Ry. Co.*, 60 Fed. 794. The mortgages in these two cases were very comprehensive and sweeping in their terms. In *Moran v. Pittsburgh etc.*

Ry. Co., 32 Fed. 878, it is held that where a railroad company mortgages its present and future-acquired property to secure coupon bonds, and subsequently executes a lease by which the lessee agrees to pay the coupons at maturity in case the net earnings of the demised road prove inadequate to protect the interest on the bonds, the lease is not after-acquired property within the meaning of the mortgage. Said the court: "Even if the income, rents, and profits of the road had been covered by the mortgage, the personal covenant of the lessee to make 'advances' as provided in the lease could not be treated as 'income' of the road, or as part of the 'purchase' of the mortgage. The subject of 'after-acquired property,' under mortgages containing similar provisions and clauses as the present, has often been before the supreme court, but no case yet decided has gone to the extent of holding that personal contracts or covenants entered into with the mortgagor, and under which no new estate is acquired by the mortgagor, comes within these terms."

VII. Grants and Bonds in Aid of Road.

A mortgage given by a railroad company embracing all property subsequently acquired, appurtenant to or necessary for the operation of the road, does not include a grant of land within the state made by Congress to the company, in aid of the construction of the road: *New Orleans Pac. Ry. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364; *New Orleans etc. Ry. Co. v. Union Trust Co.*, 41 Fed. 717. And a mortgage by a railroad company on its then and thereafter to be acquired property, containing a specific description of the different kinds of such property, does not cover municipal bonds issued in aid of the construction of the road, if they are not included in the description: *Smith v. McCullough*, 104 U. S. 25.

VIII. Rolling Stock.

A mortgage by a railroad company of its then and thereafter to be acquired cars, locomotives, and rolling stock, carries not only such rolling stock as is in existence at the time of the execution of the mortgage, but such as takes its place or is subsequently acquired and is in existence at the time of the foreclosure: *Meyer v. Johnston*, 53 Ala. 237, 64 Ala. 603; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486; *Hamlin v. Jerrard*, 72 Me. 62, 75; *Howe v. Freeman*, 80 Mass. (14 Gray) 566; *Pennoek v. Coe*, 64 U. S. (25 How.) 117; *Shaw v. Bill*, 95 U. S. 10; *Scott v. Clinton etc. R. R. Co.*, 6 Biss. 529, Fed. Cas. No. 12,527. And the rule is not varied by the fact that the transaction whereby the property is obtained is called a lease, if in reality it is a sale, and the title is retained in the so-called lessor as security for the purchase price. But in such a case, or probably in any case where the rolling stock is burdened at the time of its purchase with a lien or encumbrance, the railway mortgage will attach, subject to such lien or encumbrance: *Contracting etc. Co. v. Continental Trust Co.*, 108 Fed. 1; *Fosdick v. Car Co.*, 99 U. S. 256;

and cases cited, ante, p. 253. A mortgage of rolling stock to be acquired in the future does not grasp the rolling stock of a third person temporarily used on the road, under a contract between him and a company subsequently operating the road: *Hardesty v. Pyle*, 15 Fed. 778. If there are no words in the mortgage evincing an intention to encumber after-acquired rolling stock, as when the mortgage reads, "all and singular, the cars and rolling stock of said company," it cannot be extended by construction to include rolling stock other than that then owned: *Louisville Trust Co. v. Cincinnati etc. Ry. Co.*, 91 Fed. 699.

IX. Earnings and Income.

The future earnings of a railroad company may be the subject of a valid mortgage: *Jessup v. Bridge*, 11 Iowa, 572, 79 Am. Dec. 513. Compare *Georgia etc. Ry. Co. v. Barton*, 101 Ga. 466, 28 S. E. 842. It has been held, however, that when a railroad company mortgages "all its right, title, and interest in and to all and singular its property, real and personal, of whatever nature and description, now possessed, or hereafter to be acquired, including all its rights, privileges, franchises and easements," the mortgage does not, in law, cover future earnings of the road: *Emerson v. European etc. Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39. And it has also been held that the lien of a mortgage given by a railway corporation before it extends its line does not, as against attaching creditors of the proceeds arising from the extension, extend to such proceeds: *Alexandria etc. Ry. Co. v. Graham*, 31 Gratt. 769.

SPENCER v. SPENCER.

[31 Ind. App. 321, 67 N. E. 1018.]

COLLATERAL ATTACK, What is.—Where a Court, in accordance with an agreement and settlement between the parties, decrees that a trust be closed and terminated, a suit by one of them to have so much of the judgment vacated as declares the trust terminated, is a collateral attack. (p. 266.)

COLLATERAL ATTACK, What is.—When a Statutory Method is pursued for the purpose of avoiding or correcting a judgment, the attack upon the judgment is direct; but when the same result is sought in some manner not provided by law, the attack is collateral. (p. 266.)

COLLATERAL ATTACK, When may be Made.—In case of a collateral attack, it must be made to appear that the judgment was rendered without jurisdiction, and is void. (p. 267.)

COLLATERAL ATTACK upon Erroneous Judgment.—If a judgment is not void, it is not subject to collateral attack, however erroneous it may be. (p. 268.)

A. W. Reynolds, A. K. Sills, G. C. Reynolds and J. R. Ward, for the appellant.

B. K. Elliott, W. F. Elliott, F. L. Littleton and E. B. Sellers, for the appellee.

ROBINSON, C. J. Appellant's complaint avers that on March 20, 1893, Calvin C. Spencer, father of appellant and appellee, made his last will by which he devised to appellee the southeast quarter and the northeast quarter of the southwest quarter of section 13 in a certain township and range, which will was afterward duly probated; that concurrently with the execution of the will the testator addressed to appellee an instrument in writing giving ~~and~~ the substance of his will and stating: "Now I desire that you shall hold the following described property in trust for Fred, to wit [property above described]; you shall manage the property so held in trust and shall receive all rents, profits, and revenue from the same, and convert the same into money, at reasonable times, and after paying all necessary expenses, including taxes, on said trust property, you shall pay the balance of the money to Fred Spencer; you shall allow him the full privilege of living upon the said land; I also desire and intend that you shall hold the following described property in trust for Rae Spencer, to wit: The south half of the northeast quarter of section 18, also the south half of the northwest quarter of section 13, town 26, range 4 west; you shall hold the property in trust for Rae in the same manner and with the same powers that you hold the property in trust for Fred, heretofore described. In case you survive either Fred or Rae, then, in that case, the property of the one you survive and of both if you survive both, so held in trust by you, shall become yours absolutely. . . You shall have power of control and disposition of said property. Now, if you will accept the property herein mentioned on the terms above stated, and if you will carry out my wishes and intentions as herein expressed I shall let my will stand as I now have it"; that appellee agreed to carry out the request in the above instrument and declaration of trust; that on September 6, 1899, appellee brought suit against appellant; that appellant filed a cross-complaint against appellee, to which appellee filed an answer; that the following proceedings were had in that cause: "On the — day of —, 1900, at the April term, 1900, of said court, the following proceedings were had in said cause, to wit: Comes the defendant and cross-complainant in

person, and Fred Spencer by his attorney, E. B. Sellers, the appearance of John R. Ward and Reynolds & Sills having been withdrawn, and on motion and application of said ³²³ Fred Spencer that leave be granted him to withdraw his motion and affidavit heretofore, on the seventeenth day of May, 1900, made and filed herein for a change of venue of this cause from the county, and now, upon said application and motion, and by agreement of the parties hereto, leave is granted to withdraw said affidavit for change of venue, and the order changing the venue of said cause of Cass county, Indiana, is set aside. The defendant withdrew his demurrer to the complaint therein filed on the sixth day of September, 1899, and his motion filed therein on December 11, 1899, to require plaintiff to separate his causes of action, and also withdrew his demurrer, filed therein, to the answer of said Charles C. Spencer to the cross-complaint of said Fred Spencer, and the said Fred Spencer, appearing in person, filed his reply in the words and figures following, to wit [insert], to the several paragraphs of the answer of the said Charles C. Spencer, as defendant, to said cross-complaint, and by agreement of parties thereto, each appearing in open court for himself, and the defendant Fred Spencer also by his attorney, E. B. Sellers, said cause was submitted to the court for trial, the issues being joined on the complaint of said Charles C. Spencer and the cross-complaint of said Fred Spencer, and the court, having heard the proof, and being sufficiently advised on the issues joined on plaintiff's complaint, and the answer thereto, and the issues joined on the cross-complaint, find, upon such proof and the agreement of parties thereto, that the allegations of plaintiff's complaint and the several paragraphs thereof were true; that the said Charles C. Spencer and Fred Spencer are sons of Calvin C. Spencer, who died testate on the fourteenth day of February, 1898, and his last will and testament was duly admitted to probate in this court on February 16, 1898, and recorded in will record four, pages 142 and 143, of the records of wills of White county; that on the day said will was executed by said testator he, by an instrument in writing, requested the said ³²⁴ Charles C. Spencer to hold the following real estate in White county, Indiana, to wit: The southeast quarter and the northeast quarter of the southwest quarter of section 18, township 26 north, range 4 west, in trust for the use of Fred Spencer of the rents and profits, the fee simple title to the same to remain in said Charles C. Spencer, a sum equal to the net annual profit of said land to be paid to said

Fred Spencer. And the court found that by said will the testator devised said real estate to said Charles C. Spencer, who agreed to carry out said request in said instrument and declaration of trust and has ever since the probate of said will faithfully discharged his duties as trustee under said trust. And the court found that, after the probate of said will, Margaret Rae Spencer, who afterward became, by marriage, Margaret Rae Rubright, began against the plaintiff and defendant to the cross-complaint, Charles C. Spencer and Fred Spencer, and others, a suit, which suit was commenced in this court, and proceeded to final judgment and decree establishing said will, and in said decree said trust was recognized as to Fred Spencer, and during the continuance of said trust relation the said Charles C. Spencer faithfully discharged said duties as such trustee, and fully accounted to said Fred Spencer in said trust. And the court further found that said trust and trust relation continued until March 28, 1899, when the said Charles C. Spencer and Fred Spencer entered into a written agreement, whereby a full settlement and accounting was had between them, and said Charles C. Spencer bought from said Fred Spencer his life interest in said lands, and paid him full value therefor, and the said Fred Spencer at the time conveyed said land to said Charles E. Spencer by deed, and conveyed thereby his life estate and all other and any interest he, the said Fred Spencer, had in said land, and fully and completely released said Charles C. Spencer from accounting further in said trust and for longer holding said land in trust for which ³²⁵ said Charles C. Spencer paid him full value therefor. And the court found that at the time the said agreement was entered into, March 28, 1899, said Charles C. Spencer fully informed said Fred Spencer as to his legal and other rights in and to said real estate under said will and declaration of trust, and also fully informed him, the said Fred Spencer, as to the value, nature, and character of the consideration to be paid, delivered, and conveyed to him for his said interest in said real estate, and at said time, to wit, and ever since the probate of said will Fred Spencer fully and well knew his rights and interest, and the value thereof under said will and declaration of trust, and during all of said time said Fred Spencer was, and is, of sound mind, and over twenty-one years old, and several years the senior of Charles C. Spencer, and capable of managing his own affairs.

"And the court found that said agreement and settlement was a fair one, and made in the interest of both parties thereto, and that the said Fred Spencer at the time fully understood the same, and the terms thereof, and has received the full consideration agreed to be given him. And the court found that, pursuant to said agreement and settlement, each party had received all the consideration provided for him thereunder, and that the property so received said Fred Spencer has enjoyed, possessed, and used as his own, absolutely, and said Charles C. Spencer has used and possessed as his own, freed from the trust, said real estate. And the court found that said agreement and settlement were valid, and that by and under the same there was a full settlement and adjustment of all differences, accounts, liabilities, and all other matters of every nature existing or claimed by either or both parties, and in all matters in which either have an interest, including all claims growing out of the estate of Calvin C. Spencer, or in any manner affecting the same, or the trust created by said Calvin C. Spencer in favor of said ³²⁸ Fred Spencer. And the court found that by said settlement said Fred Spencer relinquished his right to enforce said trust, and to receive any of the proceeds of the sale of said real estate, and that said trust was ended, terminated, and closed, and said agreement and settlement should be confirmed. The court found that said Fred Spencer should take nothing in his cause of action sued on in his cross-complaint, and the court found that the said Charles C. Spencer was the owner in fee simple and in possession of said real estate, and that said Fred Spencer should be forever enjoined from setting up any interest in or to said real estate, and that the title thereto should be quieted in Charles C. Spencer, and all parties waive any exceptions or objections to the finding of the court. And the court ordered and decreed that the trust created, as heretofore found, for the use of said Fred Spencer, be closed and terminated according to said agreement and settlement of plaintiff and defendants and cross-complainant, Fred Spencer, above found to have been made, in which said agreement and settlement between the parties hereto is confirmed and approved, and said deed of said Fred Spencer executed to said Charles C. Spencer by him, pursuant to said agreement and settlement for the said real estate, to wit, the southeast quarter and the northeast quarter of the southwest quarter of section 13, township 26 north, range 4 west, in White county, Indiana, is hereby confirmed and approved, and declared to vest in said Charles

C. Spencer the fee simple title to said real estate; that said Charles C. Spencer has fully accounted in said trust, and is discharged as such trustee, and said trust declared closed and annulled; that the said Fred Spencer take nothing by this action on his cross-complaint; that the plaintiff Charles C. Spencer is the owner in fee simple of the real estate above described, and that the claims of the said defendant and cross-complainant Fred Spencer are without right and unfounded, and the plaintiff's title thereto be, and the same is hereby, ³³⁷ quieted; that the plaintiff have and recover of the defendant his costs laid out and expended herein, which are paid."

It is further averred that, ever since the above decree was entered, appellee maintains that the trust created by the will and the declaration of trust has been closed and terminated by reason of the decree, and not otherwise, and that appellant is not entitled to any of the rents and profits, and has no right to live on the land, and that appellee was discharged as such trustee. The complaint, after giving the pleader's construction of the will, avers that the design of the trust has not been accomplished; that appellee's acts were in contravention of the trust; that the deed of appellant to him, and the suit instituted in which the decree was rendered, was an attempt to defeat the object of the trust—and asks that so much of the decree as declares that the trust was terminated be annulled and vacated, that the trust be declared in force, and that appellant's interest in the trust property be held in trust for him by appellee, or that a receiver be appointed for that purpose.

The error assigned rests upon the court's ruling sustaining a demurrer to the complaint.

The statute makes the following provisions: "No person beneficially interested in a trust for the receipt of the rents and profits of lands can dispose of such interest, unless the right to make disposition thereof be conferred by the instrument creating such trust; but the interest of every person for whose benefit a trust for the payment of a sum in gross is created is assignable": Burns' Rev. Stats. 1901, sec. 3394. "Every sale, conveyance, or other act of a trustee, in contravention of a trust, shall be void": Burns' Rev. Stats. 1901, sec. 3395. "Every power, beneficial or in trust, shall be irrevocable, unless an authority to revoke it is reserved in the instrument creating the same": Burns' Rev. Stats. 1901, sec. 3407. Section 3411 of Burns' Revised Statutes of 1901 provides that real estate subject to a trust may be ordered sold by the court

upon the complaint of "the trustee or cestui que trust of any trust," setting forth either ³²⁸ that the land is liable to waste or depreciate in value, or that taxes and repairs exceed the income and are liable to defeat the intention of the person creating the trust, or that the sale of the property and the safe and proper investment of the proceeds would inure to the advantage and benefit of the cestui que trust and fulfill the purposes of the trust. Section 3419 of Burns Revised Statutes of 1901 provides that such trustee and the funds in his hands shall be at all times under the equitable control of the court having jurisdiction thereof for the preservation of the funds and carrying out the purposes of the trust.

The argument of appellant's counsel goes to the proposition that the will and declaration of trust created a trust estate, which could not be terminated by an agreement between the trustee and the beneficiary, and that the former judgment terminating the trust was without jurisdiction, and therefor void, and, being void, may be at any time vacated or set aside.

It is first argued by counsel for appellee that the court rendering the former judgment was a court of general superior jurisdiction and that, as it had jurisdiction of the subject matter of that suit and of the parties, its judgment, even if erroneous, cannot be successfully assailed in a collateral proceeding.

We think it clear that the present action is a collateral attack upon the former judgment. Any judicial proceeding, the object of which is to avoid, defeat, evade, or deny the force and effect of a judgment or decree, is either a direct or a collateral attack upon the judgment or decree. Various provisions are made by statute for avoiding or correcting judgments, and, when one of these statutory methods is pursued, the attack upon the judgment is direct; but if the same result is sought to be reached in some manner not provided by law, the attack is collateral. "Any proceeding," says the author in Van Fleet's Collateral Attack, section 5, "provided by the law for the purpose of avoiding or correcting a ³²⁹ judgment, is a direct attack which will be successful upon showing the error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing a want of power": See, also, Harman v. Moore, 112 Ind. 221, 13 N. E. 718; Lewis v. Rowland, 131 Ind. 103, 29 N. E. 922; Exchange Bank v. Ault, 102 Ind. 322, 1 N. E. 562. The present action is not an attempt to avoid or correct the former

judgment in some manner provided by law, but is an effort to obtain another and independent judgment which will destroy the effect of the former judgment. As the present action is a collateral attack upon the former judgment, it must be made to appear that the judgment was rendered without jurisdiction and is absolutely void: *Winslow v. Green*, 155 Ind. 368, 58 N. E. 259; *Cohee v. Baer*, 134 Ind. 375, 39 Am. St. Rep. 270, 32 N. E. 920; *Davis v. Clements*, 148 Ind. 605, 62 Am. St. Rep. 539, 47 N. E. 1056.

Jurisdiction is the power to hear and determine a cause. And it must be conceded that the circuit court rendering the former judgment had jurisdiction over the subject matter of trust estates. The subject of the controversy in that action was the effect of the will and declaration of trust, and the validity of the agreement of the parties in relation to the trust. The court in that case had necessarily to determine whether the relation created between the parties was of such a character, the termination of which was inhibited by the statute. It had necessarily to determine the effect of all the provisions of the will and declaration of trust—among others, that the trustee should receive the rents and profits from the land, and convert the same into money, and after paying all necessary expenses he should pay the balance of the money to the cestui que trust; that in case the trustee survived, the property was to be his absolutely; and that he should have power of control and disposition of the property. It had necessarily to determine the character of the relation created by the will and declaration of trust, and in doing so must necessarily place a construction ³³⁰ upon those instruments. It unquestionably had the power, without usurping an unconferred jurisdiction, to decide these matters, and this power to decide them included the power to decide wrong as well as right: *Ely v. Board etc.*, 112 Ind. 361, 14 N. E. 236; *Snelson v. State*, 16 Ind. 29. As stated by the court in *Coleman v. Floyd*, 131 Ind. 330, 31 N. E. 75: "An error may be committed in construing or applying a statute, no matter how clear or imperative its terms, as well as in any other ruling. If the concession be made that there was a clear and flagrant misconstruction or misapplication of the statute, still the only conclusion warranted by such a concession is that there was an erroneous ruling or decision." See *Maynard v. Waidlich*, 156 Ind. 562, 60 N. E. 348; *Craighead v. Dalton*, 105 Ind. 72, 4 N. E. 424; *Board etc. v. Platt*, 79 Fed. 567, 25 C. C. A. 87.

As it does not appear on the face of the prior judgment that it is void, it is not subject to a collateral attack: *Lantz v. Maffett*, 102 Ind. 23, 26 N. E. 195; *State v. Morris*, 103 Ind. 161, 2 N. E. 355; *Young v. Sellers*, 106 Ind. 101, 5 N. E. 686; *Hall v. Durham*, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; *Lewis v. Rowland*, 131 Ind. 103, 29 N. E. 922. The most that could be said is that the prior judgment was erroneous, and, however erroneous it might be, it is not subject to a collateral attack. The pleadings in the former action were set out in the complaint in this action, and show that the whole subject matter was covered in the complaint of the present appellee, the cross-complaint of appellant, and the answer thereto by appellee, and the decree covers the matters there put in issue. The present action seeks to avoid and annul the precise question adjudicated by that decree. The whole force and effect of the decree is assailed. As the court had jurisdiction both of the subject matter and of the parties, the decree rendered cannot be thus assailed collaterally. From the earliest judicial history of the state, it has been held that, where a court has jurisdiction, a final determination of the matter by the court forever puts it at rest: See *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 331 251; *Walker v. Walker*, 150 Ind. 317, 50 N. E. 68, and cases cited; *Beaver v. Irwin*, 6 Ind. App. 285, 33 N. E. 462; *Steves v. Frazee*, 19 Ind. App. 284, 49 N. E. 385; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599.

Judgment affirmed.

Collateral Attack upon Judgments is discussed in the monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119. The general rule is, that a judgment is not vulnerable to collateral attack unless it is void as distinguished from voidable or erroneous: *Edmundson v. Independent School Dist.*, 98 Iowa, 639, 67 N. W. 671, 60 Am. St. Rep. 224, and cases cited in the cross-reference note thereto; *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698, 90 N. W. 1042; *Burke v. Interstate Sav. etc. Assn.*, 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416, and cases cited in the cross-reference note thereto. See, too, *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672.

ROBINSON v. FOUST.

[31 Ind. App. 384, 68 N. E. 182.]

HUSBAND, Support of, by Wife.—If from Her Separate property a wife supports her husband during his last sickness, upon a promise by his grandfather to make a provision for her out of his estate, the agreement may be made the basis of a claim against the estate of the grandfather upon his death. (p. 272.)

Benjamin Crane and A. B. Anderson, for the appellant.

W. T. Whittington, W. A. Whittington and W. P. Britton, for the appellee.

³⁸⁵ ROBINSON, C. J. Appellant filed a claim against the estate of appellee's decedent, averring, in substance: That in 1880 she was married to Edward A. Kelsey, a grandson of decedent Aaron Foust, and lived with him as his wife until his death on the fourteenth day of February, 1886, leaving appellant as his only heir. Edward was the only child and heir of Catherine Kelsey, who died in November, 1864, prior to the death of her father, Aaron Foust, leaving Edward, who was about eighteen months old, whom decedent took into and maintained in his family until he was about six years old, regarding him as a son, and declaring and intending that he should have a child's portion of his estate. At the time of her marriage appellant was giving fifty dollars in cash and one hundred and fifty dollars in personal property by her father. In the fall of 1884 her husband became sick of consumption, and died February 14, 1886. When he became sick he was without any money or property of any kind or means of support, and was unable to work or in any way support himself or appellant, and was soon confined to the house and to his bed, and so continued until his death. In the spring of 1885 appellant had the personal property given her by her father, and some two hundred dollars or three hundred dollars in other property her father had given her. Aaron Foust frequently visited Kelsey while sick, and often requested appellant to provide for him, and to furnish him out of her means with provisions, fuel, and medicines, and pay the rent of the house, and during the last few weeks of Edward's life to provide attendants for him, and promised ³⁸⁶ her that if she would do this he would help her as far as he then could, and that he would see to it that she was amply paid therefor, and would make suitable provision for her at his death. Appellant, relying on these promises, and

induced thereby, expended all of her means and property in paying for the support and maintenance of her husband and in providing provisions, fuel, and medicines, and paying rent from February, 1885, until her husband's death. Again in January, 1886, Aaron Foust promised appellant that if she would continue to support her husband, and provide him with provisions, fuel, medicines, rent, and attendants, as she had been doing he would pay her for what she had already paid out and expended and might thereafter expend, and would make provision for her out of his estate. That on that day, in order to evidence such promise, Aaron Foust executed the following instrument: "At my death I promis my granson E. A. Kelsey that his wife shall be paid from my estate \$3,500, if living. [Signed] Aaron Foust." Afterward on the same day Aaron Foust proposed to pay the doctor's bill and funeral expenses, and in that event the amount thereof should be deducted from the three thousand five hundred dollars mentioned in the foregoing instrument, and as evidence of such promise executed the following: "Crawfordsville, Indiana, January 25, 1886. I. Aaron Foust, her in prisent of friends and witnes promis my granson Edward A Kelsey that at my death his wife if living shal have all due him the same as if he was living after his Dr. Bil and Furnel is taken out. sign. Aaron Foust. Witness, Albert Kelsey, Witness, M. Fahey, Witness, Susan E. Coleman. Written by Mike Fahey."

Both instruments were on that day delivered to appellant's husband. That appellant, induced by these promises, expended her property and money in the support of her husband during the year of 1885 and until the time of his death, and in so doing expended all of her property except ³⁸⁷ a part of her household goods; and at the request of appellee's decedent, and relying upon and induced by the above promises, appellant's father, at her request, paid the house rent for many months, and paid for an attendant during the last few weeks of her husband's life. Prior to and at the time of the execution of the above instruments decedent promised appellant that for what she had done and might thereafter do in supporting her husband she would be paid, and that he intended that she should have out of his estate at his death the sum of three thousand five hundred dollars. At that time and at the time of his death Aaron Foust owned property of the value of twenty-six thousand dollars, which he disposed of to others, making no provision whatever for appellant.

The rule of the common law that the husband and wife could not deal together rests upon the theory that in legal contemplation the husband and wife are one person, and not upon the theory that the wife is under a legal disability. This rule still prevails except where the legislature has expressly modified or annulled it, and the question is not whether disabilities have been removed, but whether the rule has been annulled. The common-law status of husband and wife very plainly denies to both the husband and wife a right to compensation for services rendered by either for the benefit of the other. It is quite true that the common-law rights and duties growing out of the marital contract have been very materially modified in many respects by statutes. And while the enlightened policy of modern legislation has given a married woman certain rights and powers denied her by the common law, yet these statutory innovations upon the common law have not gone so far as to permit unrestrained commercial dealings between husband and wife. The statutory right of the wife to recover for her own services does not change the relation between husband and wife, nor does it exonerate the wife from the performance of any proper services for the benefit of the husband. It is the duty of husband and wife to ³⁸⁸ protect and care for each other in sickness. This duty, arising out of the married relation, is to be performed in conformity with the mutual obligations assumed when they became husband and wife. The common law and scriptural obligation to be a "helpmeet" to her husband still rests upon the wife, and unless she carries on a separate business, or works for others on her own account, her earnings are the property of the husband: *Board etc. v. Brown*, 4 Ind. App. 288, 30 N. E. 925; *Hensley v. Tuttle*, 17 Ind. App. 253, 46 N. E. 594; *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798.

Had appellant and her husband entered into a contract that she should be reimbursed out of his estate for money of her own expended for his support, the contract could not have been enforced: *Corcoran v. Corcoran*, 119 Ind. 138, 12 Am. St. Rep. 390, 21 N. E. 468.

If it be admitted that it was appellant's legal duty as wife to use her own property and means to furnish her husband with the necessaries of life, it follows that a promise to reimburse her is without consideration: *Shortle v. Terre Haute etc. R. R. Co.*, 131 Ind. 338, 30 N. E. 1084; *Spencer v. McLean*, 20 Ind. App. 626, 67 Am. St. Rep. 271, 50 N. E. 769.

But, if it be admitted that it was her legal duty to use her own means for his support, it would follow that her estate must pay a claim of a third person furnishing such support. However, appellant's claim is not for any services rendered her sick husband. The consideration for the promise made for her benefit was not the performance of any wifely duties. Nor is it a question as to the moral and social obligations of the wife to care for and support her sick husband. The extent to which a wife will observe such obligations beyond the discharge of the wifely duties imposed by the marriage relation is a question she must determine for herself. Her personal property, which the common law gave to the husband upon marriage, is now, by statute, hers absolutely. She may do with it as she might do if unmarried. There was no common-law ~~see~~ right of the husband to support out of the wife's property corresponding to the wife's right to support out of her husband's property. And the statute which makes her personal property hers absolutely has imposed no burdens in the husband's favor. She may contract with reference to it as she chooses: *Young v. McFadden*, 125 Ind. 254, 25 N. E. 284. There is no statutory provision in this state making the "expenses of the family" and the "education of the children" chargeable upon the property of both husband and wife, or either of them: *Grant v. Green*, 41 Iowa, 88. Under the married woman's acts the property she claims to have used was hers as though unmarried, and there is no statute imposing upon her the legal duty to use it in any particular way.

The instrument sued on is in writing, signed by the decedent and contains a promise by the decedent to pay the claimant a sum of money from his estate if she be living at the time of his death. She avers the consideration for this promise. The decedent entertained for his grandson the love and affection of a father, and desired that he be properly provided for in his last sickness. He contracted for the performance of certain acts, and placed an estimate upon their value to him. Nothing is averred to authorize us to disturb that estimate. We cannot substitute our judgment for his. The decedent obtained all he contracted for, and the claimant, relying upon the promise as made, performed the conditions agreed upon: See *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, and cases cited; *Price v. Jones*, 105 Ind. 543, 55 Am. St. Rep. 230, 5 N. E. 683; *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. 797; *Farber v. National* etc.

Co., 140 Ind. 54, 39 N. E. 249; Ditmar v. West, 7 Ind. App. 637, 35 N. E. 47; Shover v. Myrick, 4 Ind. App. 7, 30 N. E. 207.

The claim is sufficient against a demurrer. Judgment reversed.

A Contract by Which a Wife, in consideration of a conveyance to her of real estate by her husband, agrees to support him during his life, is held void in *Corcoran v. Corcoran*, 119 Ind. 158, 12 Am. St. Rep. 390, 21 N. E. 468. See, in this connection, *Carse v. Reticker*, 95 Iowa, 25, 58 Am. St. Rep. 421, 63 N. W. 461. That a contract to do what one is already legally bound to do is without consideration and unenforceable, see *Davis & Co. v. Morgan*, 117 Ga. 504, 97 Am. St. Rep. 171, 43 S. E. 732; *Spencer v. McLean*, 20 Ind. App. 626, 67 Am. St. Rep. 271, 50 N. E. 769.

GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN v. MARSHALL.

[31 Ind. App. 534, 68 N. E. 605.]

BENEFIT SOCIETY.—A Member of a Beneficial Association is a part and parcel of the corporation, and is chargeable with knowledge of its laws, rules, regulations, and manner of doing business. (p. 279.)

BENEFIT SOCIETY.—Notice of Assessment, Sufficiency of.—If the constitution of a benefit society requires the grand recorder to call on the subordinate lodges for the beneficiary funds in their treasuries when needed, and declares that such call shall constitute an assessment, and shall contain a list of all deaths occurring since the last call was made, a notice showing the deaths which had been reported to the recorder up to the time of the issuance of the notice is sufficient. (pp. 279, 280.)

BENEFIT SOCIETY.—Monthly Assessments.—If the constitution of a benefit society fixes the rate of assessments, and requires that they be paid monthly, provided that twelve assessments are required to meet death losses, and directs such payments to be made on or before a certain day of the month in which the assessments are made, a member may be required to pay monthly assessments. (p. 279.)

BENEFIT SOCIETY.—Notice of Assessment, Sufficiency of.—If the constitution of a benefit society requires the grand recorder to issue a call on the subordinate lodges for their beneficiary funds when needed, and to give notice of assessments, with the approval of the finance committee, and declares that the call shall constitute an assessment, and directs that the notice shall be published, and a copy of the paper sent to each member and lodge, the notice of assessment and the call on the beneficiary funds are properly approved when signed and approved as one instrument. (p. 281.)

BENEFIT SOCIETY.—Forfeitures.—It is the Duty of a Court to declare a forfeiture upon facts which admit of no other conclusion. (p. 281.)

BENEFIT SOCIETY—Suspension of Member.—It requires no affirmative action on the part of a beneficial association to suspend a member for the nonpayment of assessments. (p. 281.)

C. L. Wedding, for the appellant.

G. K. Denton and L. A. Whitcomb, for the appellee.

535 WILEY, J. Appellant is a fraternal, benevolent, and mutual benefit association, and as such issued to one Charles E. Marshall, who was the husband of appellee, a certificate of membership, by the terms of which it undertook to pay appellee, as beneficiary, one thousand dollars at the death of the insured, according to the terms of the certificate. The said insured died November 12, 1900, being about sixteen months after the certificate was issued. Appellant refused to pay the claim, and appellee brought an action on the certificate to enforce payment. The case was put at issue, and tried by a jury, resulting in a verdict for appellee. Appellant's motion for a new trial was overruled, and judgment pronounced upon the verdict.

Two questions are presented for decision, viz.: 1. The sufficiency of the first paragraph of answer, to which a demurrer was sustained; and 2. The overruling of the motion for a new trial.

In the first paragraph of answer it is alleged that from the date of the issuing of the certificate to September, 1900, the insured paid to the financier of his lodge an assessment ⁵³⁶ each and every month as specified by the beneficiary law of the order, and that each assessment was payable on or before the 28th of each month; that the said insured was bound to know the laws of the order, and did in fact have full knowledge thereof, and knew by the payment of his assessments each month from the date of his membership until September, 1900, when he neglected and failed to pay the assessment for September, 1900, on or before the 28th of the month; that not only did he have knowledge from said payments and course of business with his lodge as to his duty to pay an assessment in September, 1900, but knew and was bound to know of the existence of the laws of the order; that in addition to the requirement to pay an assessment for said month, as set out by the constitution and by-laws, a further and additional notice was given to the insured as to such assessment by the grand recorder calling upon all the lodges in the state, including the lodge to which he belonged, to forward the beneficiary funds in their respective treasuries, and at the same time made one assessment upon

each of the members (said assessment being necessary to pay death losses), with the approval of the grand lodge finance committee, and caused such call and assessment to be published in the "Hoosier Watchman," the official organ of the order in Indiana, and that a copy thereof was duly mailed to the insured, properly addressed; that by reason of his knowledge of the constitution and laws of the order, and by his course of dealing with said order, the insured was specially called upon and notified of the assessment of seventy-two cents for the month of September, 1900, that the same must be paid on or before the 28th of said month, and that upon failure so to pay he would be suspended; that the assessment and notice for September, 1900, were in the same form, substance and words used and published of assessment notices, and the approval of the grand lodge finance committee, during each and every month during the time said Marshall was a member ¹⁸⁹⁷ of the order; that during each and every one of said months during the entire membership of the insured he acted upon and treated said assessments, notices, and the approval of said finance committee as valid and sufficient, by paying, without objection or question, his assessments for each and all of the months of his membership; that having failed to pay the assessment for September, 1900, and having paid nothing thereafter, he then and there became and stood suspended from all rights, privileges, and benefits of the order, and the beneficiary certificate sued upon thereby became null and void, and that when he died November 12, 1900, he was not a member of appellant order, and was not in good standing, and neither he nor appellee had or have any rights or claims whatever upon appellant. The constitution and by-laws of the order, the notice of the assessment and call upon the beneficiary fund for September, 1900, together with a copy of the "Hoosier Watchman," in which the notice of the assessment and the call upon the beneficiary fund were published, and the approval of the finance committee are all filed as exhibits to this paragraph of answer.

By the demurrer the appellee admits the truth of all facts stated in the answer that are well pleaded. She therefore admits that notice of the assessment against the deceased was made for September, 1900, and also admits that said assessment was not paid, and, further, that other payments were never made after that. Counsel for appellee seek to avoid the force of these admissions on the ground that the notice of the assessment was not in conformity with the laws of the order.

and hence the insured was not bound by it; also that because the assessment was not legally made he was not required to pay; and, for his failure to pay, he did not forfeit his membership and his beneficiary rights. There is substantial substance and merit in this contention, provided the notice was illegal and not in conformity with the laws.

⁵³⁸ If we correctly understand the position assumed by counsel, it is (1) that the call for the September assessment and notice does not contain a list of deaths occurring since the last call, and (2) that the call and notice were not approved by the grand lodge finance committee. These two questions depend for decision upon the laws of the order, and the assessment and call as made.

The assessment rates of the order are fixed by its constitution, and they are graded according to the age or ages of the members. The assessment which was made against the deceased in this case on the 1st of September, 1900, was for seventy-two cents, he belonging to the class against whom such assessment was authorized by the laws of the order.

Subdivisions 17, 18, 19, 30, and 39 of section 98 of the constitution, or so much of subdivision 19 as may be necessary to present the question, are as follows: "17. Calls and Assessments.—Whenever the beneficiary fund of the grand lodge treasury shall have been reduced to a sum less than six thousand dollars, or when by reason of unavoidable delay in the payment of beneficiary claims, the balance of the beneficiary fund in the grand lodge treasury would, by the payment of said claims, be reduced to a sum less than six thousand dollars, then it would be the duty of the grand recorder to call upon the subordinate lodges to forward the beneficiary fund in their respective treasuries, and, at the time of making such call, to make one assessment upon each member of the order who received the workman degree, previous to the date upon which the assessment is made. 18. Calls, When and How Made.—Every call made upon subordinate lodges to forward beneficiary funds shall be dated upon the first or second day of the month, shall contain a list of all deaths occurring since the last call was made, all necessary instructions relative to forwarding the funds called for, and shall, in every case, receive the approval of ⁵³⁹ the grand lodge finance committee. The issuing of such call shall constitute the making of an assessment. 19. Assessments, How Made.—All assessments made upon the members shall be dated upon the first day of the month, except that

if such date shall fall on Sunday or a legal holiday, it shall be dated on the second day of the month, and shall contain a list of all deaths occurring since the last assessment was made. Notice of such assessment shall be issued by the grand recorder with the approval of the finance committee, and published in a newspaper printed and published in this state in the interests of the A. O. U. W. order, which publication is hereby constituted and made the official, legal, and sufficient notice to the members of this grand jurisdiction of assessments levied, without any further notice either from the grand or subordinate lodge officers. A sufficient number of copies of said paper shall be issued every month to supply all the members, and a copy thereof shall be mailed to the last known and usual postoffice address of each member of this grand jurisdiction; and also one copy to the recorder of each lodge by its publisher, not later than the fifth day of each month." "30. Penalty for Failing to Pay Assessments.—Any member failing or neglecting to pay all the assessments made upon him for the beneficiary or relief funds to the financier of the lodge of which he is a member on or before the twenty-eighth day of the month in which said assessments are made, shall forfeit all his rights as a member, and shall stand suspended from all the rights, benefits, and privileges of the order from and after that date, and shall not be reinstated except as herein provided." "39. When Rights are Forfeited.—When a member shall be suspended or expelled from the order, through any cause whatever, he forfeits all rights, benefits, and privileges, and his beneficiaries thereby lose all rights to any portion of the beneficiary fund."

540 In the answer under consideration, it is averred that the "Hoosier Watchman," published at the city of Evansville, Indiana, was the official, legal organ of the order in this state, and that it was in that paper that the notice of the assessment against the deceased for the month of September, 1900, was published, and that a copy of that paper, containing the notice of the assessment, was duly mailed to him. A copy of that paper marked Exhibit "C" is made a part of the answer, and the date of its issue as shown therein, was September 3, 1900. That notice of assessment and call for the beneficiary fund in the various lodges is, in substance, as follows: "Official notice of assessment for September, Grand Lodge Ancient Order of United Workmen of Indiana, September 1, 1900. Whole number of deaths, 717. Whole number of level assessments, 223. Number of classified assessments, 26. To all members of the

Ancient Order of United Workmen of Indiana: in good standing, September 1, 1900. Brothers: You are hereby notified of the following deaths occurring in the membership of the order in this jurisdiction." Then follows a tabulated statement of the deaths occurring since the last call, and in this tabulated statement are the death numbers; the names of the members deceased; the names of the lodges to which they belong; the numbers of the lodges and their location, and the date of the deaths; the respective ages of the deceased; the cause of the deaths; the dates of their joining the order; the rate of the assessment; and the assessment number. The number of deaths reported in this assessment and call were three. Immediately after the tabulated statement is the following: "In order to provide for the payment of the death losses above reported, you are hereby notified that the classified assessment No. 9 for September, 1900, is hereby levied as per the classified table, to wit." Then follows the classified assessment table, showing the rate of assessment against the various classes of the members according to age, ranging ⁵⁴¹ from eighteen to fifty years and over. The notice then continues: "This assessment is levied against all members in good standing who have received the workmen degree prior to September 1, 1900, as per the attained ages, January 1, 1900. The amounts enumerated in the classified assessment table must be paid to the financier of your lodge on or before September 28, 1900; for failure so to comply you will forfeit all rights, benefits, and privileges as a member of the order, by becoming suspended."

Following this is the call upon the subordinate lodges throughout the state for the beneficiary funds in their respective treasuries, and that call is as follows: "To the subordinate lodges of the Ancient Order of United Workmen in the Grand Jurisdiction of Indiana: You are hereby notified of the following call for the month of September, 1900: Classified call No. 9. Classified assessment No. 9 will be made in the month of September. The beneficiary fund of the grand lodge treasury having been reduced to a sum less than six thousand dollars, you are hereby notified that to provide for the death losses above reported, and furthermore to provide for the prompt payment of death losses that may occur, one call is made necessary upon the beneficiary fund in the treasury of subordinate lodges, to be known as call No. 9, and to replace the money drawn from such fund by the call above enumerated. Classified assessment No. 9 will be made in September. To pay classified call No. 9: You are re-

quired to forward to Fred Baker, grand recorder, Evansville, Indiana, at once, (1) the beneficiary fund on hand in your respective treasuries, collected from your members during the month of August on classified assessment No. 8; (2) the initial assessment of those members who received the workmen degree prior to September 1, 1900, but have not been heretofore liable for assessment; (3) of back assessments paid by members reinstated since the last report." Here follows directions for remittances of this ⁵⁴² fund. This call is signed by "Fred Baker, grand recorder," attested by the seal of the of the order, and immediately following his signature are these words: "The above orders on the beneficiary fund are hereby approved." This is signed by three members as the "grand lodge committee."

If this assessment and call are in substantial compliance with the provisions of the law above quoted, then they were sufficient, and would be binding on both the insured and his beneficiary. A member of a benevolent beneficiary association is a part and parcel of the corporation, and is chargeable with a knowledge of its laws, rules, and regulations, and its manner of doing business. The notice shows the number of deaths that had occurred since the last assessment, and this must be construed to mean the deaths that had been reported to the grand recorder up to the time the notice was issued, for it is clear that if any deaths had occurred before the issuing of the notice which had not been reported to the grand recorder, they could not have been specified in the notice. It is the duty of the local lodges to report deaths. The rate of the assessment is also specified, the time when it should be paid, and notice given that, if not paid when due, the members failing to pay should forfeit all rights, benefits, and privileges.

Counsel for appellee insist that there is no provision of the laws of the order requiring a member to pay monthly assessments, and as the answer avers such requirement, and the constitution of the order is filed as an exhibit, the exhibit must control. Subdivision 15 of section 98 of the constitution fixes the rate of assessments, and requires that they be paid monthly, provided that twelve assessments are required to meet death losses. Subdivision 30, *supra*, requires such payments to be made on or before the 28th of the month in which the assessments are made. This effectually disposes of counsel's objection in this regard.

⁵⁴³ It is next urged by appellee that the call upon subordinate lodges for the beneficiary fund does not contain a list of deaths occurring since the last call, as provided by subdivision 18, supra, and, as the issuing of such call shall constitute the making of an assessment, the assessment made is void, and the insured nor his beneficiary is not bound by it. Subdivision 17, 18, and 19 of the constitution should be construed together with reference to each other, for they all pertain to the same subject matter. They provide for a call upon subordinate lodges for the beneficiary funds in their respective treasuries when needed, prescribe the manner of making the call, which is constituted an assessment, the manner of making the assessment, and what shall constitute notice to the individual member. There is no provision in the constitution or laws that requires the assessment and call to be issued separately, and to be two different and distinct instruments. On the contrary, the subdivisions of the constitution we have quoted contemplate that they shall constitute one instrument. Subdivision 18 says that "the issuing of such call shall constitute the making of an assessment." Subdivision 19 provides that the assessment shall be made on the first day of the month, with certain exceptions, and shall contain a list of deaths, etc.; that it shall be published, and a copy sent to each lodge and member. In this instance the assessment and the call are one instrument, signed by the secretary. The assessment is addressed to the members of the order, and the call to the subordinate lodges. This is in harmony with the letter and spirit of the law. The assessment and call are signed by the grand recorder, and approved by the finance committee of the grand lodge.

Assessments of this character are made for but one purpose, viz., to pay death losses of members of the association who have died while in good standing. The evident purpose of the law in requiring the grand recorder to give ⁵⁴⁴ a list of the deaths of members, when assessments are made, is to acquaint the members assessed with the facts upon which the assessment is based, for assessments for the beneficiary fund can only be based upon the death of members. It is made the duty of subordinate lodges to report to the grand recorder the deaths that occur in their respective lodges, and such officer can only give a list of such deaths as are officially reported to him. The answer avers that the assessment and call give a list of of those who had died since the last call was made. This is a statement of a substantive and issuable fact, and we must pre-

sume that the list is a correct one, and contains the names of all those whose deaths had been officially reported.

The appellee complains that the approval of the finance committee only applies to the call on the beneficiary fund, and hence is not in compliance with the laws of the order. This position is not tenable. The "above orders" are approved. This must be construed to mean and include both the notice of assessment and the call. This is made plain by the fact that the payment of said assessment is the only source of the beneficiary fund. Without the payment of the assessment there could be no beneficiary fund. The notice constitutes an order of payment, and notifies the members that if payment is not made within a given time, their rights, benefits, and privileges will be forfeited. We think the notice of the assessment and the call on the beneficiary fund were properly approved, within the meaning of the law.

Our attention is called to the rule of law that forfeitures are not looked upon with favor. We recognize the force and reason of the rule, but it is the duty of the court to declare a forfeiture upon facts which will admit of no other conclusion. We are now dealing with a question of pleading, and the facts stated therein clearly show a forfeiture. Appellant is a "fraternal, benevolent, and mutual ⁵⁴⁵ benefit association," in the language of the complaint. As such, it depends for its existence, and the purposes for which it was organized, upon the prompt payment of assessments against its members. It has no other means of paying its death losses, and no other means is contemplated. The association and the individual member have correlative and reciprocal obligations, the one depending on the other.

These obligations are that, to the end that each may derive the contemplated benefits, they must both comply with the requirements of the constitution and laws of the order. So far as the answer shows, appellant did its duty, and the insured failed in his. Members of a benevolent fraternal association are bound by and must be held to a knowledge of its constitution and by-laws; and as a general proposition of law all members must be governed by them in all their dealings with it as members thereof: *Supreme Lodge etc. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816; *Grand Lodge etc. v. King*, 10 Ind. App. 639, 38 N. E. 352.

It required no affirmative action of the lodge to suspend the insured for nonpayment of the assessment. The law is well

established that if by the laws of the society nonpayment of an assessment operates as a forfeiture, the member must elect every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and to benefits by neglecting or refusing to pay within the time: *Bacon on Benefit Societies*, 577, 578; *Rood v. Railway Passenger etc. Assn.*, 31 Fed. 62; *Bosworth v. Western Mut. Aid Soc.*, 75 Iowa, 582, 39 N. W. 903; *Maginnis v. Aid Assn.*, 43 La. Ann. 1136, 10 South. 180.

Under subdivision 30 of the constitution, supra, a member stands suspended upon failure to pay an assessment on or before the 28th of the month in which it is made. We have examined the authorities cited by the appellee in support of her contention that the assessment ⁵⁴⁶ and call in this case were not in conformity with the laws of the order and therefore the insured nor the beneficiary was not bound by them, but the law as there declared is not applicable to the facts pleaded in the first paragraph of answer. The facts here pleaded bar a recovery in favor of appellee.

This conclusion makes it unnecessary to decide questions presented by the motion for a new trial.

Judgment reversed, and the trial court is directed to overrule the demurrer to the first paragraph of answer.

While the Nonpayment of Assessments or premiums under a policy of life insurance or benefit certificate ordinarily works a forfeiture if taken advantage of by the insurer (Pitts v. Hartford etc. Ins. Co., 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95; note to South Penn Oil Co. v. Edgell, 86 Am. St. Rep. 61, 63), the assured is not in default until given proper notice of the assessment: See the monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 574-576; Cronin v. Supreme Council etc., 199 Ill. 228, 93 Am. St. Rep. 127, 65 N. E. 323. The right to declare a forfeiture for the nonpayment of dues does not exist if the insurer notifies the insured that his certificate will not be recognized as in force: Wuerfler v. Trustees of Grand Grove etc., 116 Wis. 19, 96 Am. St. Rep. 940, 93 N. W. 433; and the right may be waived by receiving unpaid dues after the death of the insured: Supreme Tribe etc. v. Hall, 24 Ind. App. 316, 79 Am. St. Rep. 262, 56 N. E. 780. As to whether the nonpayment of dues works a forfeiture ipso facto without affirmative action on the part of the insurer, see Jelly v. Mutual Aid Society, 120 Iowa, 689, 95 N. W. 197, 98 Am. St. Rep. 578, and authorities cited in the cross-reference note thereto; Pitts v. Hartford etc. Ins. Co., 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

LOUISVILLE BANKING COMPANY v. ASHER.

[112 Ky. 138, 65 S. W. 133.]

ACCOUNT STATED.—If one of two correspondent banks sends to the other numerous statements of their account as it appears from its books, and such statements are acknowledged by the other bank to be correct, this constitutes an account stated, which affords strong presumptive evidence which may be rebutted by showing fraud or mistake. (p. 286.)

NEGOTIABLE INSTRUMENTS—Indorsement—Effect of Failure to Protest.—Notes discounted by a bank in another state are not placed on the footing of bills of exchange, and an indorser is not released by failure to protest them. (p. 286.)

ACCOUNT STATED—Relief from—Mistake.—If an account stated by one bank against another embraces the amount of a note for which both banks, under a mistake of law, supposed the debtor bank to be liable on the ground that it had failed to protest such note, equity will grant relief from such mistake if the position of the creditor bank was not altered to its prejudice, after the debtor's acknowledgment of the correctness of the account between them as stated. (p. 287.)

NEGOTIABLE INSTRUMENTS—Failure of Demand and Notice.—If a bank fails to demand payment or to protest for nonpayment, a note sent it for collection on which it is liable as an indorser, it becomes liable to the holder for the amount of the note. (p. 288.)

ACCOUNT STATED—Basis of Settlement.—If one of two correspondent banks sends to the other numerous statements of their account as it appears from its books, and such statements are acknowledged by the other bank to be correct, this constitutes an account stated between them, and the balance shown thereby must be taken as the basis of settlements between them, subject to all proper corrections. (p. 288.)

S. Miller and Barnett & Barnett, for the appellant.

B. K. Marshall, for the appellee.

¹⁴⁸ HOBSON, J. The Louisville Banking Company and the Pineville Banking Company were correspondents for each other. The Pineville Banking Company made an assignment on July 28, 1893, to appellee, T. J. Asher, for the benefit of all its creditors, being then hopelessly insolvent. As shown by the books of the Louisville Banking Company, the Pineville Banking Company had then to its credit with it \$1,370.42. As shown by the books of the Pineville Banking Company, this balance was \$4,928.83. But this omitted a credit of \$500 which should have been entered, so that, as shown by these books as corrected, the balance was \$4,428.83. This litigation involves a settlement of these accounts. On February 28, 1890, five notes were executed by different persons to P. Barry, due six months after date, negotiable and payable at the Pineville Banking Company, aggregating in all \$2,168.28. Barry discounted these notes to the Citizens' National Bank of Cincinnati, and on August 15, 1890, that bank sent them to the Louisville Banking Company ¹⁴⁹ for collection, marked "Protestable." On August 19th the Louisville Banking Company sent them to the Pineville Banking Company, its correspondent, at which they were payable. The notes matured ten days later, and were neither collected nor protested for nonpayment by the Pineville Banking Company, but were sent back by it to the Louisville Company without explanation. It returned them to the Cincinnati bank. The Cincinnati bank sent them back to the Louisville Banking Company, demanding the money on them upon the ground that it was responsible for the negligence of its correspondent, the Pineville Banking Company, in not protesting the notes. The Louisville Banking Company then wrote the Pineville Banking Company, returning the notes to it, and demanded that it should pay the money. The Pineville bank claimed that the notes were sent to it marked "No protest," and again returned them to the Louisville Banking Company. This was on September 11th. On September 12th it wrote the Pineville bank this: "Yours of 11th returning notes received. In order that we may fit the responsibility upon the right one in this office, will you kindly return for our inspection our instructions not to protest the notes? Our letter-book shows that they were sent protestable." On the 13th the Pineville bank replied that it had not preserved the letter, and was sorry

it could not produce it. Some other correspondence ensued, and on October 6th the Pineville bank wrote, in answer to a letter received by it in regard to the matter, stating that it would have its Mr. Fish call and see the Louisville Banking Company during the week. On the 8th that bank replied thus: "Our Cincinnati correspondent from whom we received the items is whooping us up pretty lively. There is nothing left for us to do but to credit their account with proceeds of their collections,¹⁵⁰ and, while we regret it sincerely, we shall be compelled to look to you in like manner." In answer to this letter on October 10th the Pineville bank again wrote that Mr. Fish would call and investigate the matter, and, after stating that Fish, who attended to the notes, understood they were sent without protest, added: "We certainly don't want you to have any trouble about these items, and will surely see that they are properly adjusted at once." On October 20th the Louisville bank wrote again, inclosing a letter from the Cincinnati bank insisting that the matter be adjusted, and repeated this again in a letter of October 24th. No further correspondence appears in the record until November 20, 1890, when the Louisville bank wrote as follows: "Inclosed herewith you will find the five notes which have been charged to your account, as the cashier wrote you yesterday. We regret the circumstances that force us to do this, but cannot help it." On the same day the Louisville Banking Company charged the amount of the notes to the account of the Pineville Banking Company, and credited the Cincinnati bank by the amount, and it was checked out by that bank. The Louisville Banking Company at the end of the month of November sent the Pineville bank a statement of its account, and received from it this in substance: "Your statement of account for November, 1890, is correct." This statement showed the charge of the \$2,168.28. Similar statements and acknowledgments were made at the close of each month from that time until the Pineville bank failed, on June 28, 1893. But the Pineville Banking Company did not credit the Louisville Banking Company on its books with the amount. The Louisville Banking Company did not know this, and seems to have acted on the idea that the matter was settled until this controversy arose. The evidence shows that the ¹⁵¹ notes were sent to the Pineville Banking Company marked for protest, and we think the circumstances warrant the conclusion that the Pineville bank realized that a mistake had been made by its man in not protesting the notes.

It is earnestly insisted for appellant that after the numerous statements sent, and acknowledged to be correct, the account was stated, and the balance shown by the statements is conclusive between the parties. We think, under the evidence, it should be regarded as an account stated: *Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, 86 Ky. 688, 9 Ky. Law Rep. 831, 7 S. W. 142; *Union Bank v. Planters' Bank*, 9 Gill & J. 439, 31 Am. Dec. 113. The rule as to an account stated is thus well put in 3 Encyclopedia of Law and Procedure, pages 451, 455: "Formerly the stating of an account was considered so deliberate an act as to preclude an examination into the items, but since an early day a greater latitude has prevailed; and it may now be said to be the rule that an account stated does not create an estoppel, and that neither a stated nor a settled account is conclusive, but simply affords strong presumptive evidence, which may be rebutted by showing fraud or mistake. And, while the practice of opening accounts which the parties have themselves adjusted is considered dangerous, yet a settlement must be so far considered as made upon absolute mistake or imposition, if palpable errors are shown, as not to be obligatory upon the injured party. The presumption is one relating to the evidence. In determining whether an account stated can be impeached, the case is put upon the same footing as if the money had been paid. Such payment would be conclusive, subject to the right to recover it back on a failure of consideration; and so, on the statement of an account, if the case is one in which a payment, if made, could have been recovered ¹⁵³ back, the facts which show the failure of consideration may be proved."

In the correspondence between the two banks it seems to have been assumed that the indorser of the notes had been released by the failure to protest them, and that the Pineville bank was responsible for the loss if the notes were sent to it by the Louisville bank with instructions to protest them if not paid. But promissory notes are only put on the footing of foreign bills of exchange when they are regularly discounted by the bank at which they are payable, or another bank in this state incorporated under its laws, or organized in this state under the laws of the United States: Ky. Stats., sec. 483; *Carlisle v. Chambers*, 67 Ky. 268, 96 Am. Dec. 304. The notes in question, having been discounted by the bank in Cincinnati, Ohio, and not by any bank in this state, were not, therefore, placed on the footing of a bill of exchange, but stood as any other promissory note which had been assigned. The indorser

was not released by the failure to protest them. The Cincinnati bank had not sustained any loss by reason of the failure to protest them. The protest would have been only an unnecessary expense. There was no liability of the Louisville bank to the Cincinnati bank, or of the Pineville bank to the Louisville bank, for the failure to protest the notes, which were executed in this state, were payable here, and must be governed by its laws.

It is clear from the evidence that the parties to the notes were all insolvent at the time, and that the notes were in fact worthless. The question then arises, is there such a palpable mistake here that equity should relieve against it, treating the account as stated, and applying the principles followed in this state in the case of a payment of money by mistake? The distinction made in some jurisdictions ¹⁴⁵ between a mistake of law and a mistake of fact has been rejected in this state, and it is settled that money paid without consideration under a palpable mistake of law or fact, which was not owing in law or conscience, and ought not to be retained, may be recovered back: *McMurtry v. Kentucky Central R. R. Co.*, 84 Ky. 462, 8 Ky. Law Rep. 455, 1 S. W. 815, and cases cited. The mistake here is palpable, and the charge against the Pineville bank cannot be allowed to stand unless it has lost its rights by laches, and is now estopped to assert them. It does not appear from the evidence that the Pineville bank led the Louisville Banking Company to take the action it took. On the contrary, the correspondence would indicate that the Louisville bank charged the amount to the Pineville bank, and credited it to the Cincinnati bank on the same day, expressing to the Pineville bank regret that it was compelled to do so. In other words, it acted on its own judgment, and not by the direction of the Pineville bank. It did not wait for the Pineville bank to affirm its action before crediting the Cincinnati bank by the money or paying its checks upon it, and it does not appear that it was misled by the Pineville bank, or is now in a worse position than it would have been if the Pineville bank had promptly disaffirmed what it did. Nor does it appear that it will be unable now to get its money back from the Cincinnati bank. We are therefore of opinion that appellee was properly credited in the settlement of the account with the amount of these notes.

The next matter in dispute arises in this way: The Pineville bank held a four months' note, dated March 30, 1893, on Wyman & Cairns. The Louisville Banking Company discounted the note on April 28, 1893. It was payable at the

Pineville Banking Company. On July 25, 1893, the Louisville Banking Company sent the note to the Pineville ¹⁵⁴ Banking Company for collection. It was not paid at maturity. The Pineville Banking Company failed to demand payment, or to protest it for nonpayment. The Pineville bank was liable on this note as indorser, and, having failed to demand payment or protest, it became liable to the Louisville bank for the amount, and the court below properly so held.

The next matter to be considered is the proper basis for the settlement of the accounts. The commissioner adopted as his basis the balance shown by the books of the Pineville Banking Company. This was error. The Louisville bank had no notice of the account as it was kept on these books. The entries were not shown to have been made at the time of the transactions, or in the regular course of business. The account as kept on the books of the Louisville Banking Company had been submitted at the end of every month to the Pineville bank, and had been acknowledged by it to be correct. As we have said, it must be treated as an account stated. The commissioner should have taken the balance as shown by this account as the basis. To this balance should be added the amount of the Barry notes charged to the Pineville bank on the account, with six per cent interest from the time it was charged. We do not see from the record any other mistake in the account. If any appears, it may be corrected according to the principles laid down above. The \$1,200 note made by the Pineville Banking Company should be charged to the account at its maturity; also the Wyman & Cairns note, and the checks paid; and interest should be allowed on the balance, as it may appear, up to the time the proceeds of the Bell county bonds were received.

This is not a bill of interpleader. The costs should be ¹⁵⁵ paid as in other equitable actions. No part of the attorney's fees of appellant should be charged to appellee.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

Petition for rehearing by appellant overruled.

Accounts Stated are considered in the monographic note to Lockwood v. Thorne, 62 Am. Dec. 85-94. An account stated is an account balanced, and rendered, with an express or implied assent to the balance, so that the demand is essentially the same as if a promissory note had been given for the balance: Comer v. Way, 107 Ala. 300, 54 Am. St. Rep. 93, 19 South. 966. It establishes prima facie the accuracy and correctness of the items, and unless this presumption is overcome by proof of fraud, mistake, or error,

it becomes conclusive: *Note to Lockwood v. Thorne*, 62 Am. Dec. 91; *Hollenbeck v. Ristine*, 105 Iowa, 488, 67 Am. St. Rep. 806, 75 N. W. 355; *Deveemon v. Shaw*, 69 Md. 199, 9 Am. St. Rep. 422, 14 Atl. 464.

The Duties of Banks acting as collecting agents are considered in the monographic note to *Minneapolis etc. Co. v. Metropolitan Bank*, 77 Am. St. Rep. 613-629; *Second Nat. Bank v. Merchants' Nat. Bank*, 111 Ky. 930, 98 Am. St. Rep. 439, 65 S. W. 4.

Protest of promissory notes is not necessary by the law-merchant: See the monographic note to *Dupre v. Richard*, 43 Am. Dec. 219, on the protest of negotiable instruments. The manner of giving notice of protest, whether through the mail or by personal delivery from the notary, is not important: *M. V. Monarch Co. v. Farmers' etc. Bank*, 105 Ky. 430, 88 Am. St. Rep. 310, 49 S. W. 317.

DAVIS v. FELTMAN COMPANY.

[112 Ky. 298, 65 S. W. 615.]

HOMESTEADS—Loss of Family.—If a person has acquired the right to a homestead exemption by the occupancy of land with his family, the loss of his family by death and marriage does not defeat such right. (p. 291.)

HOMESTEADS—Fraudulent Conveyance of.—A Homestead Exemption is not lost by a conveyance to a third person which is set aside at the instance of creditors. (pp. 291, 292.)

HOMESTEAD.—A Mortgage of a Homestead Which is Adjudged to be an Act of Bankruptcy is nevertheless enforceable against creditors. (p. 292.)

HOMESTEADS—Right to Dispose of as Against General Creditors.—The owner of a homestead may make such disposition of his exempt property by deed, mortgage or other transfer, as to him may seem right, and his creditors cannot be heard to complain or interfere therewith. (p. 293.)

FRAUDULENT CONVEYANCE—Setting Aside—Attorney's Fee.—A creditor who succeeds in having a conveyance made by the debtor set aside as fraudulent and declared to operate as an assignment for the benefit of all of the creditors, is entitled to the allowance of an attorney's fee out of the property. (p. 294.)

L. W. Galbraith, for the appellant.

W. H. Wadsworth and W. D. Cochran, for the appellees.

see **BURNAM, J.** On the 25th of September, 1890, James Davis executed a mortgage to the firm of Walker & Sengstak upon a tract of four hundred and thirty-one acres of land owned by him in Mason county, Kentucky, and on certain tobacco in the warehouse in Cincinnati, Ohio, to secure an indebtedness to them of sixteen thousand dollars. This mortgage contained

no reservation of homestead, but, in terms, conveyed all the right, title, and interest of Davis therein. On the 1st of October following the execution of the mortgage, Davis made a general assignment of all his property to Thomas Wells for the benefit of his creditors. The mortgage to Walker & Sengstak was attacked within six months by H. Feltman & Co., large creditors of Davis, as preferential; and at the December term, ²⁸⁷ 1893, of the Mason circuit court, it was decided that it was made in the contemplation of insolvency, with the design to prefer, etc., and that it operated as an assignment of all his property and effects, and inured to the benefit of all his creditors in proportion to the amount of their respective demands. The judgment of the Mason circuit court was affirmed by this court, and in the opinion this court said: "It must be held that his act was preferential, under the statute, and operated as an assignment of all his property not exempt from execution for the benefit of his creditors." After the return of the case to the circuit court, the appellants, Walker & Sengstak, filed a written motion, and asked the court to adjudge that they had a lien by virtue of their mortgage upon the homestead of James Davis in the mortgaged property, and that they be paid one thousand dollars on account thereof out of the proceeds of the sale. The court overruled the motion, and adjudged that the proceeds of the homestead of Davis should be distributed equally among his creditors, and directed a sale of the real estate for this purpose. The land was sold on credits of six, twelve and eighteen months, and the sale was confirmed at the July term, 1898, and an order entered allowing the purchaser to anticipate the maturity of his obligations executed to the master commissioner theretofore by the payment of the whole of the purchase money, and the master commissioner was directed to distribute the money to the creditors in accordance with their respective rights. At the following term of the court, Davis moved the court to set aside to him out of the proceeds of the land sold, as exempt from the claim of his creditors, the sum of one thousand dollars for his homestead, and at the same time filed his affidavit reciting the grounds upon which he based this motion, and alleged that he had not consented to or ²⁸⁸ known of the order authorizing the purchaser to pay for the land before the maturity of his obligations. At the July term, 1898, the H. Feltman company moved the court for an allowance out of the proceeds of the land to be paid to their attorney for services rendered in the proceedings instituted by them to have the mortgage of Davis to Walker & Sengstak set aside as prefer-

ential, upon the ground that these services were rendered for the common benefit of all the creditors. The motion was overruled, and upon this appeal these questions are presented for decision: 1. Walker & Sengstak claim that they are entitled to one thousand dollars, the proceeds of the homestead, by virtue of the mortgage; 2. It is claimed by Davis that appellants, Walker & Sengstak, waived their right to the proceeds of the homestead because they consented to the judgment of July 1, 1898, distributing the proceeds to the general creditors; and (2) it is claimed by him that, as against his general creditors, it was exempt; 3. It is claimed by the general creditors that the question was settled by the judgment of the Mason circuit court rendered at its March term, 1895, and is therefore *res adjudicata*.

The first question to be determined is whether the appellant, Davis, was entitled to a homestead at the date of the mortgage to Walker, Sengstak & Co., on the 25th of September, 1890. It appears from the deposition of Mary Davis that the appellant, James Davis, had lived on the land for more than forty years; that during his occupancy thereof he had married, and had two children; that his wife had died, and that his children had grown up, married, and moved away from the old homestead, but that she had continued to live with her brother during this time, and was so living with him at the date of the execution of the mortgage. ²⁰⁰ These facts unquestionably entitle him to a homestead, and the loss of his family by death and marriage did not defeat this right: See *Ellis v. Davis*, 90 Ky. 183, 19 Ky. Law Rep. 893, 14 S. W. 74; and *Stults v. Sale*, 92 Ky. 5, 13 Ky. Law Rep. 337, 36 Am. St. Rep. 575, 17 S. W. 148.

The next question to be determined is the effect of the execution of the mortgage to Walker & Sengstak upon his entire tract of land, without any reservation, and the subsequent judgment of the court holding this conveyance an act of bankruptcy under the statute of 1856. It was held in *Kuevan v. Specker*, 11 Bush, 1, that the homestead exemption was not lost by a fraudulent conveyance to a third party, which was set aside at the instance of creditors, the court saying: "A fraudulent conveyance does not enlarge the rights of creditors, but merely leaves them to enforce their rights as if no conveyance had been made, and they will not be allowed to attack the conveyance as fraudulent, and then deny that he was the owner, in order to defeat his right to exemption." This was followed by the case of *Gideon v. Struve*, 78 Ky. 134. In this case Struve and wife conveyed

two acres of ground on which they resided. Certain creditors of Struve obtained a judgment for the sale of the lot under the act of 1856, upon the ground that the conveyance operated as a transfer of all of their property to their creditors. Struve filed a petition for homestead out of the lot, and it was held that their conveyance passed their title for the benefit of their creditors, and that they were not entitled to a homestead in the land conveyed. The conclusions reached by the court in this case appear to be in direct conflict with the previous case of *Kuevan v. Specker*, 11 Bush, 1. In the case of *Calloway v. Calloway*, 19 Ky. Law Rep. 870, 39 S. W. 241, this question was again considered by this court, ³⁰⁰ and, after a very full consideration of the case and all the other cases bearing thereon, it was held that an insolvent debtor did not forfeit his right to exempt property under the law by any act which operated as an assignment of his property under the act of 1856 for the benefit of his creditors, and that they had no right to complain, as they could not have subjected the debtors' exempt property to the payment of their debts previous to the act of bankruptcy under the statute. In this case the court appears to have gone back to the rule in *Kuevan v. Specker*, 11 Bush, 1. Both cases are in direct conflict with the *Struve* case, and after a careful examination of both cases, the court has decided to adhere to *Kuevan v. Specker*, 11 Bush, 1, and *Calloway v. Calloway*, 19 Ky. Law Rep. 870, 39 S. W. 241, and the case of *Gideon v. Struve*, 78 Ky. 134, is now overruled. We therefore conclude that the homestead of *Davis* did not pass to the general creditors by reason of the acts and judgment relied on.

The claim of *Walker & Sengstak* to the proceeds of the homestead presents a more serious question. In the opinion in *Calloway v. Calloway*, 19 Ky. Law Rep. 870, 39 S. W. 241, Judge Paynter says: "It must be understood that we are not considering the rights of the mortgagee, vendee, or transferee in the exempt property of the debtor, which is embraced in the deed, mortgage, or transfer which operated as an assignment, but only the question of the rights of the debtor to the exempt property as against creditors other than the one to whom he may have deeded, mortgaged, or transferred his exempt property." The case of *Allen v. Dillingham*, 20 Ky. Law Rep. 980, 47 S. W. 1076, presented this state of fact: The *Curd & Sinton Manufacturing Company*, a private corporation of which *W. H. Dillingham* was the president and principal stockholder was largely indebted to the *Allens*; and, to secure the payment of

this indebtedness, ³⁰¹ Dillingham conveyed his dwelling-house and lot to Charles E. Arnold, a brother in law of the Allens. Shortly after the execution of this deed from Dillingham, the Curd & Sinton Company made a general assignment for the benefit of their creditors, and the assignee attacked the deed to Arnold as a preferential arrangement made to favor the Allens, and within the act of 1856; and his contention was sustained. Thereupon the Allens asserted a claim to appellant's one thousand dollar homestead exemption in the property conveyed, and in passing upon this claim the court said: "A debtor may make such disposition of his exempt property as to him may seem right, and no creditor can be heard to complain. . . . To the extent that he can pass a perfect and indefeasible title to the property, the same must necessarily inure to the benefit of his vendee." And the Allens were adjudged entitled to the sum of one thousand dollars of the proceeds of the homestead. This case decides the exact question we have in this case. We therefore conclude that as James Davis owned the homestead in the tract of land mortgaged to Walker, Sengstak & Co., which was exempt from the claims of his creditors, his conveyance thereof vested the mortgagee with all the right, title, and interest therein, and that the court erred in not so adjudging.

The remaining question to be considered upon the appeal is the claim of the H. Feltman company to an allowance out of the proceeds of the land as a fee to their attorney for services rendered in the proceedings instituted by them to have the mortgage of Davis to Walker & Sengstak set aside as preferential. Section 489 of the Kentucky Statutes provides that: "In an action for the settlement of estates or for the recovery of money or property held in joint tenancy, coparcenary or as tenants in common if it ³⁰² shall be made to appear that one or more of the legatees, devisees, distributees or parties in interest have prosecuted for the benefit of others interested with themselves, and have been at trouble and expense in conducting same, it shall be the duty of the court to allow such person or persons reasonable compensation for such trouble and for necessary expenses in addition to the fees and cost; said allowance to be paid out of funds recovered before distribution, the persons interested having notice of the application for such allowance." And section 1912 provides that settlements of insolvent estates shall be conducted as actions and proceedings for the settlement of the estates of deceased persons are now required to be conducted, so far as same are applicable. The H. Feltman

company instituted the suit seeking to hold the mortgage of Davis to Walker & Sengstak void under the act of 1856, and their attorney took all the proof upon the question, wrote the judgment, advised the receiver with regard to the management of the property, argued the case orally in the circuit court, and briefed it in the court of appeals. As the result of these services, the mortgage to Walker & Sengstak for sixteen thousand dollars, with many years' interest, was set aside, and the property therein mortgaged inured to the benefit of all the creditors equally. If this mortgage had stood, the general creditors would have received practically nothing upon their claims, as in the end they only realized about thirty per cent. Under the provisions of the statute quoted, and as decided in the case of Strobel v. Boresig, 13 Ky. Law Rep. 398, we think their attorney was entitled to a reasonable fee out of the estate for his services in attacking the fraudulent conveyance only, and that the court erred in not fixing an allowance therefor.

³⁰³ For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion. Opinion modified on its face, and petitions for rehearing overruled.

A *Homestead* right is not lost by the death, marriage, or removal of some of the members of the family: Lyons v. Andry, 106 La. Ann. 356, 31 South. 38, 87 Am. St. Rep. 299, and cases cited in the cross-reference note thereto. And the transfer of property exempt as a homestead cannot, ordinarily, be in fraud of creditors: Morrow v. Bailey, 109 Ky. 359, 59 S. W. 2, 95 Am. St. Rep. 382, and cases cited in the cross-reference note thereto. A debtor after having a conveyance of his property set aside as fraudulent, may set up a claim to its exemption from sale by reason of his having made it a homestead since the entry of the decree: Dulion v. Harkness, 80 Miss. 8, 92 Am. St. Rep. 563, 31 South. 416.

GERMANIA INSURANCE COMPANY v. ASHBY.

[112 Ky. 303, 65 S. W. 611.]

FOREIGN CORPORATIONS—Insurance Companies—Service of Process.—If a foreign insurance company consents, upon coming into the state to do business, that service of process on the state insurance commissioner shall be valid service on such company, such consent extends to any action relating to any business done by the company while in the state, although it withdraws therefrom prior to the bringing of the action. (pp. 296, 297.)

FOREIGN CORPORATIONS—Insurance Companies—Service of Process.—If a foreign insurance company consents, upon coming into the state to do business, that service of process upon the state insurance commissioner shall be valid service upon such company, such consent to service is not limited to the time when the company is soliciting business within the state, but extends to all business done while there, and so long as a policy issued by it remains in force, or loss thereunder remains unsatisfied, such consent to service is binding on the company. (p. 297.)

INSURANCE—Proof of Loss.—Denial that "sufficient" proofs of loss were furnished is not a denial that the insured furnished proof of loss. (p. 297.)

INSURANCE—Waiver of Proof of Loss.—Denial of Liability for loss under a policy of insurance is a waiver of proof of loss. (p. 297.)

INSURANCE—Notice to Agent is Notice to Insurer—State of Title.—Notice to the insurance agent that the insured had only a bond for title is notice to the insurer of the state of the title, and estops it from setting up that the insured falsely stated an ownership in fee. (p. 297.)

INSURANCE—Knowledge of Agent—Iron-safe Clause.—An agreement by the insured under a clause in his policy to keep an iron safe and to keep his books therein is not binding, when the agent soliciting the insurance knows that there is no such safe kept on the premises, and there is no consideration shown for such agreement. (pp. 297, 298.)

INSURANCE—Valued Policies.—Under Kentucky statutes all insurance policies covering real estate are valued policies, and the value placed in the policy on which premium is paid is the value to be paid in case of loss notwithstanding a clause in the policy to the contrary. (p. 298.)

Jonson & Wickliffe, for the appellant.

W. H. Yost and H. P. Taylor, for the appellee.

see **WHITE, J.** This is an action on a policy of insurance covering a stock of groceries and the building wherein they were kept. The policy was for four hundred dollars on the stock and one hundred dollars on building, and the action seeks to recover these sums for a total loss. The answer admitted the issue of the policy, but denied the loss of any goods, and pleaded that appellee in his application had falsely stated that he was

the owner in fee of the land, when in fact he had no title thereto. It was also pleaded that satisfactory proof of loss had not been furnished the company. Appellee admitted signing the application, but said he did not read the application, which was written by the agent of appellant; that he started to read the application, but was advised by the agent that it was a mere form for his own report to the company. He further pleaded that, while he did not have title to the land on which the house stood, he informed the agent at the time of the contract the exact state of the title—that he had a bond or writing agreeing to make him title from the person from whom he purchased. Upon the issue thus presented, a trial was had, which resulted in a verdict and judgment for the full sum claimed.

At the threshold we are met with a question of jurisdiction of the appellant, which was presented by motion to quash the service of process on the commissioner of insurance ³⁰⁷ upon the affidavit that the appellant had withdrawn from this state, and ceased to do business herein. It is conceded that when appellant was admitted to do business in this state it filed its written consent that service upon the insurance commissioner should be sufficient to notify it of all proceedings and actions that might be instituted. It stands admitted (by not being denied) that at the date of the service the appellant had withdrawn from the state. The provision of the law which appellant complied with upon its admission to do business here reads: "Before authority is granted to any foreign insurance company to do business in this state, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the commissioner of insurance of this state, in any action brought or pending in this state shall be a valid service upon said company": Ky. Stats., sec. 631. There is no provision in the law limiting this consent to such time as the insurance company shall do business in this state. The object and purpose of the statute, *supra*, was to provide a mode of service to citizens who should desire to sue upon contracts of the insurance company, rather than compel them to go to the state of the corporation for redress. If this consent is to be withdrawn as soon as the company withdraws, the provision, so far as the insurance commissioner is concerned, would be a useless provision. As long as the company is engaged in business here, service can be had on the agent; but where it ceases to do business, and has no agents, there is a necessity for some person upon whom process might

be had. We conclude, therefore, when the reason of the statute is taken into consideration, that it is intended that the consent to service on the insurance ³⁰⁶ commissioner is not limited to the time when the company is soliciting business here, but extends to all business that it may do while here. As long as a policy issued is in force, or loss thereunder remains unsatisfied, this consent to service on the insurance commissioner is binding: *Society v. Muehl*, 109 Ky. 479, 22 Ky. Law Rep. 1378, 59 S. W. 520. We are, therefore, of opinion there was no error in overruling the motion to quash the service of process.

There is no denial by plea or in proof that appellee furnished proofs of loss. The denial is that sufficient proofs were furnished. It is not contended that appellant ever notified appellee of the insufficiency of the proofs submitted, or demanded further proof. However, it is pleaded and proven that appellant declined absolutely to pay before the suit was brought. Proof of loss is but a condition precedent to the action. It is not a condition upon which liability exists. The liability is fixed by the fire; but before action there must be proof of loss, or a waiver thereof by the insurer. It has been repeatedly held that a denial of liability is a waiver of proof: *Insurance Co. v. Clark*, 22 Ky. Law Rep. 1066, 59 S. W. 863, and authorities there cited. It is shown that proofs of loss were furnished before suit was brought. Appellant produced one proof at the trial, and it is included in the bill of exceptions.

The contract being admitted, and the loss total of the building and contents, and it being shown that proofs had been furnished, there remained but one question as to the stock lost (that of value), and but one as to the building (that of title)—as to whether the agent making the contract had notice of the state of the title. The court properly instructed the jury as to value. They were told that appellee could recover three-fourths of the value of the stock lost, not exceeding four hundred dollars. This was according to the ³⁰⁹ contract. The proof as to title was that appellee had a bond for title, and of this fact the agent writing the insurance was fully informed at the time. Notice to the agent was notice to the company: *Germania Ins. Co. v. Wingfield*, 22 Ky. Law Rep. 455, 57 S. W. 456, and cases cited.

It has also been repeatedly held that the provision for an iron safe was not binding, and a failure to keep such safe or his books therein or out of the building will not avoid the policy when the agent of the company soliciting the insurance knew

there was no such safe, and there is no consideration shown for such agreement. The reason for this rule is that such clauses are conditions subsequent that operate as a forfeiture of the right to compensation for loss sustained, and the courts will never declare a forfeiture of a right, where there is any reason for an equitable estoppel from such plea: *Germania Fire Ins. Co. v. Heflin*, 22 Ky. Law Rep. 1212, 60 S. W. 393; *Citizens' etc. Ins. Co. v. Crist*, 22 Ky. Law Rep. 47, 56 S. W. 658, and cases cited.

The instruction as to the notice of title of appellee was proper, and, if there was such notice to the agent of the state of the title, appellee was entitled to recover the contract valuation of the house.

Under our statutes, all policies covering realty are valued policies, that is, the value placed in the policy on which the premium is paid is the value to be paid in case of loss and to such the three-fourths clause does not apply. The verdict as to notice, waiver or proof of loss, and amount of loss is fully sustained by the evidence.

Finding no error, the judgment is affirmed.

Service of Process on foreign corporations is discussed in the monographic note to *Abbeville Elec. etc. Co. v. Western Elec. Supply Co.*, 85 Am. St. Rep. 926-938. That a stipulation filed by a foreign insurance company with the insurance commissioner, authorizing service on such officer in an action against it, is binding so long as any liability of the company remains outstanding in the state, although its right to do business therein has been revoked, see *Magoffin v. Mutual Reserve etc. Assn.*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

Insurance.—That notice to the agent of an insurance company of facts material to the risk is notice to his principal, see *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140, 45 N. E. 180; *McBryde v. South Carolina Mut. Ins. Co.*, 55 S. C. 589, 74 Am. St. Rep. 769, 33 S. E. 729; *Magoun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5. As to the force and effect of iron-safe clauses in fire insurance policies, see *Phoenix Ins. Co. v. Schwartz*, 115 Ga. 113, 41 S. E. 240, 90 Am. St. Rep. 98, and cases cited in the cross-reference note thereto. And as to the effect and validity of valued policy laws, see *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 658, 38 S. W. 85.

COMMONWEALTH v. WESTERN UNION TELEGRAPH
COMPANY.

[112 Ky. 355, 67 S. W. 59.]

NUISANCE—Gaming-house.—At common law, a common gaming-house is a nuisance, and persons who are in the occupation and control of such a house are guilty of maintaining a nuisance. (p. 300.)

NUISANCE—Telegraph Company Delivering Racing News.—The fact that a telegraph company receives and transmits racetrack news to persons engaged in maintaining a nuisance at a place in gambling on races thus reported to them, together with the fact that such company delivers such news, knowing that it is to be used for gambling purposes, does not make the telegraph company guilty of maintaining such nuisance. (p. 301.)

R. J. Breckinridge, attorney general, for the commonwealth.

Kohn, Baird & Spindle, Richards & Ronald and G. H. Fearons, for the appellee.

³⁵⁵ **PAYNTER, C. J.** The indictments charge the appellee with the offense of unlawfully keeping and maintaining a common nuisance. It is averred in them that Ed. Alvey and others had a house in the city of Louisville, commonly called "The Kingston," in their occupation and under their control, and habitually sold pools upon horseraces run at various cities and places in the United States, and did habitually suffer, permit, and procure divers idle and evil disposed persons to habitually assemble in that house, who engaged in betting, ³⁵⁶ winning and losing money on horseraces, to the common nuisance and common annoyance of all good citizens of the neighborhood, and those passing and repassing, etc. As to the appellee, it is averred that it is a corporation organized for the purpose of conducting the business of common carrier of intelligence by telegraph in the United States; that it, unlawfully designing to assist and aid and abet Alvey and others in the pool-selling in the house mentioned, habitually received from divers race courses in the United States messages and intelligence concerning horseraces, to wit, the names of horses entered in races, names of owners, trainers, riders, drivers, and distances of the races, terms, conditions, and state of betting at the races, condition of the weather and tracks of racecourses, with the design to enable the persons assembled at the house of Alvey and others to bet upon races. It is further averred that the appellee transmitted and delivered to Alvey and others, at the Kingston, the

information as to the result of races, with the view of enabling him and others to pay the bets made on races; that the information and intelligence transmitted and services rendered by the appellee was a necessary and essential service and means of carrying on and maintaining the existence of pool-selling by Alvey and others, of which fact the appellee was aware.

It will be observed that the Kingston is averred to be under the control and management of Alvey and others. It is not averred that the appellee had any control of or management of the building. Neither is it averred that it was engaged in keeping or maintaining a common nuisance except as stated. The essence of the charge against it is that it transmitted over its line information which enabled Alvey and the evil-disposed persons who assembled ²⁸⁷ at the house to engage in betting on races at distant points and to pay bets upon their results. At common law, a common gaming-house is a nuisance. It is detrimental to the public, because it promotes cheating and other corrupt practices; it encourages idleness and excites the desire to obtain money in an improper way. Persons who are in the occupation and control of such houses are guilty of maintaining a common nuisance: 1 Russell on Crimes, 741; 2 Bishop's Criminal Procedure, 278. As it is not averred that the appellee is in the occupation and control of the house, the question arises whether it is guilty of keeping the house by the transmission of information. It is a common carrier of intelligence and information, and was created and organized for that purpose. Section 1346 of the Kentucky Statutes denounces a penalty of not less than ten dollars nor more than five hundred dollars against an agent, officer, or manager of a telegraph or telephone line who, from corrupt or improper motives, or willful negligence, shall withhold the transmission or delivery of messages of intelligence for which the customary charges have been paid or tendered. If a person desires to transmit a message over a telegraph line, if it is couched in decent language, it is the duty of the company to receive and transmit it upon the tender or payment of the customary charges for such services. The very purpose of its creation is to serve the public, and it cannot refuse to do so without making itself liable for its refusal. It has no more right to refuse to send a message when the charges are paid or tendered, when the message is couched in decent language, than a railroad company has to refuse to carry a passenger who tenders or pays his fare. A railroad company has a right to refuse to carry a pas-

senger who is disorderly, or whose conduct imperils the lives of his fellow-passengers or the ~~ass~~ officers or the property of the company. It would have no right to refuse to carry a person who tendered or paid his fare simply because those in charge of the train believed that his purpose in going to a certain point was to commit an offense. A railroad company would have no right to refuse to carry persons because its officers were aware of the fact that they were going to visit the house of Alvey, and thus make it possible for him and his associates to conduct a gambling-house. Common carriers are not the censors of public or private morals. They cannot regulate the public and private conduct of those who ask service at their hands. It was certainly no wrong per se for the appellee to transmit over its line the information which it is charged to have transmitted. The simple fact that persons who received the information, and as a result of it, were guilty of unlawful acts, does not make the appellee a violator of the penal or criminal law. If in doing so it violated the penal or criminal law, it would be likewise guilty in transmitting information to the newspapers of the country as to prospective prize fights and horse races, because the information thus published induced persons to engage in betting on their results. The case of *Commonwealth v. Churchill*, 136 Mass. 148, is not exactly analogous to the case under consideration, but it serves to illustrate the difference between the principal in control of premises upon which a nuisance is maintained and an agent whose act in some degree contributed to it. In that case the nuisance consisted in selling intoxicating liquors, etc. The defendant made some of the illegal sales. In passing upon the effect of his acts, the court said: "The Massachusetts decisions have never pressed the liability of a servant for keeping or maintaining a nuisance, consisting of a tenement in the possession of his master, under ~~ass~~ circumstances like the present, beyond cases where the servant had had charge and control of the place, for a short time at least. . . . It is true that sales in the presence of a master do in some degree aid the master in keeping the tenement. But so do purchases, which, nevertheless, are not misdemeanors of any description. . . . The distinction between acts which amount to maintaining the nuisance and those which do not is one of degree. We do not think that the misdemeanor of unlawfully selling, committed by a servant, can be said, as a matter of law, to amount to maintaining a nuisance, unless he has assumed a temporary control of the premises, or in some other way emerged from his

subordinate position to aid directly in maintaining it. . . . And none of our cases have gone further than to leave the general question to the jury, whether the defendant aided in keeping the tenement, when it appeared that he did so by exercising some form of control." In that case the agent might have been prosecuted for selling liquor, but the court held that he was not guilty of maintaining the nuisance, because he was not in the occupation and control of the premises. He was guilty of an illegal act which contributed to the nuisance, yet the court would not hold that he maintained it. In the case at bar it was legal for the appellee to furnish the information, but it is claimed that it is liable because, after that information was obtained, parties used it in such a way as to make their acts unlawful. The court properly sustained a demurrer to the indictments.

The judgment is affirmed.

The Keeping of a Gambling place is indictable at common law as a nuisance: Vanderworker v. State, 18 Ark. 700; State v. Savannah, 1 T. U. P. Charit, 235, 4 Am. Dec. 708; Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; Tanner v. Trustees of Albion, 5 Hill, 121, 40 Am. Dec. 337. As to the statutory liability of telegraph companies for transmitting money to be bet on races, see State v. Harbourns, 70 Conn. 454, 66 Am. St. Rep. 123, 40 Atl. 179.

ABSHIRE v. ROWE.

[112 Ky. 545, 66 S. W. 394.]

SURETIES on Guardians' Bonds—Additional Bonds—Liability.—The execution of one or more new guardian bonds in addition to the old one is merely cumulative, affording additional protection and security to the infant, and the obligations of all the sureties in all the bonds are coequal and coextensive. (p. 305.)

SURETIES on Guardians' Bonds—New Bond—Liability for Past Defalcation.—In the absence of a covenant of indemnity in a new and additional guardian's bond, the liability of all the sureties in both the old and new bonds for all past liability for the default of the guardian is coequal, as if they had executed one bond originally. (p. 306.)

SURETIES on Guardians' Bonds—Liability in One Action.—If two or more bonds have been executed to a ward by his guardian, it is not necessary to sue the sureties separately upon their respective bonds for the default of the guardian, and they may all be joined in one and the same action. (p. 307.)

J. M. Roberson, for the appellants.

⁵⁴⁷ O'REAR, J. One James Matney was appointed guardian for the infant appellees, Rowe, in August, 1895, by the Pike county court, and executed bond with L. D. Marrs and seven others as sureties. Thereafter there came to the hands of the guardian a fund belonging to the infants jointly, to the amount of sixteen hundred and sixty-six dollars and sixty-six cents. On the seventeenth day of March, 1897, pursuant to a notice executed by said L. D. Marrs and D. B. Marrs, two of the sureties, the guardian was required to execute a new bond. The notice was for the purpose only of procuring the release of the two sureties named. This new bond was executed with appellants, Abshire and K. F. Roberson and others, as sureties. At the August term, 1898, of the Pike county court, Matney was removed as guardian and Samuel J. Salyer was appointed his successor, who brought this suit against all the sureties in both the bonds executed by his predecessor, Matney, alleging the insolvency of Matney and of the devastavit of his ward's estate, alleging that he had refused and failed to ⁵⁴⁸ pay over the amount, or any amount, of the money so received by him for them, and had failed to make any investment of same for them.

Appellants, Abshire and Roberson, sureties on the new bond, plead that the money received by the guardian was received before the new bond was executed or required, and that, likewise, it was squandered and converted by the guardian before the execution of the bond. They claim that in consequence of these facts they are not bound, and they cite and rely upon *Boyd v. Withers*, 103 Ky. 698, 20 Ky. Law Rep. 541, 46 S. W. 36, *Jones v. Gallatin County*, 78 Ky. 491, and *Cassily v. Cochran*, 12 Ky. Law Rep. 119. The question is, What was the purpose, and what was the effect, of the new bond? It is argued for appellants that it was to answer for the faithful accounting by the guardian of the ward's estate coming to his hands from and after its date. In *Boyd v. Withers*, 103 Ky. 698, 20 Ky. Law Rep. 541, 46 S. W. 36, the court held that in any event the burden was upon the guardian or his surety claiming exemption, to show where the devastavit was committed, and in the absence of such showing, a judgment against any of the sureties would be upheld. In *Cassily v. Cochran*, 12 Ky. Law Rep. 119, it was adjudged that under the peculiar facts of that case, the conversion of the ward's estate by the guardian occurred after the execution of the new bond, and therefore the sureties upon the new bond were undeniably liable. The question here presented did not arise, and was not de-

cided, in either of the cases cited. By section 1068 of the Kentucky Statutes, it is made the duty of the county judge to, at least once in each year, carefully inquire into the solvency of all the sureties upon the bond of each fiduciary, and if there is reason to believe that any bond is not amply sufficient to protect from loss those interested, he is required to give notice to such fiduciary ⁵⁴⁰ "that a new bond, or additional surety on the old, is required, and upon a failure of some fiduciary to give said bond or surety within a reasonable time to be fixed by the court, he shall be removed." It is obviously the purpose of this statute to give to the county court a discretion and invest it with a duty, long exercised by that tribunal to exact rigid security for the protection of infants whose estates are committed to guardians. A guardian is appointed subject to being removed for cause during the minority of the infant, and the bond first executed covers that period: *Elbert v. Jacoby*, 8 Bush, 541.

It not frequently happens that one or more, or possibly all, the sureties of this bond become insolvent. They would not be interested, therefore, in directing the attention of the county court to derelictions of the principal, but the court may require the security to be strengthened either by requiring additional surety or the execution of a new bond. In either event, it is the purpose of the court to protect the infant's interest. If the new bond should take effect only from its date, and the conversion of the ward's property or other wrongful act, that may thereafter be complained of, had occurred before the execution of this new bond, the sureties in the old one having become insolvent, then the execution of such new bond would probably be useless so far as any practical benefit is concerned. Unless such new bond is executed or additional surety furnished, it is the duty of the court to then remove the guardian and appoint another. This termination of his office, depriving him of its emoluments and privileges, and requiring of him an immediate settlement and transfer of the ward's assets to the successor, would all have occurred at the time of the original complaint, except for the execution of a new bond. The result ⁵⁴⁰ of such execution is to continue the guardian in office, and to continue his rightful custody and use of his ward's estate, and to prevent, for the time being, an action to require him to account for and pay over what had previously come to his hands. It is what the language of the statute says it is—"an additional surety." This statute is not new in our law.

It has existed in one form or another from the earliest history of the commonwealth. And under it this court has uniformly held that the execution of one or more additional bonds is merely cumulative, affording additional protection to the infant, and additional security to him that the guardian shall execute and shall have executed faithfully all the duties of his office: *Hutchcraft v. Shrout's Heirs*, 1 T. B. Mon. 208, 15 Am. Dec. 100; *Frederick v. Moore*, 13 B. Mon. 472; *Elbert v. Jacoby*, 8 Bush, 545; *Withers v. Hickman*, 6 B. Mon. 292; *Taylor v. Taylor*, 6 B. Mon. 559; *Middleton v. Hensley*, 21 Ky. Law Rep. 703, 52 S. W. 974; *Sievers v. Havens*, 5 Ky. Law Rep. 856. And such is the rule, it seems, elsewhere: *Jones v. Hays*, 3 Ired. Eq. 502, 44 Am. Dec. 78; *Poole v. Cox*, 9 Ired. 69, 49 Am. Dec. 410. These cases all hold that the obligation of all of the sureties in all the bonds is coequal and coextensive. It was held in *Wilborne v. Commonwealth*, 5 J. J. Marsh. 617, under the act of 1797, then in force, that county courts had the right, in exercising their jurisdiction requiring additional sureties, to extend the order so as to release former sureties, if, in their judgment, it was thought expedient to do so, but unless, by the terms, the former surety was released, he continued bound for all the acts of the guardian. It was also held in that case that the surety of the new bond was likewise liable for all the acts of the guardian. By section 4659 of the Kentucky Statutes, it is provided that a surety on any official bond,⁵⁵¹ or bond of a guardian, who wishes to be relieved from future liability, and to obtain indemnity for such loss as may have been incurred, or either, may, by written notice to the principal obligor, require him to appeal before the court in which the original bond was given, to execute a new bond with other surety, or to effect a discharge of the motioner from future liability, or as indemnity for the past acts of the principal, or for both. Section 4663 of the Kentucky Statutes makes the execution of such bond a discharge of all the sureties making the motion for release from all liability for the acts of the principal thereafter done; and, if the object be so specified, the bond shall contain a stipulation or covenant to indemnify the surety against any loss already incurred by reason of the suretyship. In this case it does not appear that there was a motion for indemnity, and therefore the sole question is the effect of the execution of the new bond, not as to the motioners Marrs, but as between the new sureties, the appellant here, and the old sureties who did not make the motion. The statute expressly

restricts the release effected by the execution of this new bond to such of the old sureties as moved for it. It must follow that the sureties on the old bond who did not move for the release were intended by the law-making body to be continued upon their liability. As between the motioners and those executing the new bond, the motioners would be liable only for such defalcation as had occurred before its execution; but, as between the other sureties on the old bond and the sureties of the new, they all stand alike, and upon the same footing. We could not conclude otherwise, and be in harmony with the earlier and persistent rulings of this court upon the effect of such obligations. Had the new bond contained a covenant of indemnity to the motioners ⁵⁵² in the old one, then, as between the obligors in the old bond, making the motion, and the obligors in the new, those in the new bond would have been liable for the whole of the defalcation, whenever committed. In the absence of such covenant, applying the general doctrine above discussed, and assuming that the defalcation occurred before the execution of the new bond, then the liability of all the obligors, sureties on all the bonds, is coequal, as if they had all executed one bond originally.) In *Watts v. Pettit*, 1 Bush, 155, the court had under consideration the relative liabilities of sureties on an old and a new guardian's bond, where the new one had been executed under notice such as above provided for. The statute, however, in that case, was materially different in language from our present statute. The language of the statute in that case was, "If a guardian shall give a new bond when ruled to do so by the court, his former security shall not be bound for any acts of his thereafter": 1 Acts 1855-56, p. 111, sec. 1. The court construed that language to exonerate the surety making the motion and requiring the execution of a new bond from all liability from any act of the guardian, whenever committed. *Jones v. Gallatin Co.*, 78 Ky. 491, was a controversy between sureties upon different bonds as to their respective liabilities for a defalcation of a sheriff as collector of revenue. It may well be argued that the sureties upon the sheriff's bond undertook to covenant only against the wrongful acts of their principal within the period covered by their obligation; that is, from the time the bond was executed. Not so, however, as to a guardian's bond. There the guardian obligates himself to the ward by executing a bond to the commonwealth that he will account for and pay over to the ward all money that has come or may come to his hands by virtue of his

office. ⁵³³ Such is the effect, in one sense, of his undertaking. It is not merely that he will not misappropriate the ward's funds, but that, whenever legally demanded, they will be forthcoming. The covenant is broken when default is made upon demand of the ward upon arriving at age, or upon the demand of the guardian's successor if the guardian is removed or otherwise vacates his office, to pay over the balance remaining due the ward. In another sense the breach may be said to have occurred, though not necessarily completed, at such time as the guardian may have converted his ward's estate. Properly, the guardian should not mingle the ward's estate with his own. It should be employed separately, and securities and evidences of debt taken in his name as guardian for the benefit of the ward, though it is not infrequent that guardians do use, and without any improper motive, their ward's money, being solvent, and feeling that they are bound by ample security to make good the same, with legal interest, as required by the statute. They deem it is their privilege to personally use the fund. We are not prepared to say that such use would of itself constitute a breach of the bond. It was doubtless in part for this reason that the earlier decisions of this court, as well as those later, have adopted and applied the rule concerning the general liability of all the sureties upon all the bonds for all of the acts of the guardian during the duration of his office, and until such sureties may be released by appropriate orders of court.

It follows from what has been said that there was but one cause of action in this case, and that it was not necessary to sue the sureties upon the respective bonds in separate actions, but that one suit might be maintained against all of them, and in the same action.

Judgment affirmed.

Whole court sitting.

New Bonds given by a principal are cumulative securities for the faithful performance of his duties: *Jones v. Hays*, 3 Ired. Eq. 502, 44 Am. Dec. 78; *Poole v. Cox*, 9 Ired. 69, 49 Am. Dec. 410. When two bonds were given by a guardian at different times, all the sureties on both bonds were held liable for the whole amount in *Hutchcraft v. Shrout*, 1 T. B. Mon. 206, 15 Am. Dec. 100. As to the liability in general of sureties on successive bonds, see the monographic note to *Crown v. Commonwealth*, 10 Am. St. Rep. 843-860; *Grand Haven v. United States Fidelity etc. Co.*, 128 Mich. 106, 87 N. W. 104, 92 Am. St. Rep. 446, and cases cited in the cross-reference note thereto.

SMITH v. MIDDLETON.

[112 Ky. 588, 66 S. W. 388.]

MASTER AND SERVANT—Negligence—Evidence.—If it is sought to charge a master with his servant's negligence in a particular instance, evidence that the latter was careful, sober, and painstaking generally is not admissible, in the absence of evidence to the contrary. (p. 309.)

MASTER AND SERVANT—Negligence—Punitive Damages.—The act of a drug clerk in selling and furnishing a deadly drug, when a comparatively harmless one is asked for, is gross negligence for which the master is liable in punitive damages. (pp. 309, 310.)

MASTER AND SERVANT—Liability for Gross Negligence. A master, whether a private individual or a corporation, is liable in punitive damages for the gross negligence of a servant committed in the line of his employment. (p. 310.)

NEGLIGENCE—Death of Child by Wrongful Act—Measure of Damages.—If it is sought to recover for the death of a child five years old caused by negligence in another, the measure of damages is fair compensation for the destruction of the power of the deceased to earn money, and in fixing such damage the jury should take into consideration the age of the deceased and the probable duration of his life, but not his earning capacity. (p. 312.)

Beard & Marshall and Willis & Willis, for the appellant.

J. C. Beckham & Son and G. G. Gilbert, for the appellee.

592 **O'REAR, J.** Appellee was a druggist at Shelbyville. He had besides himself, in charge of his store, a licensed pharmacist, and two other salesmen who were not licensed pharmacists. Charles Earl Smith was an infant aged about four years. His mother and her sister called at appellee's drugstore with an ordinary pillbox bearing a label, besides the druggist's name, as follows: " $\frac{1}{4}$ grain calomel." They handed this box to one of appellee's clerks—one who was not a pharmacist—and asked him to furnish in the box twenty-five cents worth of calomel in one-fourth grain tablets, which he undertook to do. They also made other purchases, including having a prescription refilled. They returned to the drugstore shortly afterward, and were delivered their packages by a clerk, which they carried to their homes. The statement of the women is that they kept on hand a supply of calomel in this form for use as occasion might seem to require. Mrs. Smith had three little children, Charles Earl being the second. He was complaining of a cold, and as a remedy she sought to administer what she believed was calomel, being some of the pellets contained in the box referred to. She did give him three of these pellets—one at the end of each hour

for three hours. It subsequently developed that, instead of calomel, the box contained morphine. The result was the death of the child. ⁵⁸³ His administratrix has brought this suit against the druggist for the negligent destruction of the child's life, alleging that the mistake by which the clerk furnished morphine instead of calomel, and putting it in a box labeled, "Calomel $\frac{1}{2}$ grain," was gross negligence of such a degree as entitled the plaintiff to recover punitive damages. The jury found for the plaintiff a nominal sum, and she appeals, presenting three grounds for the consideration of this court, upon which she asks a reversal.

1. The defendant (appellee) was permitted to prove on the trial that the clerk who furnished the medicine, and who, by the way, claimed he did not furnish morphine, but did calomel, was a careful, sober, painstaking man. This evidence was objected to. It had not been attempted, for the plaintiff, to prove that the clerk was either generally careless, inattentive, or dissipated. Therefore the question was not whether generally and ordinarily the clerk was as suggested by the evidence, but whether upon the occasion under inquiry he was careful or negligent. In our opinion, it ought not to affect this case in the least, however careful and attentive the clerk was ordinarily, if on this particular occasion he was negligent or grossly negligent. The sole question to be submitted to the jury on that point was whether the clerk did furnish morphine on this prescription instead of calomel, and whether such an act was, or not, grossly negligent. We are of opinion that the testimony discussed above should have been excluded, and the inquiry confined to the particular transaction—as to whether it was or not negligent.

2. On the trial of the case the court refused to submit to the jury the question of punitive damages. Whether this was upon the theory that the master, when a natural ⁵⁸⁴ person, is not liable to punitive damages, because of the gross neglect of his servant when upon the master's business and in the line of his employment, where care has been used by the master in the selection of the servant, or whether it was upon the idea that there was no evidence of gross neglect shown in this case, we are not informed. The court is of the opinion that to put in charge of a business of this kind one with authority to dispense such poisonous and dangerous drugs as morphine (it was shown in this case that these unlicensed clerks were authorized to sell this drug), where such one gave such a deadly drug to one call-

ing for calomel, placing it in a box labeled, "Calomel $\frac{1}{4}$ grain," without notice of the true nature of the drug furnished, was of itself such evidence of that degree of gross negligence that would warrant a jury in finding punitive damages against such wrongdoer. It is not suggested, nor can we apprehend that it is in any wise probable, that the act of furnishing the wrong drug in this case was willful. If it was furnished by the clerk, it was undoubtedly a mistake and unintentional. However, it was a mistake of the gravest kind, and of the most disastrous effect. We cannot say that one holding himself out as competent to handle such drugs, and who does so, having rightful access to them, and relied upon by those dealing with him to exercise that high degree of caution and care called for by the peculiarly dangerous nature of his business, can be heard to say that his mistakes by which he furnishes a customer the most deadly of drugs for those comparatively harmless is not, in and of itself, gross negligence, and that of an aggravated form. In a business so hazardous, having to do so directly and frequently with the health and lives of so great a number of people, the highest degree of care and prudence for the safety of those dealing with such dealer ⁵⁹⁵ is required. And that degree of care exacted of such dealer will be required, also, of each servant intrusted by him with the conduct of his calling. In argument, however, much stress is laid upon the suggestion, if the master, who is not a corporation, exercises due care in the selection of competent and careful servants, that for their gross or willful neglect, even in the discharge of their duties in his business, he is not liable. It is argued that as punitive damages are awarded, in one sense, as a punishment of the wrongdoer for his negligence, only the one actually guilty should be so punished. It is admitted that a contrary rule exists in this state where the master is a corporation. It is said that in such a case the master can act only by its servants; that from the necessities of the case the servant, when acting for his employer in the discharge of his line of duty, is the master, so far as the act in question is concerned. We are asked to differentiate the liabilities of these two different classes of employers. Why a different rule of liability should be applied to one who is compelled to operate his business by servants, to that applied to one who elects to do so, is not shown, nor are we able to perceive. There seems to have been at one time much contrariety of opinion among the courts on this point, which has later become less marked. In this state we never recognized the distinction

now sought to be drawn. The doctrine seems to us to be unsound, if not pernicious. It would imply that, with respect to all the grossly neglectful acts or intentional acts of the servant in the supposed furtherance of his master's business, the law clothed the master with immunity, if the act was right, because it was right, and, if it was wrong, it clothed him with like immunity because it was wrong. He would thus get the benefit of all his servant's acts done for him, whether right ⁵⁹⁶ or wrong, and escape the burden of all intentional or grossly neglectful acts done for him which were wrong. Under the operation of such a rule, it would always be safer for the master to conduct his business vicariously than in his own person. The public are invited to deal with the servant concerning his master's business. Through him only can the business be transacted, if the master so wills. Then for his intentional or grossly neglectful act done within the scope of his employment the one dealing with him would be left without remedy. This would be an inducement to one engaged in a specially hazardous business to conduct it by the means of financially irresponsible agents, because if they should succeed in the business, the master would get all the profits, while, if by their gross negligence or willful act injury resulted to another, the master and his business would not be hurt, so far as direct punishment was involved. It is said by Thompson, in his Commentaries of the Law of Negligence: "A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence." In *Hawkins v. Riley*, 17 B. Mon. 146, which was an action by one injured by the alleged gross negligence of a stage driver—the stage being operated by a natural person—the court said: "If the collision was brought about by the wantonness, recklessness, or gross negligence of the driver, then it was permissible in the jury, in view of all the facts, to award what the law terms 'exemplary damages,' as well against the proprietors as the driver." We are of opinion, therefore, that the court erred in not giving to the jury an instruction defining "gross negligence"—the one asked for—and predicating upon it another permitting the plaintiff to recover punitive damages if the jury find such negligence to exist.

3. As to the measure of "compensatory damages," the court ⁵⁹⁷ gave the jury the following instruction: "If the jury find for the plaintiff, they will fix the damages at a fair equivalent in money for the power of deceased to earn money, lost by reason of the destruction of his life, not exceeding ten thousand dollars;

and in fixing the damages the jury will take into consideration the age of the deceased at the time of his death, his earning capacity, and the probable duration of his life." Ordinarily this instruction fairly presents the law as administered in this state on this subject. In this case, considering the tender years of the decedent, we are of the opinion that the use of the expression "his earning capacity" was probably misleading to the jury. We rather think that an instruction after this form would have been more appropriate: "If the jury find for the plaintiff, they will fix the damages at such a sum, not exceeding ten thousand dollars, as would be a fair compensation to the estate for the destruction of the power of the deceased to earn money; and in fixing such damages the jury should take into consideration the age of deceased at the time of his death, and the probable duration of his life."

The judgment is reversed, and the cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

An Employer is Liable in Exemplary Damages for the wrongful acts of his employes if they are guilty of malice, wantonness, or gross negligence: Kansas City etc. R. R. Co. v. Little, 66 Kan. 378, 71 Pac. 820, 98 Am. St. Rep. 376, and cases cited in the cross-reference note thereto; monographic note to Hoboken Printing etc. Co. v. Kahn, 59 Am. St. Rep. 589-609.

The Liability of Druggists is discussed in the monographic note to Howes v. Rose, 55 Am. St. Rep. 255-258. The general rule is, that a druggist is required to be extraordinarily skillful and to use the highest degree of care known to practical men: Peters v. Johnson, 50 W. Va. 644, 88 Am. St. Rep. 909, 41 S. E. 190. He is liable for the negligence of his clerk in putting up a prescription, although the latter is a competent pharmacist and registered as such: Burgess v. Sims Drug Co., 114 Iowa, 275, 89 Am. St. Rep. 559, 86 N. W. 307.

GREENWICH INSURANCE COMPANY v. LOUISVILLE
AND NASHVILLE RAILROAD COMPANY.

[112 Ky. 598, 66 S. W. 411, 67 S. W. 16.]

INSURANCE—Condition Against Liability for Loss.—If a railroad company grants to another permission to build on its right of way on condition that it shall not be liable for loss by fire caused by its locomotives, such condition is valid, and neither the owner of the building nor an insurance company which has paid for its loss by fire can recover from such railroad company, in the absence of wanton or willful negligence on its part. (pp. 314, 315.)

INSURANCE—Mistake as to Title.—If a person builds upon the right of way of a railroad company upon condition that the company shall not be liable for the loss of the building by fire, the builder still has an insurable interest in the building, and an insurance company which has issued a policy thereon, and has paid for its loss, cannot recover the money paid, upon the ground that the insured misrepresented his title, that the insurer was in ignorance of such condition, and that it paid the insurance under a mistake of fact. (p. 316.)

L. S. Pence, for the appellant.

J. McChord, W. C. McChord and E. W. Hines, for the appellee.

601 O'REAR, J. The New South Brewing and Ice Company was granted the privilege by appellee, the Louisville and Nashville Railroad Company, to build a cold storage house upon the latter's right of way near Lebanon Station. Among the conditions of the lease was the following: "And whereas, such use of the right of way or the lands of said railway company is solely at the instance of said brewing and ice company, and for its accommodation, and without charge on the part of said railroad company, and whereas, said railroad company ⁶⁰² would not give its permission or consent to the erection or use aforesaid on its said right of way or lands except upon the express condition: That, in consideration of the premises, said railroad company, its officers, and agents, or other companies operating its railroad, be released and held harmless from, and indemnified against, all claims or demands of said New South Brewing and Ice Company or others on account of any injury or loss whatever to said house or its contents, by reason of fire from locomotives, or from any cause whatsoever." This contract was subsequently assigned by the consent of the railroad company, to the Frank Fehr Brewing Company, who assumed it subject to the conditions above quoted. By the

negligence of appellee railroad company's employé, a fire is alleged to have occurred, caused by the sparks from its locomotives. The fire originated in a building not on appellee's right of way, and owned by another not a party to the above contract nor to this suit. The cold storage house was burned in the same conflagration. It had been previously insured by appellant, who paid the owner for the loss, and brought this action against the railroad company, claiming it was entitled by subrogation to recover as the lessee, the owner of the cold storage house, would have been. This last statement we accept as true. The question is whether, under the contract above quoted, appellee railroad company was exempt from damages to the building in question by reason of fire caused by its negligence. The circuit court held that it was.

It is argued for appellant that the railroad company cannot contract against the consequences of its own negligence, as to do so is not only against public policy, but prohibited by section 196 of the constitution, which in part provides: "No common carrier shall be permitted to contract ⁶⁰³ for relief from its common-law liabilities." The court is of opinion that appellee railroad company is not liable for the destruction or damage to the building under the contract quoted, except for willful or wanton negligence of its servants. For mere carelessness, however gross, short of wantonness or willfulness, it will not be liable. It is a matter of common knowledge, and from the language employed in this case we may assume was known to the parties herein, that by the aid of the best contrivances so far known and in use it is impossible to altogether prevent fire caused by sparks and cinders from locomotives. Of course, the nearer the railroad track a combustible object may be the greater is the danger to which it is subjected from this source. Railroad operators are held liable for damages to the public occasioned by their negligence in failing to provide suitable spark-arresters for their locomotives in so far as they reasonably can be had. The company is under no obligation as a common carrier to the public or any member of the public to permit them to erect on its right of way any sort of structure, and if one should erect such building on the company's right of way the company would owe no duty to its owner, save to refrain from willfully or wantonly destroying it. The doctrine upon which the law and the section of the constitution above relied upon are based, prohibiting common carriers from contracting against their own negligence by their

servants, is, as suggested, that to do so is against public policy. They can operate their trains only by the employment of servants. To permit employers to contract with their servants that they will not be liable for their negligence, by which an inducement would be offered for carelessness toward the lives of so many people, could not be and is not supported in the law. Common carriers are required to transport passengers, ⁶⁰⁴ and freight, the former with the utmost, the latter with ordinary, care, looking to their safety. So passengers are compelled frequently to travel by railroad or not at all, and freight is required to be shipped by that means or not at all. The common carriers, by the conditions under which they exist, and to some extent by operation of the law, have the practical monopoly of this business. They are not upon an equal footing with their customers in the matter of making such contracts, as where they undertake to secure in advance indemnity against the result of their own negligence. Such contracts are clearly against the public policy. But in the case at bar no such necessity exists to the owner of the building that he should erect it upon the company's right of way, nor is the company compelled under any state of case to permit him to do so. It is under no obligation to extend its liabilities. It certainly could not be expected to voluntarily do so. Therefore the parties, when they come to contract with reference to the location of such a building, are dealing at arm's length, and upon an equal footing. The railroad company can well say, "While we are unwilling to assume any additional risks, we are willing to suffer you for your own convenience to build this house upon our right of way within the zone of recognized and peculiar danger from fires; but it must be understood that if you accept the privileges of this grant, you alone must bear its burdens and casualties." It is not so much that the railroad company contracts against its own negligence as that the brewing company agrees to alone bear all risks from fire. It receives a consideration for doing so. We cannot see that the public are in any wise affected by such a contract, nor can they be: *Hartford Fire Ins. Co. v. Chicago etc.* ⁶⁰⁵ R. Co., 17 C. C. A. 62, 70 Fed. 201; *Hartford Fire Ins. Co. v. Chicago etc. R. Co.*, 175 U. S. 91, 20 Sup. Ct. Rep. 33; *Griswold v. Railroad Co.* (Iowa), 53 N. W. 295; *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 41 Pac. 783; *King v. Southern Pac. Co.*, 109 Cal. 96, 41 Pac. 786.

Plaintiff also joined the Frank Fehr Brewing Company as a defendant, and by amended petition claimed that defendant had misrepresented its title to the plaintiff, and that plaintiff had paid the insurance under a mistake of fact; that it did not know that the brewing company had executed a lease with the railroad company by which the brewing company assumed the dangers incident to the extraordinary risk of fire from the near exposure of the building to the passing locomotives. It appears that the brewing company had an insurable interest in the property, and it is not alleged that the mistake was mutual. We are of opinion that the demurrer to the petition should have been sustained.

The judgment dismissing the case as to both of the defendants is affirmed; the whole court sitting.

Modification of opinion by Judge O'Rear:

The brewing company entered a special appearance to the petition for the purpose of moving to quash the summons. This motion was sustained, and a new summons was ordered to be issued. The trial court did not have the brewing company before it, and no judgment has been rendered, or can be rendered, on this branch of the case, and so no opinion is expressed thereon.

The Right of an Insurance Company, upon paying a loss, to be subrogated to the right of action of the insured against a third person who caused the destruction of the property, is discussed in the monographic notes to *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 44 Am. St. Rep. 731-739; *American Bonding Co. v. National Mechanics' Bank*, post, p. 466.

A Covenant Against Liability for Fire in a lease by a railroad company of land adjoining its depot grounds, is upheld as valid in *Stephens v. Southern Pac. R. R. Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 41 Pac. 783.

CENTRAL TRUST AND SAFE DEPOSIT COMPANY v.
RESPASS.

[112 Ky. 606, 66 S. W. 421.]

PARTNERSHIP in Breeding, Training, and Racing Horses for purses is legal and may be settled in court after its termination. (p. 318.)

PARTNERSHIP in Racehorses—Credits on Accounting or Settlement.—A surviving partner in a partnership for breeding, training and racing horses for purses is entitled in a settlement of the partnership affairs to credit for money paid out by him after the death of his copartner for training the partnership horses and keeping them in condition to race, and also to credit for money paid for entering such horses in stake races, as all this adds to their selling value. (p. 319.)

PARTNERSHIP in Racehorses—Settlement—Credits for Bets made.—A surviving partner in a partnership for breeding, training and racing horses is not entitled, on a settlement of the partnership affairs, to credit for money lost and paid by him on a bet on such horses made by him for the firm, under its promise to reimburse him in case of loss. (p. 320.)

PARTNERSHIP for Gambling—Right to an Accounting.—A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership formed and carried on for gambling. (p. 321.)

PARTNERSHIP for Illegal Purpose—Right to an Accounting. A court of equity will not entertain a bill for an accounting of a partnership in a business confessedly illegal. (p. 325.)

G. H. Wald, C. B. Wilby, L. J. Crawford and W. A. Byrne,
for the appellants.

B. F. Graziani, for the appellee.

*10 DURELLE, J. Jerome B. Respass and Solomon L. Sharp appear to have formed a copartnership, extending over several years, in the business of managing a racing stable, and, in connection with that business, were engaged in "bookmaking," or making wagers upon racehorses. They seem, also, to have had an interest in a poolroom at Newport. For the book business a separate account was kept by a cashier employed for the purpose. They had no regular time for making settlements with each other, but at various times, when requested, the cashier made out statements of the booking business of the firm. It appears from the testimony of Bernard, the cashier, that Sharp in November, 1897, handed him four thousand seven hundred and twenty-four dollars, and told him to deposit it to his

(Sharp's) credit in the Merchants' National Bank of Cincinnati, Ohio, which was done. Sharp appears to have stated at the time that ⁶¹¹ one-half of this fund belonged to Respass. It appears further that this was the "bank roll" of the bookmaking concern, in which each partner had an equal interest. At the same time he remarked that Respass had paid out fifteen hundred dollars for the firm, and that he would see him in a few days and settle with him. Sharp died suddenly, before any such settlement was made. The money in the bank roll was on deposit to Sharp's credit. The racing business of the firm seems to have been almost entirely in the hands of Respass, who attended to the horses, trained them, entered them in races, and at times wagered on them for the benefit of the firm, which divided the profits or shared the losses, as the case might be. Respass brought suit against Sharp's executors for a settlement of the partnership accounts. The horses in the racing stable were sold under order of court, and various claims against the fund in court were made by Respass for expenses incurred in keeping, shoeing, clipping, training and caring for the various horses, as well as for entering certain of the horses in stakes, and for wagers paid upon the horses "Fair Deceiver" and "Shannon." The business of breeding, training and racing horses for purses is legal. The partnership for that purpose can undoubtedly be settled by the chancellor. The only question presented as to this matter is upon the correctness of the settlement made.

The item of two thousand eight hundred and fifteen dollars in the claim of Respass against the firm assets, and which was allowed by the trial court, is, in part, a charge for training and keeping ten horses of the firm from November 10, 1897, to April 9, 1898—one hundred and forty-nine days—at one dollar and fifty cents per day for each horse, and is objected to as being in great part for expenses incurred in carrying on the partnership after it had been dissolved by the death of one of the partners. These charges would seem to an outsider to be ⁶¹² somewhat exorbitant. But the trial court appears to have allowed them upon the theory that the horses being racehorses, and unfit, or, at all events, less valuable, for any other purpose than that of being either raced, or sold for racing purposes, it was proper to keep them in condition for racing, as only by doing so could they be kept in good condition for a sale for settlement purposes. We are not inclined to disturb the chancellor's finding in this behalf.

The same objection is made to a charge of eighty dollars paid for entering the horses in stakes after Sharp's death; and while we should not have been inclined to disturb the chancellor's ruling, had he disallowed this item, we think it may possibly be justified upon the same theory upon which we have allowed the charge for training the horses—that is, that the most profitable market for racehorses is that in which they are sold to be raced; that, to supply the demand for this market, it is requisite that they should be ready to be raced—not only in physical condition, but ready in the further fact that their entrance fees in stake races have been paid, which secures them the privilege of running in those races, and which payment seems required to be made at fixed periods before the races are run. Upon this item, and the item for shoeing the horses with racing plates, we shall not disturb the finding of the chancellor, but shall assume them to be, as he found them, charges for conditioning the horses for sale at the highest price in the most profitable market.

Another item to which exception is taken consists of seven hundred dollars, being the amount of two bets made, lost and paid by Respass on the horse "Fair Deceiver" and "Shannon." In view of the statutory law of Kentucky (see section 1955 et seq., Kentucky Statutes), we are unable to see how any legal consideration can exist from a promise to reimburse ⁶¹³ to a partner any portion of any sum lost upon a bet on a horserace. In *Lyons v. Hodgen*, 90 Ky. 280, 12 Ky. Law Rep. 211, 13 S. W. 1076, it was held, in an opinion by Chief Justice Lewis, that this statute, providing that "every contract, conveyance, transfer or assurance, for the consideration in whole or in part, of money, property or other thing won, lost or bet in any game, sport, pastime, wager, or for the consideration of money, property or other thing let or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming or wagering to a person then actually engaged in betting, gaming or wagering, shall be void"—applied to dealing in "futures"; that the process by which the money was won or lost was a wager, within meaning of the statute, which was designed to embrace every species of wagering, whether practiced at the time the statute was enacted, or since devised. And in the opinion by the same judge in *Sharp v. Commonwealth*, 98 Ky. 574, 35 S. W. 553, it was held that betting upon horseraces was gaming and illegal. We think it is well settled that a man who lends money to another, to be then bet on a horserace, cannot recover it back.

And so it would seem that if A agrees with B that B shall advance the money, and himself bet upon a horserace for their joint account, no action will lie by B to compel A to respond for his share of a bet which is lost. The statement of this proposition seems to decide it. It is a contract for an illegal venture. The whole contract is illegal. No right of action can arise out of that contract. This is exactly the position of Respass as to the two bets. He advanced the money to make them for himself and Sharp, relying upon Sharp's express or implied agreement to pay half the losses if loss should be incurred. Such a contract cannot be enforced in this state.

⁶¹⁴ A closer question is presented by the claim for a division of the "bank roll." This four thousand seven hundred and twenty-four dollars was, as found by the chancellor, earned by the firm composed of Respass and Sharp in carrying on an illegal business—that of "bookmaking"—in the state of Illinois. But though this amount had been won upon horseraces in Chicago, it is claimed that, though secured illegally, "the transaction has been closed, and the appellee is only seeking his share from the realized profits from the illegal contracts, if they are illegal." On the other hand, it is claimed for appellants that, as to the bank roll, this proceeding is a bill for an accounting of profits from the business of gambling.

It does not seem to be seriously contended that the business of "bookmaking," whether carried on in Chicago or in this commonwealth, was legal, for by the common law of this country all wagers are illegal: *Irwin v. Williar*, 110 U. S. 510, 4 Sup. Ct. Rep. 160. One of the most interesting cases upon this subject is that of *Everet v. Williams*—the celebrated Highwaymen's Case—an account of which is given in 9 Law Quart. Rev. 197. That was a bill for an accounting of a partnership in the business of highwaymen, though the true nature of the partnership was veiled in ambiguous language. The bill set up the partnership between defendant and plaintiff, who was "skilled in dealing in several sorts of commodities"; that they "proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch"; that defendant had informed plaintiff that Finchley "was a good and convenient place to deal in," such commodities being "very plenty" there, and if they were to deal there "it would be almost all gain to them"; that they accordingly "dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, ⁶¹⁵ horses, bridles, saddles, and other things, to the

value of two hundred pounds and upward"; that a gentleman of Blackheath had several articles which defendant thought "might be had for a little or no money, in case they could prevail on the said gentleman to part with the said things"; and that, "after some small discourse with the said gentleman," the said things were dealt for "at a very cheap rate." The dealings were alleged to have amounted to two thousand pounds and upward. This case, while interesting, from the views it gives of the audacity of the parties and their solicitors, sheds little light upon the legal questions involved, for the bill was condemned for scandal and impertinence; the solicitors were taken into custody, and "fyned" fifty pounds each for "reflecting upon the honor and dignity of this court"; the counsel whose name was signed to the bill was required to pay the costs; and both the litigants were subsequently hanged, at Tyburn and Maidstone, respectively, while one of the solicitors was transported. This case is found referred to in the cases of *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 195, and *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. Rep. 839. In the *Sykes* case it was held, in the opinion by Sir George Jessel: "It is no part of the duty of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other." In *Watson v. Fletcher*, 7 Gratt. 1, the business of the firm had been the operation of a faro bank. One of the partners having died, the survivor sought an accounting of profits earned. The syllabus reads: "A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling. Nor will it give relief to either partner against the ⁶¹⁶ other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution, or reimbursement." To the same effect in *Shaffner v. Pinchback*, 133 Ill. 410, 23 Am. St. Rep. 624, 24 N. E. 867. In *McMullen v. Hoffman*, 174 U. S. 639, 10 Sup. Ct. Rep. 839, it appeared that a partnership was formed for the purpose of obtaining a public contract by unlawful means, upon the terms of sharing the profits equally, and that the profits came into the hands of one partner. The other filed a bill for an accounting, and was denied relief. Said the court: "We must, therefore, come back to the proposition that to permit a recovery in this case is, in substance, to enforce an illegal contract, and one which is illegal because it is against public

policy to permit it to stand. The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for defendant who sets it up, but only on account of the public interest. . . . To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined they will be to enter into them. In that way the public secures the benefit of a rigid adherence to the law": See, also, the cases of *Snell v. Dwight*, 120 Mass. 9; *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Watson v. Murray*, 23 N. J. Eq. 257; *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Northrup v. Phillips*, 99 Ill. 449; *Wiggins v. Bisso*, 92 Tex. 219, 71 Am. St. Rep. 837, 47 S. W. 637; ⁶¹⁷ *Chicago etc. R. Co. v. Wabash etc. R. R. Co.*, 9 C. C. A. 659, 61 Fed. 993; *Emery v. Candle Co.*, 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124.

Upon the other hand, a large number of cases are relied on on behalf of appellee. Many of these cases do not seem to us to bear directly upon the question here involved. We shall first consider the Kentucky cases: In *Bibb v. Miller*, 11 Bush, 306, the contest was between two persons, each of whom claimed title to the proceeds of a winning lottery ticket. The court was careful to say: "The question as to the legality of the sale of tickets and the distribution of prizes arises collaterally, and derives its importance solely from the fact that the plaintiffs in the action are compelled to rely on such sale and distribution in order to make out their title to the fund in controversy." In that case the corporation had recognized its obligation to pay, and voluntarily paid into court the amount claimed to be due on the coupon. The question there was whether the library company was acting pursuant to legal authority in selling the ticket and paying the prize distributed to that ticket; and the court held that, "in the absence of proof to the contrary, we must assume that it acted within the scope of the powers granted it by its act of incorporation." In *Martin v. Richardson*, 94 Ky. 183, 14 Ky. Law Rep. 847, 42 Am. St. Rep. 353, 21 S. W. 1039, a lottery ticket owned by one man had been fraudulently

obtained from him by another, and the proceeds collected. It was held that, the purchase of the ticket not being shown to have been made in a state where such purchase was illegal, the presumption was in favor of its legality. In *Irwin v. Irwin*, 21 Ky. Law Rep. 622, 52 S. W. 927, a lottery ticket, or its proceeds, was given by ⁶¹⁸ a husband to his wife, and invested in real estate. It was held that, whether the purchase was illegal or not, such transfer comes distinctly within the meaning and purview of the peremptory statute which requires the restoration of property obtained directly or indirectly from or through the other party by reason of the marriage." So, in *Maize v. Bradley*, 23 Ky. Law Rep. 993, 64 S. W. 655, where, in an action to recover money had and received, it was claimed the fund had been placed in the hands of defendants to avoid taxation, it was held this defense was not available, as the fund had been reinvested, and a new contract entered into between the parties, untainted by the illegality of the original transaction. In the case at bar there was no division of the unlawful gains made by Sharp at Chicago. There was no new transaction with reference to them, such as the investment of the fund, or any part of it, in horses, for their joint account. There was not even an accounting of the gains, accompanied by a promise to pay Respess the amount ascertained to be due him under the terms of the illegal partnership agreement. There was simply a termination by death of an illegal partnership, with unlawful gains in the hands of one of the partners, an accounting for which is here sued for. We are cited to but two cases which seem to come up to the requirements of appellee's contention. Both of these cases have been subsequently questioned. There are many cases which come within the general terms of the doctrine laid down in *Norton v. Blinn*, 39 Ohio St. 145: "Public policy does not require that one engaged in an unlawful enterprise should, by pleading it, shield himself from liability for the wages of his employes, agents or servants. . . . It is contrary to public policy and good morals to permit employes, agents, or servants to seize or retain the property of their ⁶¹⁹ principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify such a lowering of the standard of moral honesty required of persons in these relations. And again, if parties to an illegal contract waive the illegality and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence we think that, if in making such

settlement, one of the guilty parties should deliver property or money to an agent of another, to be delivered by the agent to his principal, such agent is bound to account therefor to his principal." It seems clear, also, that a wrongdoer who, by force or fraud, obtains money or property from another, or violates a trust imposed in him, cannot be heard to charge his victim with wrongdoing in the original obtention of the money or property. To this class belong the cases of *Farmer v. Russell*, 1 Bos. & P. 295; *Tenant v. Elliott*, 1 Bos. & P. 2; *Catts v. Phalen*, 2 How. 376. And see *Pollock on Contracts*, 334, note. The doctrine as to such cases is aptly stated in *Catts v. Phalen*, 2 How. 376: "Phalen & Morris had in their possession twelve thousand five hundred dollars, either in their own right, or as trustees for others interested in the lottery. No matter which, the legal right to this sum was in them. The defendant claimed and received it by false and fraudulent pretenses, as morally criminal as by larceny, forgery, or perjury; and the only question before us is whether he can retain it by any principle or rule of law." The cases which come nearest to supporting the contention of appellee are *Sharp v. Taylor*, 2 Phill. Ch. 801, and *Brooks v. Martin*, 2 Wall. 70. The former case was a partnership in a vessel registered in violation of the laws of both Great Britain and the United States. Her voyages were profitable, but one partner, colluding with an outsider, obtained possession of the profits and refused to account. The legality of the traffic was relied on by him as a defense to an accounting. Said Lord Cottenham: "He is not seeking recompensation and payment for an illegal voyage. That matter was disposed of when Taylor (the defendant) received the money, and plaintiff is now only seeking payment for his share of the realized profits. . . . As between these two, can this supposed evasion of the law be set up as a defense by one as against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of parliament has been violated or neglected? . . . The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties." This doctrine comes very close to appellee's contention, but, on examination, can be distinguished from the case at bar, and had been criticised and denied by Sir George Jessel, master of the rolls, in *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 195, as well

as in the case of *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. Rep. 839. The case of *Brooks v. Martin*, 2 Wall. 70—much relied upon by appellee—is explained and qualified by the supreme court in *McMullen v. Hoffman*, 174 U. S. 668, 19 Sup. Ct. Rep. 850, in the opinion by Mr. Justice Peckham: "The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed, that substantially all the profits arising therefrom had been invested in other securities or in lands, and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original ⁶²¹ contract was illegal." The case is also criticised in *King v. Winants*, 71 N. C. 473, 17 Am. Rep. 11, as follows: "Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler the other rifles his pocket of one thousand dollars, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abased. Now, if the robbers had taken the one thousand dollars and invested it in some legitimate business as partners, and had afterward sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks v. Martin*, 2 Wall. 70, so much relied on by plaintiff." See, also, *Snell v. Dwight*, 120 Mass. 9, 19; *Morrison v. Bennett*, 20 Mont. 560, 572, 52 Pac. 553; *Gould v. Kendall*, 15 Neb. 549, 556, 557, 19 N. W. 483; *Wiggins v. Bisso*, 92 Tex. 219, 225, 71 Am. St. Rep. 837, 47 S. W. 637.

We conclude that in this country, in the case of a partnership in a business confessedly illegal, whatever may be the doctrine where there has been a new contract in relation to, or a new investment of, the profits of such illegal business, and whatever may be the doctrine as to the rights or liabilities of a third person who assumes obligations with respect to such profits, or by law becomes responsible therefor, the decided weight of authority is that a court of equity will not entertain a bill for an accounting.

The judgment of the chancellor is therefore reversed, and the cause remanded, with directions to enter a judgment in accordance with this opinion.

ACCOUNTING BY ILLEGAL PARTNERSHIP.

- I. Right to Maintain Action.**
- II. Illegality of Partnership as Defense to Accounting.**
- III. Partnership Partly Legal.**
- IV. Conversion by One Partner.**

I. Right to Maintain Action.

Although there is some apparent conflict of authority, the rule is well settled by an overwhelming mass of cases that no court of law or equity will lend its assistance in any way toward carrying out an illegal contract of partnership, and such contract cannot be enforced by one partner against the other by action, either directly or indirectly: *Shaffner v. Pinchback*, 133 Ill. 410, 23 Am. St. Rep. 624, 24 N. E. 864; *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459, 33 N. E. 44; *Barrow v. Pike*, 21 La. Ann. 14; *Snell v. Dwight*, 120 Mass. 9; *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483; *Watson v. Murray*, 23 N. J. Eq. 257; *McMullen v. Hoffman*, 174 U. S. 669, 670, 19 Sup. Ct. Rep. 859. This rule has been applied under a variety of circumstances. Thus, a court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling, nor will it give relief to either partner against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution or reimbursement: *Watson v. Fletcher*, 7 Gratt. 1. If one person advances money to another to be used by them as partners in the unlawful business of betting on horseraces, he cannot recover back the money so advanced: *Shaffner v. Pinchback*, 133 Ill. 410, 23 Am. St. Rep. 624, 24 N. E. 867; and a court of equity will not entertain a suit for an accounting between partners, if it appears that the purpose of the partnership was to secretly and surreptitiously purchase a horse, and then entice a third person to make a wager on a horserace: *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553. No enforceable right can be predicated upon an agreement of partnership, the effect of which is to stifle or diminish competitive bidding on public work and to perpetrate a fraud on public officers: *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124. A contract of partnership between common carriers, the obvious purpose of which is to suppress or limit competition, and to establish rates without regard to their reasonableness, is contrary to public policy, and void, and one partner claiming to have performed his part of such contract cannot maintain suit to enforce a division of the earnings by another partner: *Chicago etc. Ry. Co. v. Wabash etc. Ry. Co.*, 61 Fed. 993. A partnership agreement made in one state to gamble in the legalized lotteries of another state, is void in the former state, and no action can be based or maintained thereon: *Goodrich v. Houghton*, 134 N. Y. 115, 31 N. E. 516. And even though such agreement is entered into in a state where it is legal, it cannot be

enforced or administered in another state. Hence, a bill by a partner of a lottery firm against his copartners for discovery, a sale of the property and a distribution of the proceeds will not be entertained: *Watson v. Murray*, 23 N. J. Eq. 257. An action to adjust the differences of partners who have engaged in an unlawful plot to advance the price of an article of food, will not be entertained by the courts: *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667, 21 N. E. 707. A bill in equity cannot be maintained by one partner in an illegal partnership for trading with the inhabitants of states declared in insurrection against the United States, for an accounting of resulting profits: *Snell v. Dwight*, 120 Mass. 9.

Grain dealers in a certain town entered into a partnership, purporting to deal in grain, but the real object was to form a secret combination to control the grain trade, and to suppress competition, and it was held that such partnership was against public policy, and that no action could be maintained to compel an accounting of the profits thereof: *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171.

Plaintiff and defendant agreed as partners not to bid against each other for a government contract to be given to the lowest bidder, and to share the profits of the contract when given to one of them, but it was held that such an agreement of partnership was opposed to public policy, and that no action could be maintained for an accounting of profits: *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11.

II. Illegality of Partnership as Defense to Accounting.

In the case of *Brooks v. Martin*, 2 Wall. 70, it was determined that after a partnership confessedly against public policy has been carried out and money contributed by one of the partners has passed into other firms, and the results of the contemplated operation are completed, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original partnership. This decision was one of expediency rather than of law, and it has been distinguished and criticised in so many well-considered cases that only a tattered fragment or remnant remains, and in fact it may be said to have been directly overruled in *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. Rep. 839, where it was decided that the court would not lend its assistance in any way toward carrying out the terms of an illegal contract of partnership, nor would it or any other court enforce any alleged rights directly springing from such a contract, and that, while distinguishing the case of *Brooks v. Martin*, 2 Wall. 70, from the case under consideration, the court, taking that case into due consideration, will not extend its authority at all beyond the facts therein stated: *McMullen v. Hoffman*, 174 U. S. 668, 19 Am. St. Rep. 839. The case of *Brooks v. Martin*, 2 Wall. 70, has been followed to some extent, and its ruling adopted in a

few illy considered cases. These cases hold that a partner is liable to account to his associates for money paid under an illegal but completed contract of partnership, and cannot set up the illegality of the partnership as a defense: *Wann v. Kelly*, 2 McCrary, 628, 5 Fed. 584. In Texas the ruling made in *Brooks v. Martin*, 2 Wall. 70, has been adhered to with startling tenacity, although acknowledgment is made that such ruling has been seriously questioned by other courts of great dignity and standing. The rule prevailing in Texas until a late date has been that when an illegal partnership enterprise has been completed, one partner cannot refuse to account to the other for the profits on the ground of the illegality of the partnership objects: *Pfeiffer v. Maltby*, 38 Tex. 524; *De Leon v. Trevino*, 49 Tex. 88, 30 Am. Rep. 101; *Pfeiffer v. Maltby*, 54 Tex. 454, 58 Am. Rep. 631. This doctrine has recently been repudiated in Texas, as, after an attempt to distinguish the foregoing cases it was decided in *Wiggins v. Bisso*, 92 Tex. 219, 71 Am. St. Rep. 837, 47 S. W. 637, that the courts cannot aid in the enforcement of contracts clearly illegal, whether they are executory or fully executed. Hence, in an action between partners for the recovery of the alleged profits of a business fully completed, an answer that such partnership was formed for the purpose of procuring an unlawful contract out of which such profits arose is not subject to general demurrer on the ground that from the pleading the contract appears to bear a date prior to that of the formation of the partnership. In such action an answer alleging the illegality of the partnership presents a defense: *Wiggins v. Bisso*, 92 Tex. 219, 71 Am. St. Rep. 837, 47 S. W. 637.

The doctrine of *Brooks v. Martin*, 2 Wall. 70, has been adopted in Florida, where it was held, on the authority of that and an early Texas case, that when, in an illegal venture, profits have been made, an account may be had in equity by one partner against the other, who has them and is seeking to appropriate them to himself, and when there has been a loss in the venture, an adjustment of accounts between the partners, and an obligation given by the debtor partner to the other, an action may be maintained on such obligation: *Crescent Ins. Co. v. Bear*, 23 Fla. 50, 11 Am. St. Rep. 331, 1 South. 318. The true rule being, as we have shown, that neither a court of law or equity will lend its aid in the settlement or adjustment of the affairs of a partnership formed for an unlawful purpose, whether such affairs are fully completed or not, and that the courts will not give relief to either partner against the other founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution or reimbursement, it must necessarily follow that a partner in such a partnership may set up its illegality as a defense in any action sought to be maintained by his partner against him on account of some transaction of the partnership, and this has been expressly announced in many well-considered cases. Thus, in *McMullen v. Hoffman*, 174 U. S. 669, 19 Sup.

Ct. Rep. 859, it was said: "We must take the whole agreement, and remember that the action is between the original parties to it; that there is no collateral contract and no new consideration, and no liability of a third party. The partnership is but a portion of the whole agreement. We must therefore come back to the proposition that to permit a recovery in this case is, in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions." In an action between partners for the recovery of the profits of a partnership business, an answer alleging the illegality of the partnership presents a defense: *Wiggins v. Bisso*, 92 Tex. 219, 71 Am. St. Rep. 837, 47 S. W. 637. Courts of justice will not enforce the execution of an illegal partnership contract, nor aid in the division of the profits of an illegal transaction between the associates, and such illegality may be set up by one of them in a suit against him by another as a defense thereto: *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459, 33 N. E. 44. The defense that a partnership or association was formed for an illegal purpose, when that fact does not appear on the face of the complaint, may be interposed by answer: *Jackson v. Brick Assn.*, 53 Ohio St. 303, 53 Am. St. Rep. 638, 41 N. E. 257.

III. Partnership Partly Legal.

If part of a partnership is legal and part illegal, the court may take charge of the legal part and appoint a receiver therefor, in an action to settle the partnership affairs: *Anderson v. Powell*, 44 Iowa, 20. But an action by one partner against another in respect to profits realized on dealings of a lawful character, when such dealings are so blended with illegal partnership dealings that it is impossible to so separate one class from the other, that effect can be given to the legal transactions alone: *Lane v. Thomas*, 37 Tex. 157.

IV. Conversion by One Partner.

If partners are engaged in an unlawful business, one partner is not permitted to convert to his own use the unlawful partnership property without liability to his copartner, and in such case the illegality of the partnership is no defense: *Gilliam v. Brown*, 43 Miss. 641; *Howe v. Jolly*, 68 Miss. 325, 8 South. 513.

JONES v. COMMONWEALTH.

[112 Ky. 689, 66 S. W. 633.]

ROBBERY.—Snatching or Jerking a Pocketbook from the hand of another so quickly that the latter has no chance to actively resist constitutes a taking by force or violence, and authorizes a conviction of robbery against the taker. (p. 333.)

Lafferty & King, for the appellant.

R. J. Breckinridge, attorney general, and M. Breckinridge, for the appellee.

689 GUFFY, C. J. The appellant was indicted, tried and convicted in the Harrison circuit court under an indictment for robbery. The specifications in the indictment are as follows: "Did feloniously take a pocketbook and seven dollars in money, the personal property of Esau Eckler, from his presence, and against his will, by violence, and putting him in fear of some immediate injury to his person." A jury trial resulted in a verdict and judgment sentencing the appellant to the penitentiary for two and one-half years. The verdict reads as follows: "We, the jury, find the defendant guilty, and fix his punishment at two and one-half years in the penitentiary. Dow Holten, Foreman."

The grounds relied upon for a new trial are because the 691 court misinstructed the jury, or refused to properly instruct the jury, and because the verdict was against the law and evidence. At the conclusion of the testimony for the commonwealth the appellant asked for peremptory instruction, which was refused by the court. No evidence was offered by the defendant. The court, in its first instruction, substantially instructed the jury that "if, from all the evidence, they believed beyond a reasonable doubt that the defendant, before the finding of the indictment, and prior to March 1, 1901, did feloniously take a pocketbook and seven dollars in money, or any part thereof, the personal property of Esau Eckler, from his presence, and against the will of said Eckler, by violence or putting said Eckler in fear of some immediate injury to his person, they should find the defendant guilty, and fix his punishment at confinement in the penitentiary for not less than two years nor more than ten years, in their discretion, governed by the proof." The second instruction was in regard to petit larceny. The third instruction was to the effect that, if the jury believed the

defendant guilty beyond a reasonable doubt, but entertained a reasonable doubt as to the degree of his guilt, they should find him guilty of petit larceny only. The fifth instruction was to the effect that if, upon the whole case, the jury entertained a reasonable doubt of the guilt of the defendant having been proven, they should acquit him. The contention of appellant is that there was no evidence tending to prove that the appellant committed the offense of robbery. The evidence as to the taking of the pocketbook in question was given by Esau Eckler, and is in words as follows: "I am acquainted with Mat Jones, the defendant. I have known him for several years. Some time in December, 1900, shortly before Christmas—I think it was on court day—Mat Jones came up to me at the corner of Main ⁶⁰² and Pike streets, in Cynthiana, Harrison county, Kentucky, about 4 o'clock in the afternoon. I think it was about that time for the 4 o'clock train was just blowing. I asked Jones if he had seen my son, James Eckler. He said that he had and that he would take me to him if I would go. I told him I would, as I wanted to get him, and go home. We then walked north on Main street a short distance below where the new church was being built, and to the head of the alley. Jones then asked me if I would change a quarter for him, and I told him I thought I could, and took my pocketbook from my pocket, which was a leather pouch, or 'ridicule,' as I called it, closing by means of a draw-string. I held the book in my left hand, and put my right hand into it and drew out a dime, and just as I was putting my hand in the book a second time Jones reached over and took the book from my hand, and ran up the alley. I called to him to stop with my pocketbook, but he didn't stop. I had about seven dollars in the book and my tax receipt. I had paid my taxes that day." On cross-examination Eckler testified as follows: "I was holding my pocketbook in my left hand, and had my right hand in it, and Jones grabbed it out of my hand, and ran up the alley." There was other testimony tending to show that the appellant really had the pocketbook in his possession, but no witness testified about the transaction of taking except Eckler. Counsel for appellant cites many authorities showing that there must be some force used in the taking of the property, or that the injured party must have been put in some fear. It may be conceded that the authorities sustain this contention of appellant, but it is the contention of appellee that the facts and circumstances proven in this case sustain the verdict, and that the jury were authorized under the

evidence to find the defendant guilty of the charge of robbery, and cites ⁶⁹³ several decisions of this court in support of his contention. In *Williams v. Commonwealth*, 20 Ky. Law Rep. 1850, 50 S. W. 240, the court had under consideration the law governing the offense of robbery. The injured party in this case testified as follows: "I was standing with my back to this colored man, and he got behind me and wrenched the pocketbook out of this [left] hand; and, of course, he being stronger than I, I had to give way to him, and let him have it." On cross-examination she said: "No, because you do not know more than just take it from your hand. That man took it by main force from my hand." The court, in discussing the testimony, said: "The crime of robbery in this state is the same as at common law. The statute does not attempt to define the crime; only provides the penalty. We are clearly of the opinion that the testimony of the commonwealth, if true, showed that the crime of robbery had been committed." In *Davis v. Commonwealth*, 21 Ky. Law Rep. 1295, 54 S. W. 959, this court again had under consideration the offense in question. In discussing the case it said: "It will be observed that the snatching of the money from Barton's hand was excluded from the jury by the second instruction, as evidence of actual violence. We think this fact was evidence to go to the jury, and they should have been instructed to convict if the money was taken against Barton's will by actual force." In *Blanton v. Commonwealth*, 22 Ky. Law Rep. 515, 58 S. W. 422, the court, in discussing the offense of robbery, said: "The taking must be by violence, or by putting the owner in fear; but both of these circumstances need not concur: *Williams v. Commonwealth*, 20 Ky. Law Rep. 1850, 50 S. W. 240. Under the rule announced in this case, and the authorities cited therein, the indictment is sufficient. It was held in the same case that to snatch a pocketbook from another's hand was robbery, and in *Snyder v. Commonwealth*, 21 Ky. Law Rep. 1538, 55 S. W. 679, it ⁶⁹⁴ was held that, if the victim was pushed or shoved about by the pickpocket or his associate for the purpose of diverting his attention, and the crime is then accomplished, it is robbery, even if the victim is at the time unaware of his loss." This court, in the recent case of *Commonwealth v. Davis* (filed January 10, 1902), 23 Ky. Law Rep. 1717, 66 S. W. 27, had under consideration the crime of robbery. After stating the case, the court said: "The prosecuting witness testified that she was walking along Fourth street about 1 o'clock in the daytime; that she saw two boys in a yard of an

empty house; that, after she passed beyond, one of them slipped up behind her, grabbed her purse which she was carrying in her hand, and that she resisted with all her force, but that he slipped one of his hands over her wrist, and wrenched her pocketbook out of her hand with his other hand; and that it contained ten dollars; and that the boy ran off with it, she pursuing." The court then proceeded to refer to the facts which in law constitute robbery, which are stated substantially as contended for by appellant. The court then said: "It is not so much the extent and degree of violence which makes the crime as the success thereof. Any force which is sufficient to take the property against the owner's will is all that is necessary to make up the crime of robbery." Under the Civil Code of Practice this court cannot reverse a judgment of conviction if there be any evidence tending to establish the guilt of the accused. In this case it must be conceded that the snatching of the pocketbook from the hand of Eckler required some force or violence, and the jury might perhaps infer from all the statements of the witness that he was put in some fear, else he would have made greater effort to recapture his money; hence it seems to us that, taking all the testimony introduced in this case, there was evidence tending to show that the appellant took the ~~the~~ pocketbook and money by violence, and probably put the witness in some fear. It is true that the witness did not state that he was put in fear, nor that he tried to hold onto the pocketbook; he does not appear to have been asked specially on these points; in fact, the snatching or grabbing and jerking of pocketbook out of the witness' hand was probably done so quickly that he had no chance to actively resist; and, if this be true, we think such taking or snatching must be construed as taking by violence or force. It results from the foregoing that the court did not err in respect to the giving or refusing of instructions.

For the reasons indicated, the judgment is affirmed.

The Offense of Robbery is not committed by the mere taking or snatching of property from the person of another; but if violence is done to the person at the time of the snatching, the crime may amount to robbery: See the monographic note to *State v. McCune*, 70 Am. Dec. 184, 185; *Smith v. State*, 117 Ga. 320, 97 Am. St. Rep. 165, 43 S. E. 736.

REID'S ADMINISTRATOR v. BENGE.

[112 Ky. 810, 66 S. W. 997.]

WILLS—Limitations.—A will may be probated at any time within ten years after the death of the testator, under the Kentucky statute. (p. 335.)

WILLS—Vesting of Estate Under—Delay in Probating.—The estate of a devisee under a will vests at the time of the testator's death, although the will is not probated until seven years thereafter, and to divest such title there must be either conveyance, prescription or estoppel. (p. 336.)

ESTOPPEL—Ignorance.—A person cannot be charged with fraud or held to be estopped where he is ignorant of the truth and does no act of any nature. (p. 337.)

WILLS—Estoppel Against Devisee.—The act of a testator in not disclosing to some person the place where his will could be found, thus causing a long delay in having it probated after his death, does not create an estoppel against his devisee. (p. 337.)

WILLS—Delay in Probating—Estoppel Against Devisee.—If a will is not probated for several years after the death of the testator, because of the ignorance of the interested parties of its existence, and an only heir has taken possession of the testator's estate and executed a mortgage thereon, the devisee named in the will is not estopped to claim and take the land as against such mortgagee. (pp. 337, 338.)

J. D. Black, for the appellant.

D. K. Rawlings, for the appellee.

312 WHITE, J. In October, 1888, T. T. Reid died in Clay county never having married or had issue. His only heir at law was J. W. Reid, Sr., his father, the mother having died prior to the death of T. T. Reid. After the death of T. T. Reid, his father, as heir at law, took possession of the real estate left by T. T. Reid, containing probably three hundred acres. In April, 1890, J. W. Reid, Sr., borrowed of appellee, E. J. Benge, six hundred dollars, and to secure its repayment executed a mortgage on the tract of land that had formerly been owned by T. T. Reid, and which J. W. Reid, Sr., then thought he had inherited from his son T. T. Reid. This mortgage was properly executed, delivered, and put to record in the proper office. After the execution and delivery of this mortgage to appellee, the mortgagor, J. W. Reid, Sr., died, and administration was had on his estate by J. W. Reid, Jr. The appellee instituted this action to collect her debt of six hundred dollars from the estate of J. W. Reid, Sr., and to enforce her mortgage lien on the tract of land. The administrator and heirs at

law of J. W. Reid, Sr., were all made parties. To this action certain of the children of J. W. Reid, Sr., brothers and sisters of T. T. Reid, deceased, filed answer, being already parties hereto, and denied that at the date of the execution of the mortgage by J. W. Reid, Sr., to appellee, or at all, the said J. W. Reid, Sr., had title to the land, or that the same ever descended to him from his son T. T. Reid, their brother. They pleaded that at the regular term of the Clay county court in May, 1895, there was produced and probated the will of T. T. Reid, by which will the land mortgaged was devised to them in conjunction with their father, J. W. Reid, Sr.; that is to say, the father was devised one-fourth the land, and the other three-fourths to appellants, his brothers and sisters. Appellants therefore denied appellee's right ^{§12} to a lien upon the land, at least to the extent of their interest—three-fourths—derived under the will of T. T. Reid. By reply the existence and probate of the will was formally denied. The only proof taken was that of appellee, who, if competent for any purpose established the justness of her claim against J. W. Reid, Sr., which was never an issue, and her entire ignorance of the will of T. T. Reid until it was probated in 1895, more than five years after she had loaned the money to J. W. Reid, Sr., and accepted the mortgage as security. With this proof and the copy of the probated will and orders of the county court the case was submitted for final hearing. The court adjudged to appellee a lien on the whole of the land to satisfy her debt, and decreed a sale thereof, and to reverse that judgment this appeal is prosecuted.

It may be said at the outset that there is no pretense or plea that the devisees (appellants) were guilty of any fraud by suppressing the will, or in fact knew that such paper existed till long after the execution of appellee's mortgage. It seems to be conceded that all parties acted in good faith upon the facts as they knew them. The question, then, presented for our consideration, is: Is the equity of appellee, acquired under the mortgage executed by J. W. Reid, Sr., when all parties believed he was the legal owner by reason of being heir at law, and five years before the discovery of the will of T. T. Reid superior to the legal title of the devisees under the will? It is conceded that no statute of limitation applies to bar appellants' right to recover, for it is well settled in this state that a will may be probated at any time within ten years after the death of the testator: *Allen v. Froman*, 96 Ky. 313, 16 Ky. Law Rep. 634, 28 S. W. 497. The will in the case at bar was probated seven

years after testator's death. There is no plea of fraud either in suppressing the will or in ^{§14} inducing the appellee to part with her money on the faith of the mortgage security by any of the appellants, at least with any knowledge or information of their rights in the land. As we understand the contention of counsel, his position is that by reason of the negligence of testator in so placing his will as not to be found for seven years after his death, though this may not have been actually intended, and by reason of laches of appellants, devisees thereunder, in not producing the will, the appellee has acquired an equitable claim superior to the legal title under the will. By section 16, chapter 113, of the General Statutes, in force at the death of T. T. Reid, it is provided that the will speaks as of the testator's death, unless a contrary intent appear by the will: *Alexander v. Waller*, 6 Bush, 330. It was held as far back as 1827 in the case of *In re Payne's Will*, 4 T. B. Mon. 423, that the interest of a devisee vested the instant of testator's death, and was not lost by destruction of the will before probate. This case has never been questioned in this state, so far as we are informed. Applying that rule here, it is clear that at the death of T. T. Reid, in 1888, the appellants, devisees under his will, had a vested estate in his lands, as the will provided. To divest them of this title there must be either conveyance, prescription, or estoppel in some form. It is not pretended that there is a conveyance, or that their right to claim under the will is barred by any statute of limitation. An estoppel is defined by Bouvier to be "the preclusion of a person from asserting a fact by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question." Stephens defines "estoppel": "A preclusion in law which prevents a man from alleging or denying a fact in consequence of his own previous act, allegation, ^{§15} or denial of a contrary tenor." Blackstone's definition is: "A special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring anything to the contrary." It is the foundation of the doctrine of estoppel that the party estopped has designedly so acted or spoken as to induce others to change their position injuriously to themselves; in other words, the doctrine of estoppel is founded on the fraud of the party who is held estopped. But, to be guilty of fraud, a person must knowingly do or say that which is inconsistent with honesty and truth, or, regardless of what the truth may be, in-

duce a person to act. There can be no case found where any person was ever charged with fraud or held to be estopped where he was ignorant of the truth and did no act at all. In the case at bar the devisees under the will of T. T. Reid did nothing, said nothing, and at that time were in entire ignorance of the existence of a will, or that they had any rights in the property. In fact, if there was no will, which they then believed to be the truth, they knew that they had no right, title, or interest in the land. They knew that without a will the land descended to their father, J. W. Reid, Sr. There can be no act of appellants that could by any rule of law be held to estop them from claiming under the will of T. T. Reid. It may be said that a person may speak a falsehood or act a falsehood, but, if he does no act, and remains silent, he cannot be charged with fraud or be estopped without he knew the truth when his nonaction or being silent is said to have induced another to act to his own injury. Likewise there can be no estoppel of appellants by reason of the act of the testator in not disclosing to some person the place where his will could be found. He was not called upon to publish the fact that he had made a will for the protection of appellee, for it was some two years after ^{his} T. T. Reid's death that appellee had any claim of lien upon the land. Surely, a dead person cannot be charged with negligence, or be estopped, or create matters of estoppel by a failure to act after his death; yet this would be the effect of holding that appellants are chargeable with the fact that the will was not found before appellee's mortgage was executed by reason of some act or omission of T. T. Reid. There seems to be a dearth of authority on the exact question here presented. After diligent search learned counsel for appellee finds only one case that approaches the question, and after diligent search by us we have failed to add another. The case found is *Chadwick v. Turner*, 1 Ch. App. 310. There the court held, under a registration act, that after six months, there being no registration of a will, the devisee would take subject to a mortgage executed by the heir at law. The case cited, coming from such eminent authority, would have great weight with us if it did not depend entirely on an act requiring registration of wills. But that case is not authority in this state for the reason that here we have no law requiring wills to be registered or recorded within any given time. This court has held that a will may be probated at any time till the cause of action to probate is barred by the ten year statute of limitation. There is no stat-

ute requiring wills to be registered or recorded or probated, like there is of conveyances; and in the absence of such statute and in the absence of fraud in suppression or destruction of wills, the devisees therein take the property when the will is probated, which, as we have said, may be at any time within ten years from the testator's death.

We conclude, therefore, that appellants have not been divested in any way of their legal title to the three-fourths of the land devised by T. T. Reid, and, not having been divested, ⁸¹⁷ it is superior to appellee's mortgage; wherefore, for the reasons indicated, the judgment is reversed, and cause remanded for judgment, with decree of sale in favor of appellee, Bengé, as against one-fourth the land embraced in the mortgage only, and for proceedings consistent herewith.

A Will may be admitted to probate at any time after the testator's death, in the absence of any statutory limitation: *Shumway v. Holbrook*, 1 Pick. 116, 11 Am. Dec. 153; *Haddock v. Boston etc. R. R.*, 146 Mass. 155, 4 Am. St. Rep. 295, 15 N. E. 495; but acts done and rights acquired under a previous grant of administration will be protected: *Rebhan v. Mueller*, 114 Ill. 343, 55 Am. Rep. 869, 2 N. E. 75.

One may be Estopped by his silence: *Wampol v. Kountz*, 14 S. Dak. 334, 86 Am. St. Rep. 765, 85 N. W. 595. But silence, in order to work an equitable estoppel, must be with intent to mislead: *Maple v. Kussart*, 53 Pa. St. 349, 91 Am. Dec. 214; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115. See, too, *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307, 10 S. W. 891; *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 57 Am. St. Rep. 458, 45 N. E. 923.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MAINE.

WOOD v. MAINE CENTRAL RAILROAD COMPANY.

[98 Me. 98, 56 Atl. 457.]

CARRIERS OF PASSENGERS—Baggage, Duty of to Transport.
The existence of the relation of passenger and carrier entitles the passenger to have his personal baggage transported at the same time without additional charge. (p. 341.)

CARRIERS OF PASSENGERS—Responsibility of for Baggage.
A carrier, with respect to baggage accompanying a passenger, incurs the responsibility of a common carrier of merchandise, and is liable as an insurer of the baggage, except in the case of vis major or the public enemy. (p. 341.)

CARRIERS OF PASSENGERS—Liability of for Baggage.
If a passenger does not accompany his baggage in its transportation, the carrier does not incur the liability of an insurer of the baggage, unless the passenger's failure to accompany it is due to the carrier's fault. (p. 341.)

CARRIERS OF PASSENGERS—Baggage, When Liable, for Only as a Gratuitous Bailee.—If a carrier receives baggage, understanding that it will go forward as the baggage of a passenger, but he does not intend to, and in fact does not, accompany it, the carrier is liable only as a gratuitous bailee. (pp. 342, 343.)

CARRIERS OF PASSENGERS, When not Answerable for Baggage in Their Possession as Gratuitous Bailees.—If a carrier of passengers has baggage in its possession as a gratuitous bailee, which it deposits in an ordinarily well constructed baggage-room with doors and windows closed in the ordinary manner, it is not liable for the loss of the baggage through the felonious entrance of a thief effected by breaking a pane of glass in one of its windows. (p. 343.)

Action for the loss of baggage which had been intrusted by the plaintiff to the defendant and by the latter carried to its destination without the former accompanying it and, being there deposited in its baggage-room, had been stolen therefrom.

W. M. Hilton, for the plaintiff.

N. and H. B. Cleaves, S. C. Perry and H. W. Swasey, for the defendant.

•• WHITEHOUSE, J. In this case the first count in the writ sets out an express contract, on the part of the defendant as a common carrier, to transport the plaintiff's trunk with its contents safely from Portland to Wiscasset and there to deliver it to the plaintiff. The second is on an alleged contract by the defendant as a warehouseman to receive from the plaintiff, and safely keep and deliver to him his trunk and its contents upon demand. The defendant pleads to the first count that it was not liable to plaintiff as a common carrier for the loss of his property, and to the second count that as a warehouseman it used reasonable and ordinary care and diligence in keeping the property; and that the defendant's baggage-room in Wiscasset was broken open and entered by thieves and the contents of the trunk stolen without the fault of the defendant.

On the 16th of June, 1902, the plaintiff bought a passenger ticket from Asbury Park, New Jersey, to Boston, and had his trunk checked through to Wiscasset, Maine. The plaintiff testified that he paid ¹⁰⁰ "an additional price," or "extra charge" over and above the price of his ticket to have the trunk checked through to Wiscasset, but he was unable to remember whether this "extra charge" was seventy-five cents or one dollar and twenty-five cents. The check found on the plaintiff's trunk was the ordinary paper check usually attached to trunks of passengers on the roads over which this trunk was carried. The plaintiff came to Boston as a passenger on the same train with the trunk, arriving there on the morning of June 17th. He remained in Boston the entire day and in the evening continued his journey by boat from Boston to Bath. There, on the morning of June 18th, he bought a ticket on which he traveled over the defendant's railroad from Bath to Wiscasset, arriving there about 9:30 in the forenoon of that day. In due course of transportation upon the check, the plaintiff's trunk had reached Wiscasset over the defendant's railroad from Portland at 2:55 in the afternoon of the day preceding, but no one appearing there to receive it on its arrival, it was duly deposited in the baggage-room with other baggage. The plaintiff did not call for it until the afternoon of the 18th about twenty-four hours after its arrival.

It is contended that the facts thus disclosed are insufficient to establish the liability of the defendant as a common carrier and an insurer of the trunk, and that it can only be liable either as a gratuitous bailee or as a warehouseman.

It is settled and familiar law respecting public carriers of passengers, that the existence of the relation of passenger and carrier between the parties entitles the passenger to have his personal baggage transported at the same time without any additional charge for the freight. No separate contract is required for the carriage of mere personal baggage which is accompanied by the passenger in its transportation. The fare for the transportation of the passenger includes compensation for the carriage of the baggage; and with respect to such baggage, the carrier of passengers incurs the responsibility of common carriers of merchandise, and becomes liable as an insurer of the baggage, except in cases of "vis major" or the public enemy. But in the absence of any special agreement therefor the carrier does not incur this liability as an insurer of the baggage, unless the passenger accompanies it in its transportation or is prevented from so ¹⁰¹ doing by the fault of the carrier: *Wilson v. Grand Trunk Ry. Co.*, 56 Me. 60, 96 Am. Dec. 495, 57 Me. 138, 2 Am. Rep. 26; *Graffam v. Boston etc. R. R. Co.*, 67 Me. 234. "If, therefore, that which would have been properly baggage had it been accompanied by the owner as a passenger should by accident or mistake be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in the character of baggage, and would not be responsible for it as such. . . . For although the measure of the liability of the carrier of the baggage is the same as that of the common carrier of goods as freight, the risk incurred by the carrier in the two cases is not always the same. Where the baggage is accompanied by the owner, as the carrier has the right to suppose will be the case, emergencies may arise in which his care and attention to it may preserve it from loss; and where his journey has been safely made, the carrier may at once deliver to him his baggage": *Hutchinson on Carriers*, secs. 701, 702; *Collins v. Boston etc. R. R. Co.*, 10 Cush. 506.

In *Beers v. Boston etc. R. R. Co.*, 67 Conn. 417, 52 Am. St. Rep. 293, 34 Alt. 541, the defendant company received from another carrier and transported the plaintiff's trunks upon the erroneous assumption created by the checks on the trunks that they were the personal baggage of passengers who had purchased tickets over the defendant's road as a connecting carrier. In fact the owner of the trunks traveled by another route, but supposed that the trunks were properly checked. The court held that the defendant did not receive the trunks in the capacity of

a common carrier of passengers for hire; and as there were no passengers accompanying the trunks or who had bought tickets entitling them to passage with their trunks over defendant's road, there was no liability of the defendant, except for willful and intentional injury to the trunks in its possession. So in the recent case of *Marshall v. Pontiac etc. R. R. Co.*, 126 Mich. 45, 85 N. W. 242, the plaintiff purchased a passenger ticket over the defendant's railroad for the purpose of obtaining a check upon which his trunk was forwarded as baggage, without any intention of accompanying the baggage in its transportation. He made the journey to his destination by his own private conveyance, but in the meantime ¹⁰² the baggage had arrived and as the owner was not there to receive it, the trunk was deposited in the baggage-room used for that purpose. The second night after the arrival of the trunk, the baggage-room was feloniously entered and the trunk carried away by thieves. Some four months later the plaintiff used his ticket as a passenger on the defendant's railroad. The court held that the plaintiff was not a passenger at the time the trunk was transported over the road, and that at the time it was stolen from the baggage-room the defendant was only a gratuitous bailee, and not being guilty of "gross negligence" it was not liable to the plaintiff. In this case, however, the court deemed it proper to close the opinion with this observation: "We must not be understood as holding that it is absolutely necessary for the passenger to go upon the same train with his baggage in order to entitle him to have his baggage taken care of at his destination by the railroad company as a warehouseman. Where the passenger purchased his ticket with the bona fide intention to use it, but without fault upon his part, did not accompany it, but went upon a following train, a different case is presented."

In the case at bar it satisfactorily appears from all the evidence that the plaintiff's trunk was received by the carrier in New Jersey in the ordinary way as the personal baggage of a passenger, in the expectation that it would be accompanied by the owner. It is true that the plaintiff testifies that he paid an "extra amount" to have the trunk "checked through to Wisconsin," but he is unable to state the precise amount paid for that purpose, and he recalls no conversation between the checker and himself tending to show that the trunk was to be forwarded as freight without the passenger. He received only the ordinary passenger check for the trunk, and it seems probable from all the evidence that the "additional price" paid by him was only

the ordinary charge for the transfer of the baggage of passengers across New York and Boston. The conclusion is irresistible that when the trunk was checked at Asbury Park both the parties understood that it was to go forward as the baggage of a passenger. It is equally clear that the plaintiff did not intend to accompany it beyond Boston, and it is admitted that he did not in fact accompany it over any part of the defendant's railroad.

¹⁰² It is accordingly the opinion of the court that the defendant did not incur the full responsibility of a common carrier of goods, and that at the time the trunk was rifled of its contents, the defendant was only liable as a gratuitous bailee.

But with respect to its manner of storing and keeping the trunk, the evidence fails to show that the defendant was guilty of any negligence which would render it liable, as a gratuitous bailee, to compensate the plaintiff for the loss of baggage taken from its custody by shop-breakers and thieves. The trunk was deposited in an ordinarily well-constructed baggage-room with the doors and windows secured in the ordinary manner on the night in question, and the felonious entrance was effected by breaking out a pane of glass in one of its windows. The plaintiff's conduct indicated that he regarded this baggage-room as a reasonably safe place for the storage of baggage. Wiscasset was his old home. He must have been familiar with the condition of the baggage-room of the defendant company at that station. When he stopped in Boston, he knew that in the ordinary course of transportation his trunk would reach its destination in advance of his arrival, and be stored in this baggage-room over night. After his arrival he made no haste to call for it and showed no anxiety in regard to its safety.

There was no want of ordinary care on the part of the defendant respecting the custody of the trunk.

Judgment for the defendant.

LIABILITY OF COMMON CARRIERS FOR THE BAGGAGE OF PASSENGERS.*

- I. Nature of the Liability.**
 - a. That of Insurer.
 - b. Act of God or Public Enemy as Defense.
- II. What Baggage Includes.**
 - a. On What It Depends.
 - b. To Whom It must Belong.

***REFERENCES TO MONOGRAPHIC NOTES.**

Power of carrier to limit liability: 32 Am. Dec. 495.
Liability for articles kept in passenger's custody: 42 Am. Dec. 37.
What constitutes baggage: 71 Am. Dec. 158; 8 Am. Rep. 302.
Liability for negligence of connecting carrier: 35 Am. Rep. 708.

a common carrier of passengers for hire; and as there were no passengers accompanying the trunks or who had bought tickets entitling them to passage with their trunks over defendant's road, there was no liability of the defendant, except for willful and intentional injury to the trunks in its possession. So in the recent case of *Marshall v. Pontiac etc. R. R. Co.*, 126 Mich. 45, 85 N. W. 242, the plaintiff purchased a passenger ticket over the defendant's railroad for the purpose of obtaining a check upon which his trunk was forwarded as baggage, without any intention of accompanying the baggage in its transportation. He made the journey to his destination by his own private conveyance, but in the meantime ¹⁰² the baggage had arrived and as the owner was not there to receive it, the trunk was deposited in the baggage-room used for that purpose. The second night after the arrival of the trunk, the baggage-room was feloniously entered and the trunk carried away by thieves. Some four months later the plaintiff used his ticket as a passenger on the defendant's railroad. The court held that the plaintiff was not a passenger at the time the trunk was transported over the road, and that at the time it was stolen from the baggage-room the defendant was only a gratuitous bailee, and not being guilty of "gross negligence" it was not liable to the plaintiff. In this case, however, the court deemed it proper to close the opinion with this observation: "We must not be understood as holding that it is absolutely necessary for the passenger to go upon the same train with his baggage in order to entitle him to have his baggage taken care of at his destination by the railroad company as a warehouseman. Where the passenger purchased his ticket with the bona fide intention to use it, but without fault upon his part, did not accompany it, but went upon a following train, a different case is presented."

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There was no want of ordinary care on the part of the defendant respecting the custody of the trunk.

Judgment for the defendant.

LIABILITY OF COMMON CARRIERS FOR THE BAGGAGE OF PASSENGERS.*

I. Nature of the Liability.

- a. That of Insurer.
- b. Act of God or Public Enemy as Defense.

II. What Baggage Includes.

- a. On What It Depends.
- b. To Whom It must Belong.

***REFERENCES TO MONOGRAPHIC NOTES.**

Power of carrier to limit liability: 82 Am. Dec. 495.

Liability for articles kept in passenger's custody: 42 Am. Dec. 37.

What constitutes baggage: 71 Am. Dec. 156; 8 Am. Rep. 302.

Liability for negligence of connecting carrier: 35 Am. Rep. 708.

- c. Specific Articles of Baggage.
 - 1. Wearing Apparel.
 - 2. Money.
 - 3. Valuable Documents.
 - 4. Jewelry.
 - 5. Tools and Instruments.
 - 6. Bedding and Household Goods.
 - 7. Weapons.
 - 8. Books and Manuscripts.
 - 9. Dogs.
 - 10. Miscellaneous Articles.
- d. Merchandise not Included.
 - 1. In General.
 - 2. May be by Agreement.
 - 3. Effect of Rule of Company Against Receiving It.
 - 4. Knowledge of Character of Property.
 - A. Need not be by Direct Statement.
 - B. Knowledge by Agent.
 - C. Need not Inquire as to Contents—Fraud.
 - e. Disclosing Value of Baggage by Passenger.
 - f. Liability for Extra Baggage.
- III. Connecting Carriers.
 - a. May Contract Beyond Own Line.
 - b. Limiting Liability to Own Line.
 - c. English Rule—American Rules.
 - d. Presumptions, Where not Known Where Loss or Injury Occurred.
- IV. Limitation of Liability.
 - a. How Far Carrier may Restrict His Liability.
 - b. Effect of General Notice of Nonliability.
 - c. May Limit Liability by Contract.
 - 1. Generally.
 - 2. Ticket as a Contract.
 - A. Opposing Views.
 - B. Must have Opportunity and Ability to Read It.
 - 3. Limitations must be Communicated before Journey Starts.
 - 4. Unreasonable Limitations.
 - 5. Restrictions by One Carrier Available to Connecting Carrier.
 - d. Construction of Conditions.
 - e. Statutory Enactments.
 - 1. Prohibiting Limitation of Liability.
 - 2. Construction of Statute Limiting Liability.
- V. When Liability Attaches.
- VI. Delivery to Carrier.
 - a. Necessity Therefor.
 - b. Custom as Showing Delivery.
 - c. Retention of Control of Baggage by Passenger.
 - 1. Effect Thereof.
 - 2. Steamship Companies as Innkeepers.
- VII. When Liability Ends.
 - a. After Reasonable Time.
 - b. Custom as Determining Cessation of Liability.
 - c. Must have Opportunity to Obtain Baggage.
 - d. To Whom Delivery must be Made.
 - e. Where Taken Charge of by Government Officials.

- 1. Burden of Showing Delivery to Passenger.
- g. Liability for Property Left Behind in Car.
- VIII. Liability as Warehouseman.
- IX. Contributory Negligence of Passenger.
- X. Authority of Baggage Master as to Baggage.
- XI. Power of Carrier to Establish Regulations.
- XII. Liability for Willful Acts of Employés.
- XIII. Necessity for Payment of Fare in Advance.
- XIV. When Baggage Should be Sent.
 - a. On Same Train.
 - b. Effect of Passenger not Accompanying It.
- XV. Measure of Damages.
 - a. For Loss or Destruction.
 - b. For Delay.
 - c. Place of Destination as Fixing Damages.
- XVI. Conflict of Laws.
- XVII. What Actions will Lie.
- XVIII. Who may Sue.
 - a. In General.
 - b. Principal Suing Where Agent was Passenger.
 - c. Partners or Joint Owners.
 - d. Husband.
 - e. Father.
- XIX. Burden of Proof and Evidence.
 - a. Proof of Delivery and Failure to Produce Make Out Prima Facie Case.
 - b. Baggage Check as Evidence of Receipt of Baggage.
 - c. Statements of Carrier's Agents.
 - d. Proof as to Contents of Trunk.

I. Nature of the Liability.

a. That of Insurer.—While it was at one time held that in order to render a common carrier liable for the baggage of passengers a separate price must be paid therefor, it is now universally considered as law that payment for the personal transportation of a passenger includes also that of his baggage, without any special agreement or separate compensation, it being merely incidental to the carriage of the passenger himself: *Cincinnati etc. R. Co. v. Marcus*, 38 Ill. 219; *Chicago etc. R. Co. v. Fahey*, 52 Ill. 81, 4 Am. Rep. 587; *Seasongood v. Owensboro etc. R. Co.*, 14 Ky. Law Rep. 430; *Wilson v. Grand Trunk Ry.*, 56 Me. 60, 96 Am. Dec. 435; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052; *Harlow v. Fitchburg R. Co.*, 74 Mass. (8 Gray) 237; *Smith v. Boston etc. R. Co.*, 44 N. H. 325; *Hedding v. Gallagher*, 69 N. H. 650, 76 Am. St. Rep. 204, 45 Atl. 96; *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845; *Isaacson v. New York etc. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142, reversing 25 Hun, 350; *Orange County Bank v. Brown*, 9 Wend. 85, 24 Am. Dec. 129; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Talcott v. Wabash R. Co.*, 89 Hun, 492, 35 N. Y. Supp. 574; *Oakes v. Northern Pac. R. Co.*, 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230; *Peixotti v. McLaughlin*,

1 Strob. (S. C.) 468, 45 Am. Dec. 563; *Wilson v. Chesapeake etc. R. Co.*, 21 Gratt. 654.

In regard to such baggage the liability of a common carrier of passengers does not differ from that of a carrier of goods or freight, and he is held to the strict accountability of an insurer, excused only from loss or damage occurring by an act of God, or a public enemy: *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 583; *Waldron v. Chicago etc. R. Co.*, 1 Dak. 351, 46 N. W. 456; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Woods v. Devin*, 13 Ill. 747, 55 Am. Dec. 483; *Louisville etc. Ry. Co. v. Nicholas*, 4 Ind. App. 119, 51 Am. St. Rep. 206, 30 N. E. 424; *Seasongood v. Owensboro etc. R. Co.*, 14 Ky. Law Rep. 430; *Aiken v. Wabash R. Co.*, 80 Mo. App. 8; *Ringwalt v. Wabash R. Co.*, 45 Neb. 760, 64 N. W. 219; *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845; *Camden etc. Co. v. Burke*, 13 Wend. 611, 28 Am. Dec. 488; *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455; *Merrill v. Grinnell*, 30 N. Y. 594; *Hyman v. Central Vermont R. Co.*, 66 Hun, 202, 21 N. Y. Supp. 119; *Oakes v. Northern Pac. R. Co.*, 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230; *Dill v. South Carolina R. Co.*, 7 Rich. (S. C.) 158, 62 Am. Rep. 407; *Houston etc. Ry. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W. 437.

This liability arises from the fact that a reward has been paid, although included in the personal fare of the passenger. Therefore, where a common carrier undertakes to carry baggage without compensation, he is held to no greater degree of diligence than that of a gratuitous bailee, answerable only for bad faith or gross neglect: *Rice v. Illinois Cent. R. Co.*, 22 Ill. App. 643; *Flint etc. Ry. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499.

b. Act of God or Public Enemy as Defense.—An unusual flood is an act of God, and if the destruction of baggage is caused thereby it is a good defense when sued for its loss; and such loss does not give rise to a presumption of negligence: *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343, 30 Am. St. Rep. 732, 23 Atl. 459. The act of God relied upon as an excuse must be the entire cause of the damage, and the carrier must be free from negligence in any way contributing thereto: *Sonneborn v. Southern Ry. Co.*, 65 S. C. 502, 44 S. E. 77. See, also, *Wald v. Pittsburgh etc. R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332, 44 N. E. 888, reversing 60 Ill. App. 460. And in *Harzburg v. Southern Ry. Co.*, 65 S. C. 539, 44 S. E. 75, it is held that it is not sufficient to show that the damage resulted from an unusual and unforeseen action of nature, but that the carrier must show further that the injury could not have been prevented by any foresight, pains or care reasonably to be expected.

The act of a public enemy will constitute no defense where the baggage might still be saved. So, where during the Civil War, a Confederate cruiser captured a passenger vessel, but the passengers were permitted to take with them their baggage, and the captain of the captured ship undertook to transfer the passengers' baggage to a schooner provided by the enemy to convey the passengers to

port, the steamship company was held liable where certain baggage was not brought on board the schooner but was lost: *Spaids v. New York Mail S. S. Co.*, 3 Daly, 139.

Where it is proved that the baggage was in good condition when received by the carrier, and damaged when delivered, the burden is on him to show that it was occasioned by some cause exempting from absolute liability for safe delivery: *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483; *Toledo etc. R. Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 462.

II. What Baggage Includes.

a. *On What It Depends.*—The liability of a common carrier of passengers as insurers extending only to baggage, it becomes necessary to determine what is meant by that term. It has been held to comprise such articles of necessity and convenience as passengers usually carry for their personal use, comfort, instruction, amusement, or protection, having regard to the length and object of their journey: *Parmelee v. Fischer*, 22 Ill. 212, 74 Am. Dec. 138. It is a relative term, depending not only on the length and purpose of the journey, but also upon the station in life of the passenger, and therefore what might be considered baggage for one traveler could not be so held for one occupying a different position: *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Hannibal etc. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262; *Fraloff v. New York etc. R. Co.*, 100 U. S. 24, affirming 10 Blatchf. 16, Fed. Cas. No. 5025, 12 Blatchf. 484, Fed. Cas. No. 5026, in which latter case a wealthy Russian woman was allowed ten thousand dollars for the loss of a quantity of lace which she was carrying with her as her personal baggage. It is not essential that the articles be for use on the journey itself, but if for use with reference to the ultimate purpose of the journey, it is regarded as baggage: *Dexter v. Syracuse etc. Ry. Co.*, 42 N. Y. 326, 1 Am. Rep. 527; *Missouri etc. Ry. Co. v. Meek* (Tex. Civ. App.), 75 S. W. 317; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612. For other cases defining baggage, see *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460, *Cincinnati etc. R. Co. v. Marcus*, 38 Ill. 219; *Doyle v. Kiser*, 6 Ind. 242; *American Contract Co. v. Cross*, 71 Ky. (8 Bush) 472, 8 Am. Rep. 471; *Del Valle v. The Richmond*, 27 La. Ann. 90; *Jordan v. Fall River R. Co.*, 59 Mass. (5 Cush.) 69, 51 Am. Dec. 44; *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052; *New Orleans etc. R. Co. v. Moore*, 40 Miss. 39; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *Spooner v. Hannibal etc. R. Co.*, 23 Mo. App. 403; *Nordemeyer v. Loeschner*, 1 Hilt. (N. Y.) 499; *Herring v. Utlev*, 53 N. C. (8 Jones) 270; *Oakes v. Northern Pac. R. Co.*, 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230; *Bomar v. Maxwell*, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682; *Missouri Pac. Ry. Co. v. York*, 2 Wils. Civ. Cas. Ct. Rep. (Tex.), sec. 639; *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366. That luggage and baggage are synonymous, see

Pfister v. Central Pac. Ry. Co., 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686; *Choctaw etc. R. Co. v. Zwirtz*, 13 Okla. 411, 73 Pac. 941.

Of what articles baggage may consist is a mixed question of law and fact, to be determined by the jury under proper instructions from the court: *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356; *Kansas City etc. R. Co. v. Morrison*, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225; *Nevins v. Bay State Steamboat Co.*, 17 N. Y. Super Ct. (4 Bosw.) 225; *Jones v. Priester*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 613; *Texas etc. Co. v. Ferguson*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 1255.

b. To Whom It Must Belong.—To render the company liable, the baggage must belong to the passenger carrying it, and not to another: *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Andrews v. Ft. Worth etc. Ry. Co.* (Tex. Civ. App.), 25 S. W. 1040. See, as to who may sue, XVIII, herein.

c. Specific Articles of Baggage.

1. Wearing Apparel.—Personal baggage, while including wearing apparel, is not confined thereto: *Bunyan v. Central R. Co.*, 61 N. J. L. 537, 68 Am. St. Rep. 711, 41 Atl. 367; *Mexican Nat. R. Co. v. Ware* (Tex. Civ. App.), 60 S. W. 343. The mere fact, however, that it is wearing apparel will not impress upon it the character of baggage, and it has accordingly been held that where a passenger took a short journey in the summer-time, and carried with him heavy winter clothing, it was error for the trial court to hold as a matter of law that it came within the definition of baggage: *Missouri etc. Ry. Co. v. Meek* (Tex. Civ. App.), 75 S. W. 317.

2. Money.—Money intended and reasonably sufficient to defray the traveling expenses of a passenger, having regard to all the circumstances, is now regarded as baggage, and the carrier liable accordingly; but not for an amount in excess thereof, as the carrier cannot be held to have assumed the great risk connected with transporting large quantities of money, for which he does not receive equal remuneration and of the existence of which he is not, in most instances, aware: *St. Louis etc. Ry. Co. v. Berry*, 60 Ark. 433, 30 S. W. 764; *Pfister v. Central Pac. Ry. Co.*, 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686; *Hutchings v. Western etc. R. R. Co.*, 25 Ga. 61, 71 Am. Dec. 156; *Davis v. Michigan etc. R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Cincinnati etc. R. Co. v. Marcus*, 38 Ill. 219; *Doyle v. Kiser*, 6 Ind. 242; *Del Valle v. The Richmond*, 27 La. Ann. 90; *Jordan v. Fall River R. Co.*, 59 Mass. (5 Cush.) 69, 51 Am. Dec. 44; *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Levins v. New York etc. R. Co.*, 183 Mass. 175, 97 Am. St. Rep. 434, 66 N. E. 803; *Whitmore v. The Caroline*, 20 Mo. 513; *Orange County Bank v. Brown*, 9 Wend. 85, 24 Am. Dec. 129; *Torpey v. Williams*, 3 Daly, 162; *Walsh v. The H. M. Wright, Newb. Adm.* 494, Fed. Cas. No. 17,115; *Phelps v. London etc. R. Co.*, 19 Com. B., N. S., 321, 115 Eng. Com. L. 321.

Some decisions are to the effect that money deposited in a passenger's trunk is not baggage: *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Grant v. Newton*, 1 E. D. Smith (N. Y.), 95. See, also, *The Ionic*, 5 Blatchf. 538, Fed. Cas. No. 7059. The later and better view, however, is to the contrary, and money for traveling expenses is now regarded as baggage, where contained in a trunk or valise: *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, 83 Am. Dec. 143; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Merrill v. Grinnell*, 30 N. Y. 594. See also *Duffy v. Thompson*, 4 E. D. Smith, 178, holding that a passenger on a voyage from a foreign country may keep money designed for small personal expenses in his trunk on board ship, and hold the ship owner responsible for its loss, the court drawing a distinction between travel by land and by sea.

By the act of its own agent a carrier may become liable for a greater amount of money than he is authorized by its rules to receive: *St. Louis etc. Ry. Co. v. Berry*, 60 Ark. 433, 30 S. W. 764, where the court said: "We conclude that where a passenger, who is ignorant of the rules or instructions of railway companies for bidding their agents to receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount, if he accepts it to ship as baggage, and a loss occurs, the carrier's common-law liability will attach. We are aware that a different rule prevails in some of the states, notably Massachusetts: *Blumantle v. Fitchburg R. R. Co.*, 127 Mass. 322, 34 Am. Rep. 376; *Alling v. Railroad Co.*, 126 Mass. 121, 30 Am. Rep. 667; *Jordan v. Fall River R. R. Co.*, 5 Cush. 69, 51 Am. Dec. 44; *Collins v. Boston etc. R. Co.*, 10 Cush. 506. See, also, *Bomar v. Maxwell*, 9 Humph. 620, 51 Am. Dec. 682. But the weight of authority is with the rule as we have announced it: *Camden etc. R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481; *Hutchinson on Carriers*, sec. 685; *Jacobs v. Tutt*, 33 Fed. 412; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Humphreys v. Perry*, 148 U. S. 627; *Great Western Ry. Co. v. Shepherd*, 8 Ex. 30; *Minter v. Pacific R. R.*, 41 Mo. 503, 97 Am. Dec. 288. . . .

"While most of these cases have reference to merchandise in some form, yet the rationale of the doctrine as to it, when carried as baggage, is equally applicable to money, where it is carried as baggage."

Whether the amount claimed in case of a loss would be reasonable or excessive, depends upon the character of the journey and the special circumstances of the case: *Merrill v. Grinnell*, 30 N. Y. 594, and is a question for the jury: *Jones v. Priestester*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 615.

A carrier is not liable for the loss of money kept in the sole custody of a passenger, carried without notice to the defendant, for a purpose unconnected with the expenses of the journey, although

occasioned by the negligence of defendant's servants: *First Nat. Bank v. Marietta & C. R. Co.*, 20 Ohio St. 259, 5 Am. Rep. 655.

3. **Valuable Documents.**—For documents of great value, forming no part of a passenger's ordinary baggage, no liability attaches, such as a valuable package of bonds: *Weeks v. New York etc. R. Co.*, 72 N. Y. 50, 28 Am. Rep. 104, affirming 9 Hun, 669; or title deeds of a client, carried by his attorney: *Phelps v. London etc. R. Co.*, 19 Com. B., N. S., 321, 115 Eng. Com. L. 321.

4. **Jewelry.**—A reasonable amount of jewelry, such as is ordinarily worn by persons in the same condition as the passenger, and a watch, are held included in the term "baggage": *Torpey v. Williams*, 3 Daly, 162; *Coward v. East Tennessee etc. R. Co.*, 84 Tenn. (16 Lea) 225, 57 Am. Rep. 227; *Galveston etc. Ry. Co. v. Fales* (Tex. Civ. App.), 77 S. W. 234; *Walsh v. The H. M. Wright, Newb. Adm.* 494, Fed. Cas. No. 17,115. But see *Bomar v. Maxwell*, 28 Tenn. (9 Humph.) 621, 51 Am. Dec. 682. Nor does the fact that it is carried by the passenger in his trunk, and not on his person, relieve the carrier from his liability, a trunk being a proper place to carry it in: *American Contract Co. v. Cross*, 71 Ky. (8 Bush) 472, 8 Am. Rep. 471; *Jones v. Voorhees*, 10 Ohio, 145; *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.), 181.

It is a question for the jury whether the jewelry exceeded in value that usually taken by passengers of like station: *Bonner v. Blum* (Tex. Civ. App.), 25 S. W. 60. But a gentleman passenger traveling without a lady companion cannot recover for lady's jewelry carried by him in his trunk: *Metz v. California Southern R. Co.*, 85 Cal. 329, 20 Am. St. Rep. 228, 24 Pac. 610.

5. **Tools and Instruments.**—Recovery for a reasonable quantity of tools belonging to a passenger and used by him in his trade has been allowed in several instances, it being for the jury to decide upon the reasonableness of the quantity: *Kansas City etc. R. Co. v. Morrisson*, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225; *Davis v. Cayuga etc. R. Co.*, 10 How. Pr. 330; *Porter v. Hildebrand*, 14 Pa. St. 129; *Missouri etc. Ry. Co. v. Meek* (Tex. Civ. App.), 75 S. W. 317. In *Choctaw etc. R. Co. v. Zwirtz*, 13 Okla. 411, 73 Pac. 941, the court refused to allow recovery for a number of butcher's tools, as they did not fall within the definition of baggage under the laws of Oklahoma, which applies only to such articles as are intended for the use of the passenger while traveling, or for his personal equipment.

That the surgical instruments of a surgeon in the army traveling with the troops are considered as his baggage, see *Hannibal etc. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262.

6. **Bedding and Household Goods.**—Bedding not intended for use on the journey is not baggage, for which a carrier is liable: *Connolly v. Warren*, 106 Mass. 146, 8 Am. Rep. 300; *Texas & P. R. Co. v.*

Ferguson, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 1255; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612. Where, however, a steerage passenger on a vessel was bound to provide his own bedding for the voyage, it was held to constitute part of the ordinary baggage: *Hirschsohn v. Hamburg-American Packet Co.*, 34 N. Y. Super. Ct. (2 Jones & S.) 521. That a silk quilt in a trunk is not baggage, see *St. Louis etc. R. Co. v. Hardway*, 17 Ill. App. 321. But it has been held that a bed, pillows, and quilts belonging to a poor man traveling with his family may properly be called baggage: *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646.

Household goods may be found by the jury to be baggage, as many circumstances might occur on a trip which would render the articles necessary for the convenience and comfort of travelers: *Missouri Pac. Ry. Co. v. York*, 2 Wills. Civ. Cas. Ct. App., sec. 639.

7. **Weapons.**—Weapons, reasonably necessary to the safety and protection of passengers, or carried for amusement, such as hunting, are deemed included in the term baggage, and recovery has accordingly been allowed for a revolver or rifle taken by a passenger on his journey: *Woods v. Devin*, 13 Ill. 747, 56 Am. Dec. 483; *Davis v. Michigan etc. R. Co.* 22 Ill. 278, 74 Am. Dec. 151; *Davis v. Cayuga etc. Co.*, 10 How. Pr. 330; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.), 453. Where one revolver is reasonably sufficient for the personal use and protection of a passenger, having due regard to his habits and condition in life, he cannot recover for the loss of more than one such weapon: *Chicago etc. R. Co. v. Collins*, 56 Ill. 212.

8. **Books and Manuscripts.**—Books, as tending toward the comfort and amusement of travelers, are part of their baggage. This question is considered in *Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6692, in which case a student brought suit against a carrier to recover damages for the loss of manuscript books, which were necessary to the prosecution of his studies. The court there remarked: "Now, it may safely be said, that books constitute to some extent a part of the baggage of every intelligent traveler. Especially is this the case with scholars, students and members of the learned professions. There is no reason why they should not be under the protection of the law, as against the negligence of carriers, as well as any other portions of their baggage. But it is said that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and in my researches I have found none. But I see no reason for adopting a rule by which they should be excluded, under all circumstances, from the list of articles termed 'baggage.' With the lawyer going to a distant place to attend court, with the author proceeding to his publisher's, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small yet an indispensable, part of his baggage. They are carried as such, in his trunk or portmanteau, among his other necessary effects. They are indispensable to the

object of his journey; and, as they are carried with his baggage, in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or his fishing tackle. In the present case the manuscript books lost are admitted to have been necessary articles for the student at the institution to which he was proceeding. They must, under all the circumstances, be deemed to have been a part of his baggage, for which the defendants are liable." See, however, *Phelps v. London etc. Ry. Co.*, 19 Com. B., N. S., 321, 115 Eng. Com. L. 321, in which case it was held that an attorney traveling as a passenger was not entitled to carry with him as ordinary baggage, title deeds, which were required as evidence on a trial which he was going to attend.

The record books of a nurse, used by her in her vocation, have been considered as baggage: *Werner v. Evans*, 94 Ill. App. 328; as have also the catalogue or price-book of a traveling salesman, being regarded as a book, not an article of merchandise, but convenient and necessary for accomplishing the object of his trip: *Staub v. Kendrick*, 121 Ind. 226, 23 N. E. 79; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716.

Books bought by a woman passenger for her husband with money he had sent her for that purpose are not the baggage of such woman: *Hurwitz v. Hamburg-American Packet Co.*, 56 N. Y. Supp. 379.

Manuscript music, used in connection with the business and travels of a theatrical company, is baggage: *Texas etc. Ry. Co. v. Morrison's Trust Co.*, 20 Tex. Civ. App. 144, 48 S. W. 1103.

9. *Dogs.*—A common carrier may become liable for the loss of a dog belonging to a passenger and taken with him on his trip. In *Kansas City etc. R. Co. v. Higdon*, 94 Ala. 286, 33 Am. St. Rep. 119, 10 South. 282, a passenger on a train took his dog with him, for the purpose of hunting, and was required by the conductor to put him in the baggage-car. Upon reaching his destination, the baggage-master refused to deliver the dog without payment of a small fee, and the dog was then carried on and lost. The company set up as a defense a rule, requiring that dogs be placed in the baggage-car, and allowing the baggage-master a small fee therefor. The company was held liable, the court saying: "There is no evidence to show that when the appellee delivered the dog to the baggage-master, he had knowledge or notice of the rule under which the appellant seeks to relieve itself of responsibility. The conductor was acting within the apparent scope of his authority when he gave directions as to the disposition to be made of the dog. When the baggage-master received the dog, there was nothing to indicate that he was acting in his own behalf rather than as an employé of the appellant and for it. It does not appear that the appellant was in any way made to understand that in reference to the carriage and custody of the dog he was to look to the baggage-master

individually, and not to the railroad company. He was not informed that the company was unwilling to transport the dog, or to become responsible for it. He was simply told to leave the dog in another part of the train, and with the person in charge of the baggage. He was not presumed to know the rules of the company as to the kinds of property it would receive for transportation. It does not even appear in this case that the rule relied on was posted in the depot, or in any other public place at the station where the appellee was received as a passenger. The rule itself shows that it was the duty of the defendant's employees to give notice to the owners of dogs of the conditions upon which they would be carried by the railroad company, and, if the owners were unwilling to accept such conditions, to refer them to the express company. In the present case, the conductor permitted the dog to remain on the train, and had it put in the baggage-car, and neither he nor the baggage-master intimated to the appellee that the company was unwilling to carry the dog, or to become responsible therefor. It affirmatively appears that the appellee did not know of the rule in question. He was entitled to rely upon and to follow the instructions given by the conductor." See, also, *Cantling v. Hannibal etc. R. Co.*, 54 Mo. 385, 14 Am. Rep. 476.

Where a carrier does not assume to transport dogs as a common carrier, but to accommodate a passenger who was notified of its rules, permits its baggage-master to receive them in its car and accept pay for their transportation, this charges the carrier for the safety of such animals only as a bailee or private carrier: *Honeyman v. Oregon etc. R. Co.*, 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628.

10. *Miscellaneous Articles*.—Among various articles which have been regarded as baggage, as reasonably necessary for comfort, enjoyment or convenience during the trip or at the end of the journey, are a camera and its belongings: *Atwood v. Mohler*, 108 Ill. App. 416; opera-glasses: *Toledo etc. Ry. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221; razor and strop: *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr., N. S., 229; cloth cut into garments: *Duffy v. Thompson*, 4 E. D. Smith (N. Y.), 178; spectacles: *Walsh v. The H. M. Wright, Newb. Adm.* 494, Fed. Cas. Mo. 17,115; a large quantity of lace, worth ten thousand dollars: *New York etc. R. R. Co. v. Fraloff*, 100 U. S. 24, affirming 10 Blatchf. 16, Fed. Cas. No. 5025, 12 Blatchf. 484, Fed. Cas. No. 5026; but see *Dibble v. Brown*, 12 Ga. 217, 53 Am. Dec. 460.

The following articles have been held not to fall within the definition of baggage: a large rocking-horse for a child: *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366; costumes to be used at a masquerade: *Michigan etc. R. Co. v. Oehm*, 56 Ill. 293; a bicycle: *State v. Missouri Pac. Ry. Co.*, 71 Mo. App. 385; packages of groceries for family consumption: *Bullock v. Delaware etc. R. Co.*, 60 N. J. L. 24, 36 Atl. 773; silverware: *Bell v. Drew*, 4 E. D. Smith (N. Y.),

59; fruit in a trunk: *Georgia R. Co. v. Johnson*, 113 Ga. 539, 38 S. E. 954; Masonic regalia and engraving: *Nevins v. Bay State Steamboat Co.*, 17 N. Y. Super. Ct. (4 Bosw.) 225.

Trifling presents for the use of the traveler's family have been regarded as baggage: *Jones v. Priester*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 613; but not jewelry for presents to friends: *Nevins v. Bay State Steamboat Co.*, 17 N. Y. Super. Ct. (4 Bosw.) 225; nor clothing carried for a person not a member of his family: *Dexter v. Syracuse etc. Ry. Co.*, 42 N. Y. 326, 1 Am. Rep. 527. That a sacque, muff, and silver napkin rings form no part of a gentleman's traveling baggage, see *Chicago etc. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268.

d. Merchandise not Included.

1. In General.—It is well-settled law that merchandise or samples of goods are not baggage, so as to render common carriers liable therefor, which are accepted by them under the guise of ordinary baggage, and of the true character of which they are ignorant; and as to those goods a common carrier is liable only for gross neglect or fraud: *Hutchings v. Western etc. R. R.*, 25 Ga. 61, 71 Am. Dec. 156; *Blumenthal v. Maine Cent. R. Co.*, 79 Me. 550, 11 Atl. 605; *Collins v. Boston & M. R. R.*, 64 Mass. (10 Cush.) 506; *Stimson v. Connecticut R. R. Co.*, 98 Mass. 83, 93 Am. Dec. 140; *Alling v. Boston etc. R. Co.*, 126 Mass. 121, 30 Am. Rep. 667; *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, 34 Am. Rep. 376; *Haines v. Chicago etc. R. Co.*, 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; *Ross v. Missouri etc. R. Co.*, 4 Mo. App. 582; *Pardee v. Drew*, 25 Wend. 459; *Sloan v. Great Western Ry. Co.*, 6 Hun, 546; *Gurney v. Grand Trunk Ry. Co.*, 59 Hun, 625, 14 N. Y. Supp. 321; *Simpson v. New York etc. R. Co.*, 16 Misc. Rep. 613, 38 N. Y. Supp. 341; *Humphreys v. Perry*, 146 U. S. 627, 13 Sup. Ct. Rep. 711; *Strouse v. Wabash etc. Ry. Co.*, 17 Fed. 209. The fact that the articles are carried for sale fixes their status, and property which, under other circumstances would be baggage, when intended for sale are not so: *Spooner v. Hannibal etc. R. Co.*, 23 Mo. App. 403.

In *Belfast etc. R. Co. v. Keys*, 9 H. L. Cas. 556, a passenger took with him as baggage, a case containing merchandise. In the course of the journey a guard of the company applied to him and desired that the case might be carried in the baggage-van, which was accordingly done. Upon this state of facts the plaintiff was held not entitled to recover, as he was bound in the first place to pay for the transportation of merchandise, and the acceptance of it by the guard could not create an alteration of the original contract with the company.

In *Pennsylvania Co. v. Miller*, 35 Ohio St. 541, 35 Am. Rep. 620, it was held that by voluntarily taking a valise containing samples of merchandise into his charge, and finally putting it in his ware-

house for safekeeping, a common carrier assumed the relation to it of an ordinary bailee.

2. **May be by Agreement.**—There is, however, nothing to prevent a carrier from agreeing to carry merchandise or samples as baggage, and if he undertakes to convey them as such, having full notice of the real character of the articles, he will be held to the same strict accountability as if they were in fact only ordinary baggage: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659; *Waldron v. Chicago etc. R. Co.*, 1 Dak. 351, 46 N. W. 456; *Lake Shore etc. Ry. Co. v. Hochstim*, 67 Ill. App. 514; *Chicago etc. R. Co. v. Conklin*, 32 Kan. 55, 3 Pac. 762; *Illinois Cent. R. Co. v. Matthews*, 72 S. W. 302, 24 Ky. Law Rep. 1766; *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052; *Ross v. Missouri etc. R. Co.*, 4 Mo. App. 583; *Stoneman v. Erie Ry. Co.*, 52 N. Y. 429; *Perley v. New York etc. R. Co.*, 65 N. Y. 374; *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208; *Talcott v. Wabash R. Co.*, 159 N. Y. 461, 54 N. E. 1; *Glovinsky v. Cunard S. S. Co.*, 6 Misc. Rep. 388, 26 N. Y. Supp. 751; *Toledo etc. Ry. Co. v. Dages*, 57 Ohio St. 38, 63 Am. St. Rep. 702, 47 N. E. 1039; *Oakes v. Northern Pac. R. Co.*, 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230; *Texas etc. Ry. Co. v. Cappa*, 2 Wills. Civ. Cas. Ct. App. (Tex.), sec. 34; *Fort Worth etc. Ry. Co. v. Rosenthal Millinery Co. (Tex. Civ. App.)*, 29 S. W. 196; *Hannibal etc. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262; *Streuss v. Wabash etc. Ry. Co.*, 17 Fed. 209; *Jacobs v. Tutt*, 33 Fed. 412; *Central Trust Co. v. Wabash etc. Ry. Co.*, 39 Fed. 417; *Great Northern R. Co. v. Shepherd*, 8 Ex. 30.

Some courts place this liability on the ground that the company must be considered to have assumed, with reference to such property, the liability of a common carrier of merchandise; while others place it on the ground of estoppel to deny that it was baggage. But the liability is the same in either case: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659. And the fact that payment of an extra charge has or has not been made makes no difference, if it be knowingly accepted as personal baggage: *Oakes v. Northern Pac. R. Co.*, 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230.

3. **Effect of Rule of Company Against Receiving It.**—It is no defense to an action for the loss of, or damage to, merchandise voluntarily received as baggage that there is a rule of the company against such reception and that the employé had no authority to check it as such, where such rule or want of authority is not brought to the passenger's notice: *Minter v. Pacific R. R.*, 41 Mo. 503, 97 Am. Dec. 288; *Sherlock v. Chicago etc. Ry. Co.*, 85 Mo. App. 46; *Sloman v. Great Western Ry. Co.*, 6 Hun, 546; *Trimble v. New York etc. R. Co.*, 162 N. Y. 84, 56 N. E. 532, affirming 39 App. Div. 403, 57 N. Y. Supp. 437. Knowledge by the passenger, however, that the carriers' agent is acting contrary to regulations will defeat his right to recover. So where a railroad company had a rule requiring

their agents to demand and receive a bond releasing it from liability in case of loss of jewelry cases to be carried as ordinary baggage, and such rule was known to a passenger, or he had good reason to know of it, he could not recover, even though they were received without the required bond being given: *Weber Co. v. Chicago etc. Ry. Co.*, 92 Iowa, 364, 60 N. W. 637; 113 Iowa, 188, 84 N. W. 1042.

4. Knowledge of Character of Property.

A. Need not be by Direct Statement.—It next becomes necessary to determine what is sufficient knowledge by the carrier of the character of the property transported, so as to render him liable as for ordinary baggage. It is not necessary that a direct statement be made by the passenger that the trunk contains merchandise, but such fact may be inferred from circumstances: *Trimble v. New York etc. R. Co.*, 162 N. Y. 84, 56 N. E. 532, affirming 39 App. Div. 403, 57 N. Y. Supp. 437. So a custom knowingly to receive merchandise as baggage may show notice and allow recovery, whether it be implied from the general custom of the carrier in its manner of conducting business with the public, or from a particular custom or manner of doing business with a particular person: *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052. And see *Amory v. Wabash R. Co.*, 130 Mich. 404, 90 N. W. 22; *Bunyan v. Central R. Co.*, 65 N. J. L. 228, 47 Atl. 422. A usage and custom of allowing packages of merchandise as baggage must be clearly proved, and it was held in *Bunyan v. Central R. Co.*, 64 N. J. L. 67, 44 Atl. 985, that the habit of one passenger in this regard was not sufficient to establish the existence of such custom.

In *Rider v. Wabash etc. Ry. Co.*, 14 Mo. App. 529, a trunk containing jewelry was broken open and robbed. The plaintiff introduced evidence to show that the size, construction and general appearance of the trunk were of a sort peculiar to sample trunks, and recognized among railway people as such. The court held that the question was not whether the conductor of the train ought to have known what other people generally knew about sample trunks, but whether he did in fact know, or had information from the passenger, that the trunk in question contained valuable merchandise, and not ordinary baggage, and refused to disturb a verdict for the company. And in *Smith v. Boston etc. R. Co.*, 44 N. H. 325, it was held that the fact that other passengers on other occasions, had taken along with them in passenger-cars similar bundles of merchandise without objection had no legal tendency to prove an agreement that they were to be regarded as part of their baggage or paid for by their passenger ticket.

If a common carrier of passengers for a long time acquiesces in and makes accommodation for the carriage of small packages of merchandise of its passengers in its passenger-cars as personal baggage, so as to lead the passengers to accept and rely upon its atti-

tude in that respect as one of its regulations it can resume its right under the law only after reasonable notice of its rescission of the regulation so made: *Bunyan v. Central R. Co.*, 61 N. J. L. 537, 68 Am. St. Rep. 711, 41 Atl. 367.

No liability for merchandise transported as baggage will attach to a common carrier in the absence of a clear agreement to that effect. "Such an agreement cannot be proved," said the court in *Blumantle v. Fitchburg R. Co.* 127 Mass. 322, 34 Am. Rep. 376, "or such a responsibility created, by mere evidence of a custom of passengers to take with them, and of railroad corporations to carry, similar packages as personal baggage; or by evidence that the package, delivered by the passenger as baggage, is of such form or appearance as to raise a doubt or suspicion or inference that it contains baggage: *Stimson v. Connecticut River R. R.*, 98 Mass. 83, 93 Am. Dec. 140; *Alling v. Boston etc. R. R.*, 126 Mass. 121, 30 Am. Rep. 667; *Michigan Cent. R. R. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Cahill v. London etc. Ry.*, 10 Com. B., N. S., 154, 13 Com. B., N. S., 818; *Belfast etc. Ry. v. Keys*, 9 H. L. Cas. 556."

B. Knowledge by Agent.—Knowledge by the agent is generally imputed to the principal, but knowledge by an agent of a railroad company that a valise contains only merchandise is not held knowledge of such company, where the former did not learn of such fact in the transaction of the carrier's business: *Central of Georgia Ry. Co. v. Joseph*, 125 Ala. 313, 28 South. 35.

Want of authority in the agent to act has also been held to defeat an action for merchandise carried as baggage. So where a baggage agent of a railroad company was given authority to check baggage to all stations on a connecting line, no presumption was held to have arisen that he had authority to check merchandise over the latter line under the guise of baggage, and knowledge by him that a trunk contained merchandise instead of baggage did not charge the connecting carrier with such knowledge: *Toledo etc. R. Co. v. Bowler etc. Co.*, 63 Ohio St. 274, 58 N. E. 813.

C. Need not Inquire as to Contents—Fraud.—A carrier is entitled rely upon the implied representation of a passenger that a trunk or valise contains baggage only, and is not bound to inquire as to its contents: *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Haines v. Chicago etc. R. Co.*, 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; *Toledo etc. Ry. Co. v. Dages*, 57 Ohio St. 38, 63 Am. St. Rep. 702, 47 N. E. 1039. He may, however, adopt a rule requiring a passenger in the habit of carrying goods as baggage to make a certificate that it contains only wearing apparel, and the passenger must abide thereby: *Norfolk etc. R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532; 85 Va. 217, 7 S. E. 233.

Misrepresenting or concealing the facts that the packages offered as baggage are in reality merchandise is fraud, and relieves the car-

rier from responsibility therefor, except for gross negligence: *Cincinnati etc. R. Co. v. Marcus*, 38 Ill. 219; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455; and in *Dunlap v. International Steamboat Co.*, 98 Mass. 371, he is, in such a case, held not liable even for gross negligence.

Although a passenger may have intended to defraud a carrier by having a quantity of gold carried as baggage, if the carrier knew of the fact, and charged only baggage rates, he was not deceived, and is answerable for its loss: *Hellman v. Holladay*, 1 Woolw. 365, Fed. Cas. No. 6340.

That a subsequent detention of merchandise falsely delivered as baggage may not amount to a conversion by the carrier, see *Wunsell v. Northern Pac. R. Co.*, 62 Fed. 878. Where a person procures free passage for himself and trunk by falsely representing himself as an employé of the railroad, the company is not liable for the thefts of the contents of the trunk, left on the station platform: *Burkett v. New York etc. R. Co.*, 24 Misc. Rep. 76, 53 N. Y. Supp. 394.

A steamship company cannot confiscate property consisting of merchandise taken by a passenger in his trunk as baggage, on an outgoing steamer, there being no attempt at fraud, although carried on board in violation of the company's rule, and claimed to be an attempt to violate the United States laws respecting the manifest of cargo: *Tanco v. Booth*, 15 N. Y. Supp. 110.

E. Disclosing Value of Baggage by Passenger.—In the case of ordinary baggage, in the absence of an inquiry as to its value, the passenger need not disclose it to the carrier: *Jones v. Voorhees*, 10 Ohio, 145; *Brown v. Camden etc. R. Co.*, 83 Pa. St. 316. This is clearly brought out by Justice Harlan, in his opinion in the case of *New York etc. R. Co. v. Fraloff*, 100 U. S. 24, where he said: "It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value

of the passenger's baggage, if the latter, by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person. But in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the articles carried under the name of baggage, for his personal use and convenience when traveling; and in the absence of conduct on the part of the passenger misleading the carrier as to the value of his baggage—the court cannot, as matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage is a fraud upon the carrier, which defeats all right of recovery." To the same effect, see *Bonner v. Blum* (Tex. Civ. App.), 25 S. W. 60.

F. Liability for Extra Baggage.—If paid additional compensation for conveying extra baggage, common carriers are liable for, as such: *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460. The fact that extra charges are paid for overweight on a trunk is not notice that it contains anything besides ordinary baggage: *Illinois Cent. R. Co. v. Matthews*, 72 S. W. 302, 24 Ky. Law Rep. 1766; and the mere payment of extra compensation does not convert such baggage into freight: *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. 662, 27 Ill. App. 182; but the court there said: "But in the case of an emigrant who carries with her trunks and other ordinary baggage, and also turns over to the common carrier a number of boxes of goods for transportation, and pays freight for the weight in excess of her baggage allowance, and the general character of the shipment is known to such carrier, it would be unjust to conclusively presume the entire shipment was as baggage, and that there could, in case of loss, be no recovery except for such articles contained in the boxes as would properly be designated as necessary baggage."

The obligation to take whatever is delivered and received as baggage on the train in which the passenger travels, is the same whether the baggage is within the quantity allowed a passenger, to be carried gratis, or whether it is an extra quantity, for which an additional charge is made: *Glaseo v. New York Cent. R.*, 36 Barb. 557.

III. Connecting Carriers.

a. May Contract Beyond Own Line.—Many interesting questions as to the liability for the safekeeping and delivery of baggage have arisen where two or more connecting lines of carriers have had such baggage in their possession for the purpose of transportation. The authorities are by no means unanimous in fixing responsibility therefor.

A carrier may assume responsibility for the safe transportation of baggage beyond the limits of its own road, if it chooses so to contract: *Najac v. Boston etc. R. Co.*, 89 Mass. (7 Allen) 329, 83 Am. Dec. 686; *Talcott v. Wabash R. Co.*, 159 N. Y. 461, 54 N. E. 1; *Wilson v. Chesapeake etc. R. Co.*, 21 Gratt. 654; *Mauritz v. New York etc. R. Co.*, 23 Fed. 765. See, also, *Maskos v. American S. S. Co.*, 11 Fed. 698. In *Baltimore etc. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617, it is said: "Where it is necessary for a traveler, in going from one place to another, to pass over the connecting lines of several railroad companies, it is competent for either company to contract with him for the transportation of himself and his baggage the whole distance, whether such lines are confined to one state or extend through several states. Connecting carriers, in such case, recognizing such contract, become the agents of the contracting carrier, and their negligence is its negligence. And the collection, by such contracting carrier, of fare in advance for the entire journey, without an agreement as to risks, renders it liable, on receipt of the travelers' baggage, to transport it safely to the end of the route, and there deliver it, on demand, to such owner." See, also, *Weed v. Saratoga etc. R. Co.*, 19 Wend. 534; *Louisville etc. R. Co. v. Weaver*, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654.

In *Candee v. Pennsylvania R. Co.*, 21 Wis. 582, 94 Am. Dec. 566, a railroad company sold a through ticket over its own and connecting lines by a specified route, with permission to the passenger to stop at a certain point and go by other named lines to the point of destination, and gave a through baggage check over one of the specified routes. When the party reached the point designated, he elected to go by the other route, and the connecting company changed the baggage check and gave one of its own through checks to the point of destination. The court held that this act did not constitute a new contract so as to change the liabilities of the parties, but that the first carrier was liable, and not the connecting carrier without proof that the loss occurred through his negligence. The burden is on the plaintiff to show that the initial carrier made a contract of carriage beyond its own line, in order to hold it liable for a loss on a connecting road: *Lessard v. Boston etc. R. R.*, 69 N. H. 648, 45 Atl. 712; *Marmorstein v. Pennsylvania R. Co.*, 13 Misc. Rep. 32, 34 N. Y. Supp. 97.

An initial carrier is not liable for losses sustained beyond the terminus of its own line, unless by agreement or some arrangement in the nature of a partnership exists between it and the connecting carriers: *Furstenheim v. Memphis etc. R. Co.*, 56 Tenn. (9 Heisk.) 238; *Central Trust Co. v. Wabash etc. Ry. Co.*, 31 Fed. 247; and see *Green v. New York etc. R. Co.*, 12 Abb. Pr., N. S., 473. So if the first company is acting only as agent for the second, it is not liable

for property destroyed while in possession of the latter: *Milnor v. New York etc. R. Co.*, 53 N. Y. 863.

The sale of a through ticket over two or more connecting lines of railroad is not evidence of a joint contract between such roads, making one responsible for the default of another: *Felder v. Columbia etc. R. Co.*, 21 S. C. 35, 53 Am. Rep. 656.

As to what shows such a joint contract or copartnership, the court in *Peterson v. Chicago etc. Ry. Co.*, 80 Iowa, 92, 45 N. W. 573, quotes with approval from *Hutchinson on Carriers*, page 131, where that author says: "From these cases it may be deduced: First, that where carriers over different routes have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it, after deducting any of the expenses of the business, they become jointly liable as partners to third persons; but that, where the agreement is that each shall bear the expenses of his own route, and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither inter se nor as to third persons, and incur no joint liability." Of which the court remarked: "We think this is a fair statement of the rule of joint liability which is supported by the great weight of authority."

The initial carrier incurs no liability where the baggage was never delivered into its possession, there being no joint liability as partners. So, where a passenger, having purchased a ticket over several connecting lines, kept his valise in his own charge until he reached the terminus of the first company's road, and then delivered it to an agent of a connecting road, who checked it through to another point on the route, he could not recover for its loss of the first carrier: *Straiton v. New York etc. R. Co.*, 2 E. D. Smith (N. Y.), 184.

The burden of proof is on the carrier having possession of a passenger's trunk to show that it was carried safely to its terminus, and there delivered to the connecting carrier: *Philadelphia etc. R. Co. v. Harper*, 29 Md. 330. Where a passenger traveled part of the way by steamboat and the remainder by railroad, and delivered his trunks to the steamboat company, receiving a check, which he presented at the end of the railroad, where the trunks could not be found, in an action against the former company, it was held that evidence of a clerk of the steamboat company that if the trunks were not delivered to the railroad, they would be brought back to the steamboat company's office, and that he knew of no such return during the month when the trunks were lost, was not sufficient to show a delivery to the railroad company so as to exempt the defendant from liability: *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402, 37 Am. Dec. 575.

In *Rome R. R. v. Wimberly*, 75 Ga. 316, 58 Am. Rep. 468, a passenger traveled part of the way to her destination by the defendant's

railroad, resuming her journey the next morning by a connecting road, which used the same baggage-room and platform as the first, her trunk remaining in the baggage-room all night and she retaining the check. Before the train on the second road left, an employé of the first took the check, agreeing to place the trunk in proper position for transportation. When she reached her destination, it was discovered that the trunk had not been put on board the train, and was never found. On this state of facts the defendant was held liable, at least as a bailee for hire, for want of ordinary care.

b. Limiting Liability to Own Line.—An initial carrier may limit its liability to such loss or damage only as occurs upon its own line, thereby absolving itself from responsibility for injury occurring on any other part of the route: *Peterson v. Chicago etc. Ry. Co.*, 80 Iowa, 92, 45 N. W. 573; *Baltimore etc. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Pennsylvania etc. R. Co. v. Schwarzenberger*, 45 Pa. St. 208, 84 Am. Dec. 490; *Gulf etc. Ry. Co. v. Ions*, 3 Tex. Civ. App. 619, 22 S. W. 1011; *Zunz v. South Eastern R. Co.*, L. R. 4 Q. B. 539. Although a carrier limit its liability to loss or injury occurring on its own road, still if the article shipped was never delivered, the burden is on the carrier who received it to show a safe delivery to the connecting carrier: *International etc. R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541.

A ticket given by an initial carrier, exempting it from liability on a connecting line, prima facie charges a passenger to whom it was given, with knowledge of its contents: *Marmorstein v. Pennsylvania R. Co.*, 13 Misc. Rep. 32, 34 N. Y. Supp. 97, reversing 11 Misc. Rep. 725, 32 N. Y. Supp. 1146. Where a through ticket over several connecting lines contained a clause to the effect that the initial carrier was merely acting as agent in selling the ticket, and was not responsible beyond its own line, and further provided that none of the companies would assume any liability for baggage except for wearing apparel, and then only to the extent of one hundred dollars, it was held that the first clause referred only to personal injuries: *Coward v. East Tennessee etc. R. Co.*, 84 Tenn. (16 Lea) 225, 57 Am. Rep. 226.

c. English Rule—American Rules.—The English rule in regard to connecting carriers holds the company receiving the property and booking it for a certain destination, as the carrier throughout the entire route, and liable therefor: *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Louisville etc. R. Co. v. Weaver*, 77 Tenn. (9 Lea) 38, 42 Am. Rep. 654; and although the loss may have occurred upon a connecting line, such line incurs no liability, and an action can be maintained only against the initial carrier: *Mytton v. Midland R. Co.*, 4 Hurl. & N. 615.

In this country, however, it is generally held that the company in whose possession the baggage was when the loss or damage occurred is the one liable therefor: *Montgomery etc. Ry. Co. v. Culver*,

75 Ala. 587, 51 Am. Rep. 483; *Chicago etc. R. Co. v. Fahey*, 52 Ill. 81, 4 Am. Rep. 587; and this rule certainly commends itself to reason.

The English rule has been followed to a limited extent in Georgia, where the first connecting carrier has been held liable, although it delivered the baggage to the next connecting company: *Hawley v. Screven*, 62 Ga. 347, 35 Am. Rep. 126. But the passenger may in that state sue the second connecting carrier, and his right of action is not limited to the initial carrier, as it is in England: *Wolff v. Central R. Co.*, 68 Ga. 653, 45 Am. Rep. 501; *Savannah etc. Ry. Co. v. McIntosh*, 73 Ga. 532.

In Texas where connecting lines receive each other's tickets and checks, they are held jointly liable for the proper transportation and delivery of baggage: *St. Louis etc. Ry. Co. v. Hindsman*, 1 White & W. Civ. Cas. Ct. App., sec. 205; and the passenger may bring his suit against any one of them: *Texas etc. R. Co. v. Fort*, 1 White & W. Civ. Cas. Ct. App., sec. 1252; *Texas etc. R. Co. v. Ferguson*, 1 White & W. Civ. Cas. Ct. App., sec. 1253; *Missouri Pac. Ry. Co. v. Slater*, 3 Wills. Civ. Cas. Ct. App., sec. 7.

d. Presumption Where not Known Where Loss or Injury Occurred. In *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 583, the rules of law applicable where it is not known on which line the loss or damage occurred are discussed, the court saying: "From the necessities of trade and commerce, or of successful competition, or from other causes, it has become common to establish long routes of transportation by successive and connecting roads. Under such circumstances, it would generally be difficult and oftentimes impossible, for the owner to show on which road they were injured. One of the roads is certainly responsible; and the last carrier has the means of showing the condition of the goods when received by him. The safety and protection of the commercial and traveling public require the recognition of the presumption, in the absence of evidence, that the goods continued in the same condition as when received by the first carrier, unless it may be exceptional goods of a perishable nature, and casts on the discharging carrier, who delivers them in a damaged condition, the burden of showing their condition when received by him." See to the same effect, *Moore v. New York etc. R. Co.*, 173 Mass. 335, 73 Am. St. Rep. 298, 53 N. E. 816; *Lin v. Terre Haute etc. R. Co.*, 10 Mo. App. 125; *Myerson v. Woolverton*, 9 Misc. Rep. 186, 29 N. Y. Supp. 737; *Springer v. Westcott*, 2 App. Div. 295, 37 N. Y. Supp. 909. This presumption, however, is not conclusive, but may be rebutted by proof on the part of the company delivering the baggage in a damaged condition that it was in such condition when received by it, in which case it is exonerated: *Fox v. Wabash R. Co.*, 16 Misc. Rep. 370, 38 N. Y. Supp. 88.

In the absence of a joint contract or partnership between the carriers, a different rule applies in the case of a total loss, and there the discharging carrier is not held liable unless it is shown that the

baggage came into its possession: *Kessler v. New York etc. R. Co.*, 61 N. Y. 538, affirming 7 Lans. 62; *Texas etc. R. Co. v. Berry* (Tex. Civ. App.), 71 S. W. 326.

In *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.), 181, a passenger in Chicago, purchased for New York a through ticket, consisting of four coupons, to be detached and delivered up on demand. Three of them were delivered between Chicago and Albany, and the fourth was received by the defendant after leaving Albany. At Buffalo he delivered up his baggage, and received therefor one of the defendant's checks. Part only of the baggage was delivered in New York, but the rest could not be found. The court held on these facts that the defendant took charge of the baggage in Buffalo, and was liable therefor.

IV. Limitation of Liability.

a. **How Far Carrier may Restrict His Liability.**—At common law, common carriers of passengers were liable to the full extent of a passenger's baggage carried by them: *Ranchau v. Rutledge R. Co.*, 71 Vt. 142, 76 Am. St. Rep. 761, 43 Atl. 11. Their attempts to restrict or limit this liability have given rise to much litigation, and it becomes of importance to determine how far they may go in this direction.

There is no doubt that a carrier may legally contract for exemption from the extraordinary liability of insurer: *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607. But in the United States he cannot, according to the weight of authority, free himself of liability for negligence or willful default of himself or his servants, such being against public policy: *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Indianapolis R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640; *Thomas v. Southern Ry. Co.*, 131 N. C. 590, 42 S. E. 964; *Camden etc. R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481; *Coward v. East Tennessee etc. R. Co.*, 84 Tenn. (16 Lea) 225, 57 Am. Rep. 226; *International etc. R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541; *The New England*, 110 Fed. 415. In England, a carrier may, by express contract, be relieved from his own negligence and that of his servants: *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665; *The New England*, 110 Fed. 415; and the same is true in New York: *Weinborg v. National S. S. Co.*, 57 N. Y. Super. Ct. (25 Jones & S.) 586, 8 N. Y. Supp. 195; *Prentice v. Decker*, 49 Barb. 21.

b. **Effect of General Notice of Nonliability.**—A general notice to the effect that the baggage of passengers is at their own risk, will not relieve the carrier of liability, even though it be brought to the knowledge of the passenger: *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470; *Camden etc. Co. v. Belknap*, 21 Wend. 354; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Jones v. Voorhees*, 10 Ohio, 145; *Baltimore etc.*

R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617. Other cases, notably those of the Pennsylvania courts, hold that a general notice, if clear and explicit in its terms, and of which the passenger has knowledge, will be effectual to limit his liability: Logan v. Pontchartrain R. Co., 11 Rob. (La.) 24, 43 Am. Dec. 199; Bean v. Green, 12 Mo. 422; Whitsell v. Crane, 8 Watts & S. 369; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Camden etc. R. Co. v. Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; and it has been held that such limitation is sufficiently made known to passengers by a line of public coaches, by being posted up at the place where they book their names: Whitsell v. Crane, 8 Watts & S. 369.

In Smith v. North Carolina R. Co., 64 N. C. 235, the court held that although a carrier could not free himself from liability by a general notice, as that all baggage was at owner's risk, still he might, by notice brought to the knowledge of the owner, reasonably qualify his liability, as by notice that he would not be liable for glass in a box or valuable articles, unless informed of the facts. A notice that a carrier will not be liable for baggage unless checked, which is posted in a steamboat, even if it be of any effect, will not protect the carrier, where the passenger delivered his baggage and demanded a check, but did not obtain one because the person whose duty it was to give them was not present: Freeman v. Newton, 3 E. D. Smith (N. Y.), 246.

c. May Limit Liability by Contract.

1. Generally.—There is no doubt that a common carrier may limit his liability by contract, assented to by the passenger: Indianapolis etc. R. Co. v. Cox, 29 Ind. 360, 95 Am. Dec. 640; Rawson v. Pennsylvania R. Co., 2 Abb. Pr., N. S., 220; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Nevins v. Bay State Steamboat Co., 17 N. Y. Super. Ct. (4 Bosw.) 225; Bingham v. Rogers, 6 Watts & S. 495, 40 Am. Dec. 581; Verner v. Sweitzer, 32 Pa. St. 208; The Priscilla, 106 Fed. 739; and the burden is on the carrier, in order to relieve himself from liability, to establish such a contract: Grossman v. Dodd, 63 Hun, 324, 17 N. Y. Supp. 855; Baltimore etc. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Verner v. Sweitzer, 32 Pa. St. 208.

Difficulty, however, arises in determining what is a sufficient contract, whether the passenger had knowledge of the limitation, and whether he consented thereto; and these questions have most often been presented by conditions printed on tickets, checks or vouchers, received by passengers from transportation companies.

A limitation on a ticket or check is not binding on a passenger, unless he agrees to it: Kansas City etc. R. Co. v. Rodebaugh, 38 Kan. 45, 5 Am. St. Rep. 715, 15 Pac. 899; Baltimore etc. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617. See, also, Weigand v. Central R. Co., 75 Fed. 370, affirmed, 79 Fed. 991, 25 C. C. A. 681. There is no presumption that he had knowledge thereof, and it is a question for the jury whether he knew of the condition: Merrill v. Pacific Trans-

fer Co., 181 Cal. 582, 63 Pac. 915; and especially is this so where it was printed on the back of the ticket: *Brown v. Eastern R. Co.*, 65 Mass. (11 Cush.) 97; *Malone v. Boston etc. R. Corp.*, 78 Mass. (12 Gray) 388, 74 Am. Dec. 598; *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 40.

Where a passenger purchased a steamer ticket, containing a condition limiting the company's liability for loss of baggage to one hundred dollars, and when she received the ticket it was so folded up that no writing was visible unless she opened it, it was held that there was sufficient evidence on which a jury could find for the plaintiff in a sum exceeding one hundred dollars, where they found that she knew there was printing on the ticket, but did not know that it contained conditions relating to the terms of the contract of carriage, and that the company did not do what was reasonably sufficient to give her notice thereof: *Richardson v. Rountree*, [1894] App. Cas. 217.

2. Ticket as a Contract.

A. Opposing Views.—As to whether a condition contained in a ticket is of any effect regardless of knowledge thereof by the passenger, depends to a great extent upon what may be considered to be the nature of the ticket. If it be deemed a contract, the well-known rule of law, that a person voluntarily entering into a contract is bound by all its terms, applies; if it be considered not a contract, a special agreement, and of course, knowledge, must be shown. This is well brought out in *Aiken v. Wabash R. Co.*, 89 Mo. App. 8, where it is said: "The cases all agree that an ordinary railroad ticket, which contains merely the names of the stations, is a receipt or voucher and cannot be said to be a contract nor to contain a contract. It is merely evidence that the holder has paid the amount of the fare between the two stations: *Logan v. Hannibal etc. R. R. Co.*, 77 Mo. 658; *Thompson on Carriers*, p. 65; *Elliott on Railroads*, p. 2482. The authorities are also numerous in holding that a railroad company may, by a special contract with the passenger, limit its liability as to amount in the carriage of baggage, or the parties may agree on an amount certain as liquidated damages in case of loss, etc. The cases, however, differ as to the quantum of evidence necessary to establish such a contract. With but few exceptions the decisions are to the effect that in the purchase of a railroad ticket under ordinary circumstances, the passenger is not bound by conditions printed on the back of his ticket, unless the railroad company shows that he read them, or that his attention was called directly to them. It will not be presumed that he read them: *Perkins v. Railroad*, 24 N. Y. 196, 82 Am. Dec. 281; *Malone v. Railroad*, 12 Gray, 388, 74 Am. Dec. 598; *Brown v. Railroad*, 11 Cush. 97; 2 *Fetter on Carriers of Passengers*, bot. p. 980; *Fonseca v. Ounard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665; *Indianapolis etc. R. R. Co. v. Cox*, 29 Ind. 366, 95 Am. Dec. 640. But in some states the rule is otherwise where

the ticket on its face directs attention to the printed matter on its back: *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365, 23 N. E. 205; or where the purchase of such a ticket is made under circumstances leading to the conclusion that the purchaser did read the conditions and assented to them: *Potter v. Majestic*, 60 Fed. 624; *Rawson v. Railroad*, 48 N. Y. 212, 8 Am. Rep. 543. A contrary rule, however, has been asserted in other states, where it is held that the railroad company must affirmatively show that the holder of such a ticket either read the conditions before commencing the journey, or that he had his attention called directly to them: *Malone v. Boston etc. R. Corp.*, 12 Gray, 388; *Brown v. Eastern R. Co.*, 11 Cush. 97; *Railroad v. Cox*, 29 Ind. 360, 95 Am. Dec. 640.

"In all of the foregoing cases the ticket is regarded only as evidence that the passenger has paid his fare. The actual terms of the contract are outside of the ticket and are implied by law. It is for this reason that the courts require affirmative evidence of the assent of the passengers to conditions printed on the back of the ticket. The modern decisions, however, hold to the doctrine that a railroad ticket may be both a receipt and a contract. In other words, it may be so framed and worded as to justify the conclusion that it was intended to represent the entire contract of transportation. Thus, if certain limitations or conditions are plainly printed on the face of the ticket and as a part thereof, the law will draw the inference that the passenger read the conditions and assented to them as part of his contract: 4 Elliott on Railroads, p. 2482, note 1, and authorities cited: *Brown v. Eastern R. Co.*, 11 Cush. 97; *Fonseca v. Steamship Co.*, 153 Mass. 558, 25 Am. St. Rep. 660, 27 N. E. 666; *Zuns v. South Eastern R. Co.*, L. R. 4 Q. B. 539; *Fetter on Carriers*, bot. pp. 980, 981. We can see no valid objection to this view. It is reasonable and just and we are inclined to adopt it."

Actual notice is not necessary, but it is sufficient if constructive notice be had, such as would put a prudent man on inquiry: *Merrill v. Pacific Transfer Co.*, 131 Cal. 562, 63 Pac. 915; and it is for the jury to determine whether a person receiving a receipt or ticket, accepted it with notice of its contents. "The fact that the receipt was printed in large type, and could be easily read; that it was received in the daytime, or when there was sufficient light to enable the traveler to read it; that he was acquainted with the methods of the business—these and other facts may be shown, not as conclusive against the recovery, but as bearing upon the ultimate fact to be proven, that the party, when he accepted the receipt, knew of its limitations, or that it contained special terms for the carriage of the property": *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153. The mere receipt of a ticket or check containing a condition does not give rise to a contract: *Prentice v. Decker*, 49 Barb. 21; *Lechowitzer v. Hamburg-American Packet Co.*, 6 Misc. Rep. 536, 27 N. Y. Supp. 140; *Woodruff v. Sherrard*, 9 Hun, 322; and the following cases hold

that conditions on a ticket or check do not bind the passenger, if no knowledge thereof by him be shown: *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 3 Am. Rep. 543, affirming 2 Abb. Pr., N. S., 220; *Gross v. Dodd*, 63 Hun, 324, 17 N. Y. Supp. 855; *Mauritz v. New York etc. R. Co.*, 23 Fed. 765; so it has been held that emblazoning the general object on a check, ticket or notice, in large letters, but stating the restriction in small ones, is insufficient: *Verner v. Sweitzer*, 32 Pa. St. 208.

A condition printed upon the contract of the carrier, but not made a part of the body of the contract by being referred to in it, is only a notice, and is no part of the contract between the carrier and passenger: *The Majestic*, 166 U. S. 375, 17 Sup. Ct. Rep. 597, reversing 60 Fed. 624, 9 C. C. A. 161.

Other cases have held the passenger bound by receiving a ticket containing stipulations limiting the carrier's liability, where the ticket was to be regarded as a contract: *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665; *Wheeler v. Steam Nav. Co.*, 72 Hun, 5, 25 N. Y. Supp. 578. Both of these cases involved tickets for transportation by steamship, and in the former of them it is said: "The precise question in the present case is whether the 'contract ticket' was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to read it, and if he failed to do so, he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the defendant company affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff is immaterial: *Quimby v. Boston etc. R. R.*, 150 Mass. 365, 23 N. E. 205, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. In that particular, it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question, the same rules of law apply to a contract to carry a passenger as to a contract for the transportation of goods. There is no reason why a consignor who is bound by the provision of a bill of lading, which he accepts without reading, should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger": See, also, *Louisville etc. Ry. Co. v. Nicholai*, 4 Ind. App. 119, 51 Am. St. Rep. 206, 30 N. E. 424. And see *Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6692; *Stewart v. London etc. R. Co.*, 3 Hurl. & C. 135; *Zunz v. South Eastern R. Co.*, L. R. 4 Q. B. 539, where

the passenger was held bound by the receipt of a ticket or voucher, containing a limitation of liability, although he did not actually read it.

B. Must have Opportunity and Ability to Read It.—If a passenger did not see the ticket or have an opportunity to read it, he is not bound by a limitation of the carrier's liability contained in it: *Wamaley v. Atlas S. S. Co.*, 50 App. Div. 199, 63 N. Y. Supp. 761; nor is he so bound if he was unable to read and it was not read to him: *Ranchau v. Rutland R. Co.*, 71 Vt. 142, 76 Am. St. Rep. 761, 43 Atl. 11; *Mauritz v. New York etc. R. Co.*, 23 Fed. 765; and the same applies where the condition is printed in a language which the passenger does not understand: *Engberman v. North German Lloyd S. S. Co.*, 84 N. Y. Supp. 201; *Camden etc. R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481, as in none of those cases can he be considered as having agreed thereto, he not having notice thereof.

3. Limitations must be Communicated Before Journey Starts.—Discovery of notice of conditions restricting liability made after entering upon the journey does not affect the traveler's rights, and his rights and duties are determined when the ticket is purchased: *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543, affirming 2 Abb. Pr., N. S., 220; *Lechowitzer v. Hamburg-American Packet Co.*, 8 Misc. Rep. 213, 28 N. Y. Supp. 577; *Wilson v. Chesapeake etc. R. Co.*, 21 Gratt. 654.

4. Unreasonable Limitations.—If a ticket provides that a bill of lading or receipt must be signed by the passenger, specifying the articles, and their respective values, or the carrier would be liable only for the sum of fifty dollars, recovery is limited to that amount if no bill of lading or receipt be given as specified: *Steers v. Liverpool etc. S. S. Co.*, 5 N. Y. 1, 15 Am. Rep. 453. But a stipulation limiting liability for the loss of baggage carried by a traveler across the ocean to fifty dollars, is unreasonable and will not be enforced: *Glovinsky v. Cunard S. S. Co.*, 4 Misc. Rep. 266, 24 N. Y. Supp. 136; *The New England*, 110 Fed. 415.

5. Restriction by One Carrier Available to Connecting Carrier.—It is held in *Aikin v. Wabash R. Co.*, 80 Mo. App. 8, that a limitation of liability in the contract between the passenger and the initial carrier may be available to a connecting carrier, where such connecting carrier is to be regarded as the agent of the former in completing the shipment.

6. Construction of Conditions.—In construing conditions limiting liability on the part of a common carrier, the courts are inclined to be strict, and refuse to extend such conditions by implication. Accordingly, where a condition provided that the carrier would not be liable for an amount exceeding fifty dollars on any article, this was held to refer to the separate articles contained in a trunk, and a recovery might be had for the aggregate value of the articles therein com-

tained, although in excess of fifty dollars: *Earle v. Cadmus*, 2 Daly, 237. That such a condition refers to the articles contained in a trunk, and not to the trunk and its entire contents in gross, see *Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6692.

In *Louisville etc. Ry. Co. v. Nicolai*, 4 Ind. App. 119, 51 Am. St. Rep. 206, 30 N. E. 424, a ticket sold the plaintiff contained a clause to the effect that liability for wearing apparel would be assumed only up to one hundred dollars, to which the plaintiff agreed. When the trunk reached its destination, it was discovered that property of the value of three hundred dollars had been abstracted. The court held that where the exemption provided for by contract was not for loss or damage from a particular cause, but only as to amount, as in that case, and the carrier would not account, nor attempt to account for a refusal to deliver the property which it undertook to carry safely, the presumption was that there had been negligence on the part of the carrier, and the plaintiff might recover the full amount of the loss sustained.

Where a steamship company is by its contract exempted from liability for loss occasioned by the negligence of the company's servants, this does not by implication exempt the company from liability for loss occurring through its own negligence, and to effect that object, it must be included in clear and explicit form: *Weinberg v. National S. S. Co.*, 57 N. Y. Super. Ct. (25 Jones & S.) 586, 8 N. Y. Supp. 195.

A condition upon a cloak-room ticket issued by a railway company that it would not be responsible for any package, exceeding the value of ten pounds, relieves the company from liability not only for loss, but also for damage or injury to any article deposited with it: *Pratt v. South Eastern Ry. Co.* (1897), 1 Q. B. 18.

In *Glovinsky v. Cunard S. S. Co.*, 5 Misc. Rep. 388, 26 N. Y. Supp. 751, a steamship ticket provided that baggage a greater value than a certain sum must be specially mentioned and shipped under bill of lading as cargo. There was no provision for payment of overweight, but it was stated that a certain charge per cubic meter would be made for extra freight on shipboard. When the plaintiff purchased her ticket, she was charged for extra weight, which she paid. On these facts the court held that the arrangement between the plaintiff and the defendant's agent was wholly outside of the provisions of the contract, and constituted a separate agreement for the transportation of the baggage, and could not be avoided by the limitations in the ticket contract: See, also, *Wasserberg v. Cunard S. S. Co.*, 8 Misc. Rep. 78, 28 N. Y. Supp. 520.

e. Statutory Enactments.

1. **Prohibiting Limitation of Liability.**—In some jurisdictions the right of a carrier to limit his liability has been prohibited by statute: *Davis v. Chicago etc. Ry. Co.*, 83 Iowa, 744, 49 N. W. 77. In that

case a railway company attempted to restrict its responsibility for wearing apparel to one hundred dollars and no more. The contract for transportation was made in Ohio, to be performed in Iowa. It was not shown that the statutes of the former state differed from those of the latter which declared such limitation invalid; and in the absence of such showing the court presumed them to be to the same effect.

Texas has a similar law, and this is held to apply to an interstate shipment beginning in that state, as well as to domestic ones: *Mexican Nat. R. Co. v. Ware* (Tex. Civ. App.), 60 S. W. 343.

2. Construction of Statute Limiting Liability.—A United States statute, relieving owners of vessels from liability as carriers in any form or manner if certain articles be shipped, without giving notice of their true character and value, and having the same entered on a bill of lading, refers only to liability as carriers, and does not abridge their responsibility as bailees: *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155, 21 Am. St. Rep. 729, 26 N. E. 248, reversing, 52 Hun, 75, 5 N. Y. Supp. 101.

V. When Liability Attaches.

The liability of a carrier for baggage attaches when it is received to be transported on any part of the road: *Logan v. Pontchartrain R. Co.*, 11 Rob. (La.) 24, 43 Am. Dec. 199; but it is not always easy to determine when it is so received for transportation. Common carriers are responsible under their common-law liability for baggage left by passengers at their offices and knowingly received by their agents, with the intention of proceeding with the same in the next conveyance of the carrier departing from the place where the baggage is deposited: *Camden etc. Transp. Co. v. Belknap*, 21 Wend. 354.

In *Hicks v. Naugatuck R. Co.*, 31 Conn. 281, 83 Am. Dec. 143, a passenger took his trunk to a railroad station at 11 o'clock in the morning, and requested that it be checked for the next train to a certain station, which was to leave four hours later. Being informed by the agent that they did not check trunks until fifteen minutes before the train left, he left the trunk with the agent, returning later and obtaining a check, and then went by the same train. Upon receiving the trunk, some property was found to have been taken therefrom. The court held that the company was liable, regardless of whether the articles were abstracted while the trunk was lying at the station or after it left, as the company was to be regarded as having received it when first delivered for transportation, and not for storage; that the delivery of the check was of no importance as constituting a contract, it being merely a receipt and intended as a means of identification. And the company will be liable for a trunk received as baggage, from a prospective passenger, even though no ticket has been bought or fare paid, whether the loss occur before or after the arrival and departure of the train or before or after

the purchase of the ticket: *Lake Shore etc. Ry. Co. v. Foster*, 101 Ind. 293, 54 Am. Rep. 319, 4 N. E. 20.

Where goods were delivered by a passenger to a baggage agent of a railroad, to be shipped on the evening of the next day, unless the passenger should direct to the contrary, and no such direction was given, the company thereafter held the baggage for immediate shipment, and if it was burned while so held, it became liable as a common carrier. If, however, there was a regulation of the company known to the plaintiff, that the baggage should be received only for immediate carriage, and their agent took charge of the baggage as a matter of accommodation and without any direction as to its shipment, the company was not liable at all for the loss: *Illinois Cent. R. Co. v. Tronstine*, 64 Miss. 834, 2 South. 255.

A rule of a carrier allowing baggage to be checked only half an hour before train time, is not, as a matter of law, unreasonable, and a passenger cannot make it answerable as an insurer, by an earlier delivery, without its consent: *Goldberg v. Ahnapee etc. Ry. Co.*, 105 Wis. 1, 76 Am. St. Rep. 899, 80 N. W. 920.

In *The Priscilla*, 106 Fed. 739, the question presented was whether an admiralty court had jurisdiction of an action to recover for baggage sent by a person to the pier of a steamship company, a receipt being given therefor, as was customary, and the owner soon afterward purchasing a ticket. The court said: "Upon the long-established usage in evidence, it seems to me clear that the reception of the baggage was an incident of the company's maritime business, and in anticipation of its subsequent maritime contract of transportation, and formed part of the contract from the moment the ticket was purchased. The company's obligation was to carry the passengers and their reasonable baggage already deposited with the company according to its custom of doing business; and that was a part of the libellant's right under the tickets purchased. The court has, therefore, jurisdiction of this action for its loss."

VI. Delivery to Carrier.

a. *Necessity Therefor.*—Before a carrier can be held liable for the loss of a passenger's baggage, it is essential that a delivery to and acceptance by, him be shown, for he cannot be made responsible for property never in his possession or under his control: *Michigan etc. R. Co. v. Meyres*, 21 Ill. 627; *Perkins v. Wright*, 37 Ind. 27; *Rogers v. Long Island R. Co.*, 2 Lans. 269; *Forbes v. Davis*, 18 Tex. 263. To charge a carrier with the loss of property packed in a trunk, it must satisfactorily appear that the trunk was not rifled after it was so packed and before it reached the possession of the carrier: *McQuesten v. Sanford*, 40 Me. 117; *Ringwalt v. Wabash R. Co.*, 45 Neb. 760, 64 N. W. 219. The burden of proving a delivery to the carrier is on the plaintiff: *Lustig v. International Nav. Co.*, 33 Misc. Rep. 802, 78 N. Y. Supp. 885.

Where the property has been placed in the custody of a servant or agent of the carrier, whose duty, or apparent duty, it is to receive and take care thereof, it is a sufficient delivery to charge the carrier: *Block v. The Trent*, 18 La. Ann. 664; *Moore v. The Evening Star*, 20 La. Ann. 402; *Minter v. Pacific Railroad*, 41 Mo. 503, 97 Am. Dec. 288; *Butler v. Hudson River R. Co.*, 3 E. D. Smith (N. Y.), 571; but it must be to an agent intrusted to receive goods, and not one merely engaged in other duties: *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716.

b. *Custom as Showing Delivery.*—It is not, however, absolutely necessary that a personal delivery be made to the carrier or his agent, but baggage may be left at a depot or station by its consent, which may be implied from custom: *Green v. Milwaukee etc. R. R. Co.*, 38 Iowa, 100. In *Wright v. Caldwell*, 3 Mich. 51, it is said: "It is well settled by a series of adjudications, of high authority, that if a uniform custom is established and recognized by the carrier, and is known to the public, that property intended for carriage may be deposited in a particular place, without express notice to him, that a deposit of property for that purpose in accordance with the custom is constructive notice, and would render any other form of delivery unnecessary. The rule is founded in reason, as the usage, if habitual, is a declaration by the carrier to the public, that a delivery of property in accordance with the usage will be deemed an acceptance of it by him for the purpose of transportation. To allow a carrier, when property is thus delivered, to set up by way of defense the general rule, which requires express notice, would operate as a fraud upon the public, and lead to manifest injustice." So where a passenger advised the agent of a railroad company that she intended taking the train the following morning, and sent her baggage the evening before, properly marked, as was customary with passengers taking trains at that point, and the trunk was afterward locked up in the baggage-room, it was held to constitute an acceptance of the baggage by the carrier: *Green v. Milwaukee etc. R. Co.*, 41 Iowa, 410. Where it is customary for passengers on a boat, to deposit their baggage on the deck, there being no means of booking or checking it, this is such a delivery as will render the company liable for its loss: *Doyle v. Kiser*, 6 Ind. 242.

Where a carrier has an agent on his boat to receive and check baggage, it is not a good delivery to leave it on the boat without obtaining a check or calling the agent's attention to it: *Ball v. New Jersey Steamboat Co.*, 1 Daly, 491. In *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716, plaintiff took passage on a steamboat and was assigned a stateroom. He asked for a key to the room, in order to place his baggage therein, but was informed that they gave no keys. He then deposited his valise in the room, calling the attention of a number of cabin boys to the fact and asking whether it would be safe, receiving an affirmative answer. Upon

his return a short time after, the valise was missing. There was a porter on the boat, whose duty it was to receive and check baggage, which the plaintiff knew. There was no evidence of any custom of travelers to deposit their baggage as was done in this case, nor of any usage of carriers by boat, or of the defendant, to accept delivery in that way, nor was there any finding that the carrier was negligent in not providing the stateroom with a lock and key. The court held that no delivery was shown, and refused to allow recovery for the baggage.

Whether or not a custom has been established, that a delivery of baggage at a station without notice to a carrier is regarded by the latter as a good delivery, is a question of fact for the jury: *Green v. Milwaukee etc. R. Co.*, 41 Iowa, 410.

c. Retention of Control of Baggage by Passenger.

1. **Effect Thereof.**—A retention of custody and control by a passenger over his baggage relieves the carrier from his liability, it never having been delivered into the company's keeping. Many interesting questions have arisen in regard to the application of this proposition of law, where passengers have seen fit to keep with them articles of personal baggage, and on a similar state of facts, different courts have decided differently. Mr. Justice Lush, in *Le Conteur v. Landon etc. R. Co.*, L. R. 1 Q. B. 54, remarked: "We know it is the every-day practice for passengers to carry, with the consent of the company, carpet-bags, books and cloaks, and things they want upon the journey, in the carriage with them. It cannot be said that the things are not in the custody of the company as carriers, because they agree, at the passenger's request, to place them in the carriage where he sits."

But in *Nashville etc. R. Co. v. Lillie (Tenn.)*, 78 S. W. 1055, it is said: "We think that in the case of passengers in day coaches who prefer to keep their baggage, and especially their hand luggage in their own possession, and on the seat with them in the day coach, the railroad company should not be held liable as an insurer."

"There are large numbers of day passengers, and they almost invariably carry hand grips and parcels in their hands, retaining control and custody of them during the entire trip. In such a case the carrier should not be held as an insurer of the safety of the baggage": See, also, *Bergheim v. Great Eastern R. Co.*, 3 C. P. Div. 221; *Talley v. Great Western Ry. Co.*, L. R. 6 C. P. 44. That the same rule does not apply where the baggage is deposited by a passenger, under the berth of a sleeping-car, when retiring, see *Nashville etc. R. Co. v. Lillie (Tenn.)*, 78 S. W. 1055.

Common carriers are not responsible for wearing apparel or money carried by a passenger about his person, and which is under his own immediate control: *The Crystal Palace v. Vanderpool*, 55 Ky. (16 B. Mon.) 302; *Abbott v. Bradstreet*, 55 Me. 530; but they are

for their negligence, resulting in its loss: *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010. A railroad company is not liable for the loss of a bag containing money and jewelry, carried by a passenger and by him accidentally dropped through the open window of a car, although, after being informed of the loss, it refuses to stop the train, short of a usual station, so that it might be recovered: 97 Fed. 656. An excellent discussion of this subject will be found *Henderson v. Louisville etc. R. Co.*, 123 U. S. 61, 8 Sup. Ct. Rep. 60, affirming 20 Fed. 430.

2. Steamship Companies as Innkeepers.—The liability of steamship companies, which hire staterooms to passengers for their use during the journey has been held, by some authorities, the same as that of innkeepers: *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 56 Am. St. Rep. 616, 45 N. E. 369, affirming 9 Misc. Rep. 25, 29 N. Y. Supp. 56. So the taking of a valise to a stateroom is not such a taking into the passenger's own exclusive custody and guardianship as to absolve the carrier from any duty or liability respecting it: *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr., N. S., 229; nor will the delivery of a key of a stateroom to a passenger have that effect: *Mudgett v. Bay State Steamboat Co.*, 1 Daly, 151, disapproving *Cohen v. Frost*, 9 N. Y. Super. Ct. (2 Duer) 335. Other cases have denied that a carrier is liable as an innkeeper for baggage kept in a stateroom: *Clark v. Burns*, 118 Mass. 275, 19 Am. Rep. 456; *American S. S. Co. v. Bryan*, 83 Pa. St. 446; *The Humboldt*, 97 Fed. 656. An excellent discussion of this subject will be found in *McKee v. Owen*, 15 Mich. 115, where the court was evenly divided.

A steamship company has been held liable as an insurer for money, a watch, and like articles stolen from the stateroom occupied by a passenger: *Crozier v. Boston etc. Steamboat Co.*, 43 How. Pr. 466; *Lincoln v. New York etc. S. S. Co.*, 30 Misc. Rep. 752, 62 N. Y. Supp. 1085. See, however, *The R. E. Lee*, 2 Abb. N. S., 49, Fed. Cas. No. 11,690, and *Clark v. Burns*, 118 Mass. 275, 19 Am. Rep. 456, the latter case holding that the owner of a steamship is not liable for a watch worn by a passenger on his person by day and kept by him within reach at night, whether retained upon his person, under his pillow, or in his clothing.

An overcoat worn by a passenger when procuring passage on a boat, and obtaining a stateroom, cannot be held to be within the exclusive custody of the passenger, so as to relieve the carrier from liability where it is subsequently removed by the passenger and deposited in the stateroom, from which it was stolen: *Gore v. Norwich etc. Transp. Co.*, 2 Daly, 254, where the court said: "If the traveler, while using any article of dress, such use establishing the animus custodiendi for the time being, loses it, it is right that the carrier should be released from liability. But if, after it shall have

been used temporarily, as in this case, it be restored to the locality provided for such things generally, or specially as in this case, the use ceases—the animus custodiendi in fact and in law ceases, and the custody reverts to the carrier.”

An overcoat, being an article of wearing apparel of present use, however, is under the control of a passenger, although not on his person, where it is deposited in his seat in a railroad car: *Tower v. Utica etc. R. Co.*, 7 Hill, 47, 42 Am. Dec. 36.

VII. When Liability Ends.

a. After Reasonable Time.—The authorities are agreed that the extraordinary liability of carriers for baggage does not terminate immediately upon the arrival of the conveyance at the place of destination, but the passenger must have a reasonable time and opportunity in which to remove his baggage, during which period the carrier is responsible as an insurer for its safety, the reasonableness of the time being usually a mixed question of law and fact: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659; *Chicago etc. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Toledo etc. R. Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 462; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162; *Mote v. Chicago etc. R. Co.*, 27 Iowa, 22, 1 Am. Rep. 212; *Dittman Boot etc. Co. v. Keokuk etc. Ry. Co.*, 91 Iowa, 416, 51 Am. St. Rep. 352, 59 N. W. 257; *Marshall v. Pontiac etc. R. Co.*, 126 Mich. 45, 85 N. W. 242; *Felton v. Chicago etc. Ry. Co.*, 86 Mo. App. 332; *Hedding v. Gallagher*, 69 N. H. 650, 76 Am. St. Rep. 204, 45 Atl. 96; *Roth v. Buffalo etc. R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736; *Dinenny v. New York etc. R. Co.*, 49 N. Y. 546; *Matteson v. New York etc. R. Co.*, 76 N. Y. 381; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.), 453; *National Line S. S. Co. v. Smart*, 107 Pa. St. 492; *Texas etc. Ry. Co. v. Capps*, 2 Wills. Civ. Cas. Ct. App. (Tex.), sec. 84; *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Jacobs v. Tutt*, 38 Fed. 412; *Patscheider v. Great Western Ry. Co.*, 3 Exch. 153.

In determining what is a reasonable time, the customs of the company, the manner of transporting baggage from the station, and all the surrounding circumstances are to be considered: *Mote v. Chicago etc. R. Co.*, 27 Iowa, 22, 1 Am. Rep. 212.

While the matter of reasonable time is usually a mixed question of law and fact, where the facts are undisputed, it becomes one of law alone: *Chicago etc. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Roth v. Buffalo etc. R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736; *Burgevin v. New York etc. R. Co.*, 69 Hun, 479, 23 N. Y. Supp. 415; *Mortland v. Philadelphia R. Co.*, 81 Hun, 473, 30 N. Y. Supp. 1021.

Under ordinary circumstances it is unreasonable for a passenger to delay calling for his baggage until the day following his arrival: *Wiegand v. Central R. Co.*, 75 Fed. 370; affirmed *Central R. Co. v. Wiegand*, 79 Fed. 991, 25 C. C. A. 681; and the lateness of the

hour of arrival and the fact that there were no vehicles at the station by which it could have been removed are not sufficient to extend the time till the next morning: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659; *Quimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; nor will the sickness of the passenger have that effect, where he is given a stop-over ticket, and his baggage arrives at the destination before he does: *Chicago etc. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268. But it has been held that where, due to storms, trains arrived late at night, and there was an unusual crowd of passengers and accumulation of baggage, it was not unreasonable for a female passenger, traveling alone, to put off demanding her baggage till the next morning: *Carry v. Cleveland etc. R. Co.*, 29 Barb. 35.

In *Felton v. Chicago etc. Ry. Co.*, 86 Mo. App. 332, a passenger on leaving the train in the night-time at a station without a night agent, went to the baggage-car to receive his trunk, but it was not on board, and he could not learn when he might expect it. He then went to the country. The trunk arrived the next afternoon, and was broken open and robbed that night in the station. On the following day the passenger called for it. The court held that the carrier was liable as an insurer, and that the owner had called for his trunk within a reasonable time.

Where baggage is to be conveyed to a certain place, but the company in violation of its contract, carries it to a different place on the road, and there stores it in its baggage-room, its liability as a common carrier is not terminated: *Toledo etc. Ry. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221.

b. Custom as Determining Cessation of Liability.—Custom and course of carrying on business are of importance in determining when a carrier's liability ceases, as in the case of connecting carriers, where it is customary at the terminus of one line for baggage to be left at the station, until taken in charge by the connecting carrier, and it is not necessary for the passenger to take charge thereof till then: *Quimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646, in which case the court said: "Where trains arrive at a late hour of the night and stop for a few hours, and it is the usual course of the company upon whose train baggage arrives, upon being informed that it is going on in the morning by the next train over a connecting road, to put it in their baggage-room and keep it for delivery in the morning to the servants of the other road when called for by the owner and requested to do so, then their usual practice as to the delivery of such baggage should govern, and the custody during the night should be that of carrier and not warehousemen. The traveler has the right to call for such delivery in the morning according to the usual practice. The danger of collusive theft from the baggage-room during the night is as great as at any point of the carriage; the traveler relying on such practice

has no custody of his property and cannot substitute his own watchfulness for that of the company; and the latter, by adopting the practice, lead the public to rely on their vigilance and care. That the course of business—the practice of the carrier—is a most important element in determining when the transit ends, will appear from an examination of the leading case of the *Farmers' etc. Bank v. The Champlain Transportation Co.*, 23 Vt. 211, 56 Am. Dec. 68. Judge Redfield in delivering the opinion of the court, says: 'All the cases almost without exception regard the question of time and place when the duty of the carrier ends, as one of contract to be determined by the jury from a consideration of all that was said by either party at the time of the delivery of the parcels to the carrier; the course of the business, the practice of the carrier and all other attending circumstances.' To hold that delivery by railroad companies of baggage on the platform is delivery to the owner, and by an absolute and inflexible rule of law terminates the transit and discharges the carrier, as such, from further responsibility—irrespective of their own practice and course of business as to delivery—would, we think, be in conflict with the principal of the decision in the case last alluded to': See, also, *Powell v. Myers*, 26 Wend. 591.

c. **Must have Opportunity to Obtain Baggage.**—Opportunity must be allowed passengers to obtain their baggage upon arriving at their destination, and a servant, charged with the duty of delivering it, must be at hand for a reasonable time after the arrival of the conveyance: *Dinenny v. New York etc. R. Co.*, 49 N. Y. 546; *Patscheider v. Great Western Ry. Co.*, 3 Exch. 153. But where the station is closed a short time thereafter, and it is not shown that a passenger requested the station agent to keep the station open or to be there at a fixed time to deliver the baggage, and he did not claim the trunk till the following morning, does not render the company liable as an insurer: *Graves v. Fitchburg R. Co.*, 29 App. Div. 591, 51 N. Y. Supp. 636.

d. **To Whom Delivery must be Made.**—The baggage must be delivered to the right person, and if delivered to another, it is a conversion, for which the company is liable: *Trice v. Miller*, 3 Willa. Civ. Cas. Ct. App. (Tex.), sec. 440; and when it delivers baggage upon a forged order, that fact will constitute no defense: *Powell v. Myers*, 26 Wend. 591. A delivery to the baggage-master of an independent steamboat company, who is not the passenger's authorized agent, but who has, under agreement between the carriers, always entered the cars prior to their arrival at the depot and took the baggage of through passengers, giving his checks in exchange for those of the railroad company, will not discharge the latter from loss after such delivery: *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 496, 94 Am. Dec. 607.

In *Hodkinson v. London etc. R. Co.*, 14 Q. B. Div. 228, upon the plaintiff's arrival at the station, her baggage was taken from the baggage-car by one of the company's porters, who asked if he should engage a cab for her. She replied that she would walk to her destination, and leave her baggage at the station for a short time, and send for it. The porter agreed to put it to one side and take care of it. Part of the baggage being lost, suit was instituted therefor. The court held that there could be no recovery, as the transaction amounted to a delivery of the baggage by the company to the plaintiff, and a redelivery of it by her to the porter as her agent, to take care of.

Where a railway company employs porters at its stations to convey passengers' baggage from the cars to their vehicles, the company's liability as carrier continues until the porters have discharged their duty: *Richards v. London etc. Ry. Co.*, 7 Com. B. 839, 62 Eng. Com. L. 837.

a. **Where Taken Charge of by Government Officials.**—The question of the carrier's liability, where the baggage of a passenger has been taken charge of by officers of the government has been before the courts. In *Torpey v. Williams*, 3 Daly, 162, the plaintiff, an immigrant passenger on a steamer from Liverpool to New York, was, on the arrival of the vessel at the latter port, transferred with all the other immigrants and their baggage, to a barge, by which they were carried to Castle Garden, the laws of New York requiring that they be landed there with their baggage. The barge was licensed by the commissioners of immigration, as required by law, but was employed by, and at the expense of, the defendants. In an action for breach of contract by nondelivery of the plaintiff's baggage at Castle Garden, it was held that the transportation by the barge from the steamer to Castle Garden was only a continuation of the journey from Liverpool to New York, rendering the defendants liable. But where the voyage has terminated, by landing at a place fixed by the established usage and custom of the carrier, there being no contract to land at a particular place in the port of destination, he is not answerable for baggage lost through the fault of immigrant officers, who then take charge of the baggage: *Klein v. Hamburg-American Packet Co.*, 3 Daly, 390.

That a common carrier is not liable for the destruction of baggage detained by the custom authorities for inspection, over which it had no control, see *Parker v. North German Lloyd S. S. Co.*, 74 App. Div. 16, 76 N. Y. Supp. 806.

f. **Burden of Showing Delivery to Passenger.**—In an action for loss of baggage, the burden of showing delivery thereof is on the defendant, and it is not sufficient to discharge him from responsibility to show transportation of the baggage to the place of destination: *Matheson v. New York etc. R. Co.*, 76 N. Y. 381. Where goods were delivered by a railroad company to an express company, acting as

agent of the passenger, and after he received the goods from the express company, some of the articles were missing, this was held not sufficient evidence to fasten liability for their loss upon the railroad company: *Galveston etc. Ry. Co. v. Schafermeyer* (Tex. Civ. App.), 72 S. W. 1037.

g. Liability for Property Left Behind in Car.—A carrier may become responsible for property left by a passenger in a car or conveyance, after his departure. So where carriers of passengers make it the duty of their agents, by a general regulation, to take charge of property inadvertently left in their cars, and provide a place for its safekeeping at their depot, where the owner may apply for it, this makes them liable as bailees for hire, the compensation which they receive for carrying the passenger being sufficient consideration therefor: *Morris v. Third Ave. R. Co.*, 1 Daly, 202, 23 How. Pr. 345. See, also, *Bonner v. De Mendoza* (Tex. App.), 16 S. W. 976.

VIII. Liability as Warehouseman.

The liability of common carriers as warehousemen has been treated in a recent note in this series, 97 American State Reports, 101-105, and discussion of that subject will therefore be omitted.

IX. Contributory Negligence of Passenger.

Negligence on the part of a passenger, contributing to a loss of his baggage, will bar an action for recovery therefor: *Talley v. Great Western Ry. Co.*, L. R. 6 C. P. 44. So where a trunk was delayed by being carried to a wrong station, which was due as much to the passenger's own negligence in not looking at the check which was given him as to that of the company, he cannot recover: *Gonthier v. New Orleans etc. R. Co.*, 28 La. Ann. 67. But see *Isaacson v. New York etc. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142, holding it not negligence for a passenger not to examine his baggage-check. And it has been held such negligence as to bar recovery for a passenger not to make use of appliances for better securing himself, such as a bolt or lock on the door of a stateroom. *The John Brookes*, 1 Hask. 439, Fed. Cas. No. 7335.

In *Bonner v. De Mendoza* (Tex. App.), 16 S. W. 976, it was held that where a passenger left valuables behind him in the car, which were subsequently stolen by the carrier's employés, the fact that he was negligent in so leaving them was no bar to an action for their value, the fact that his negligence furnished the temptation and opportunity to defendant's servants to steal not releasing it from its obligation to protect him against them.

X. Authority of Baggage-master as to Baggage.

The authority of a carrier's agent, charged with the duty of attending to the baggage of passengers, and commonly known as a

baggage-master, becomes of importance in fixing the liability of the company represented by him for his acts. A baggage-master, as such, has no authority to contract for carriage beyond his company's route: *Marmorstein v. Pennsylvania R. Co.*, 13 Misc. Rep. 32, 84 N. Y. Supp. 97, but he may, by his action, bind his company, and this was well expressed in *Isaacson v. New York etc. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142, in the following words: "The passenger has, we think, the right to assume that the baggage-master possesses the requisite authority to make all ordinary and usual arrangements with passengers in respect to the transportation of baggage. If a question arises as to checking baggage beyond the line of the road receiving it, the practice of the company is presumably known to the baggage-master, and he is practically the only person to whom the inquiry can be addressed. It would produce great inconvenience if it should be held that the baggage-master did not represent the company in respect to the ordinary incidents of baggage transportation. It could not be claimed that a baggage-master, in the absence of special authority, could bind the company by a contract to carry baggage beyond the terminus of the road, or agree upon special or unusual modes of delivery, as to deliver at a place other than the depot of the company, or (perhaps) to a specified person at the terminus of the route, other than the owner. But it is, we think, within the apparent scope of a baggage-master's employment, when asked by a passenger whether the company checks baggage over a route indicated by his passage tickets, to answer the question and to bind the company by checking it over connecting roads. In this case the request to check over the Mobile route was made to the baggage-master and assented to by him, and he assumed to give checks in accordance with the request. This constituted, we think, an agreement binding on the company."

A baggage-master may also bind his company by arranging as to what sort of baggage shall be carried, and he has authority, so far as the public is concerned, to receive trunks not filled with ordinary baggage, if he knowingly does so and takes extra pay therefor: *Talcott v. Wabash R. Co.*, 159 N. Y. 461, 54 N. E. 1; *Strauss v. Wabash etc. Ry. Co.*, 17 Fed. 209.

That the agent of one connecting line, authorized to check baggage upon another connecting line, has no authority to accept and send merchandise as baggage over the latter, see *Toledo etc. R. Co. v. Bowler*, 63 Ohio St. 274, 58 N. E. 813.

XI. Power of Carrier to Establish Regulations.

In the conduct and government of its business, a common carrier of passengers may establish reasonable regulations as to baggage, and it incurs no liability if a loss is due to noncompliance therewith; and the consent of a passenger thereto is not necessary: *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716. It is absolutely

essential, however, that notice should be given him of such regulations, or it should be shown expressly that he knew thereof, or that he ought to have: *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr., N. S., 229.

So far as the reasonableness of the rule depends upon the existence of particular facts or circumstances, it is a question for the jury; but where the facts are undisputed, it is for the court: *Pittsburgh etc. Ry. Co. v. Lyon*, 123 Pa. St. 140, 10 Am. St. Rep. 517, 16 Atl. 607, where the court held that any regulation that deprives a passenger of the right to stop and receive his baggage at any regular station or stopping place of the train on which he might be traveling, was unreasonable and illegal. But a rule providing that baggage can only be checked to the place for which the passenger holds a ticket, is reasonable: *Howell v. Grand Trunk Ry. Co.*, 92 Hun, 423, 36 N. Y. Supp. 544. The plaintiff in that case held a stopover ticket, but the baggage-man on the train refused to put off the baggage at the intermediate station, in accordance with the above rule, and it was subsequently carried to the destination, where it was destroyed without the fault of the company. The company was held to have incurred no liability, the court saying: "It is not seen that the mere privilege extrinsic the contracts which permitted the passengers to stop off over night at an intermediate station, and resume their passage the next day afforded to them the right to require the company to unload and reload their baggage at such station. Our attention is called to *Pittsburgh etc. Ry. Co. v. Lyon*, 123 Pa. St. 140, 10 Am. St. Rep. 517, 16 Atl. 607. There the company refused to sell to the defendant in error a passage ticket to Birmingham station, in the city of Pittsburgh, where the train uniformly stopped for passengers to alight, and he was required to take a ticket for the station further on, which was known as the Union depot within the city. The company's agent also declined to check his baggage to Birmingham station, and checked it to the destination mentioned in the passage ticket. The court very properly held that the rule of the company, requiring its agents to refuse to sell tickets and check baggage to the intermediate station was unreasonable. The doctrine of that case would have been applicable to the present one, if the defendant had declined to sell to the plaintiffs passage tickets to London (the intermediate station). This the defendant was neither requested nor refused to do. That case, therefore, does not seem to have any necessary application to the one at bar."

A rule of a railroad company that baggage shall not be checked till a ticket has been procured is reasonable; but a rule that a baggage-master shall not receive baggage into the baggage-room until then, is unreasonable and void: *Coffee v. Louisville etc. R. Co.*, 76 Miss. 569, 71 Am. St. Rep. 535, 25 South. 157. A rule allowing baggage to be checked only half an hour before train time is not, as

a matter of law, unreasonable: *Goldberg v. Ahnapsee etc. R. Co.*, 105 Wis. 1, 76 Am. St. Rep. 899, 80 N. W. 920.

A rule that passengers shall not be allowed to take into street-cars such articles as are cumbersome or dangerous, is reasonable as a matter of law, and it is error for the trial court to leave that question to the jury: *Dowd v. Albany Ry.*, 47 App. Div. 202, 62 N. Y. Supp. 179.

That a carrier may limit his liability by specific regulations, brought to the knowledge of the passenger, which are reasonable in their character and not contrary to any statute or public policy, see *New York etc. R. Co. v. Fraloff*, 100 U. S. 24.

XII. Liability for Willful Acts of Employés.

Where baggage is stolen by a servant of a common carrier, the latter is responsible therefor and must make good the loss: *Mobile etc. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607. See, also, *Abbott v. Bradstreet*, 55 Me. 530. But it has been held that a railroad company operating a parlor-car is not responsible for the loss of money, not intended for traveling expenses, if stolen by a porter in the company's employ, when the passenger left it on the window sill of the toilet-room of the car, as the act was not within the scope of the servant's employment: *Levins v. New York etc. R. Co.*, 183 Mass. 175, 97 Am. St. Rep. 434, 66 N. E. 803, citing *Illinois Cent. R. R. v. Handy*, 63 Miss. 609, 56 Am. St. Rep. 846; *Root v. New York etc. Co.*, 28 Mo. App. 199.

Where the chief officer on an ocean steamer, prompted by spite, countenanced the throwing overboard of a valise containing a passenger's property, the steamship company was held liable for its loss: *De Felice v. Compagnie Francaise etc.*, 83 App. Div. 73, 82 N. Y. Supp. 552.

XIII. Necessity for Payment of Fare in Advance.

To charge a carrier it is not indispensable that passage money should be paid in advance: *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.), 453; *McGill v. Rowland*, 3 Pa. St. 451, 45 Am. Dec. 654, where it is said: "In order to charge a person as a common carrier, it is not necessary that a specific sum should be agreed on for the hire, much less paid for, if agreed on; although not paid, he is entitled to a reasonable compensation." See, also, *Flaherty v. Greenman*, 7 Daly, 481.

XIV. When Baggage Should be Sent.

a. **On Same Train.**—If a carrier agrees to send baggage by a particular route and violates its agreement, sending it by another and longer route, he is an insurer and liable as such if it is injured while on that route: *Estes v. St. Paul etc. R. Co.*, 55 Hun, 605, 7 N. Y. Supp. 863.

Not only should it be sent on the route desired by the passenger, but on the same train with him, if he gives the agent time to check it: *Toledo etc. R. Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 462; and it is a question for the jury whether a carrier is guilty of negligence in not sending a passenger's baggage by the train on which he travels, and having it so carried throughout the journey: *Wald v. Pittsburgh etc. R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332, 44 N. E. 888, reversing 60 Ill. App. 460. But see *St. Louis etc. Ry. Co. v. Ray*, 13 Tex. Civ. App. 628, 35 S. W. 951, to the effect that it is the carrier's duty to forward baggage in a reasonable time, but not necessarily on the same train as the passenger.

b. **Effect of Passenger not Accompanying It.**—In order to hold the carrier to his strict liability, a passenger must accompany his baggage, or be prevented from so doing by the fault of the carrier himself; and he has no right to require it to be carried subsequently without compensation as baggage, and the carrier is under no obligation so to transport it: *Wilson v. Grand Trunk Ry.*, 56 Me. 60, 96 Am. Dec. 435; 57 Me. 138, 2 Am. Rep. 26. In *The Elvira Harbeck*, 2 Blatchf. 336, Fed. Cas. No. 4424, a person took passage in a vessel, but, his baggage not reaching him in time to be put on board, he sailed without it, and it was put on board another vessel, and never delivered. When sued for the loss of the goods, the carrier defended on the ground that they were shipped on a passenger ship, as personal baggage belonging to a passenger; that as the owner did not take passage on board the ship and pay the fare, which would include compensation for the usual baggage, no compensation was paid for the freight and the ship was entitled to none, and hence the owners of the ship were liable only as gratuitous bailees. The court, however, denied this contention, saying: "In cases where the passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery. If the passenger does not accompany it, the carrier may claim compensation in advance for its transportation, or may postpone his claim till the delivery and rely on the lien or on the personal responsibility of the owner. And I do not see why the rule of responsibility for the safekeeping and delivery should not be the same in both cases. The actual payment of the freight in the one case, and the actual liability and lien for its payment in the other, constitute the consideration for the undertaking.

"But it is sufficient to say, in this case, that the proofs show an independent shipment of the goods in question, unconnected with the owner as a passenger. The case is one, therefore, of the ordinary shipment of goods."

It has been held that if a passenger purchases a ticket on a railroad, for the sole purpose of having his trunk carried, but he himself goes by a private conveyance, he is not a passenger, and

can hold the company liable only as a gratuitous bailee where the trunk arrived at the destination, was placed in the baggage-room, and was stolen the next day: *Marshall v. Pontiac etc. R. Co.*, 126 Mich. 45, 85 N. W. 242.

In *Beers v. Boston etc. R. Co.*, 67 Conn. 417, 52 Am. St. Rep. 293, 34 Atl. 541, a carrier received baggage by mistake, supposing that the owners were passengers over its own line, when in fact they had purchased tickets over another line, and the owners believed in good faith that the baggage was properly checked. It was held that the carrier was liable only for willful or intentional injury to the property while in its possession, and did not receive the baggage as a common carrier.

If baggage is forwarded after a passenger pursuant to an agreement to that effect, and as part of the consideration moving from the company for the fare paid by the passenger, the same rules of care and diligence apply as when sent on the same train: *Warner v. Burlington etc. R. Co.*, 22 Iowa, 166, 92 Am. Dec. 389.

XV. Measure of Damages.

a. *For Loss or Destruction.*—The amount to be allowed as compensation for lost or damaged baggage is the value of the property lost, with interest thereon from such time: *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356; *Spooner v. Hannibal etc. R. Co.*, 23 Mo. App. 403; *Bonner v. Blum* (Tex. Civ. App.), 25 S. W. 60, although the right to recover interest has been denied: *Texas etc. R. Co. v. Ferguson*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 1254; and the amount expended in purchasing clothing and other articles necessary to supply the immediate wants of the party is not admissible in evidence as a means of ascertaining the damage: *New Orleans etc. R. Co. v. Moore*, 40 Miss. 39. Proof of the cost of goods and the length of time the plaintiff had them is admissible on the question of value: *Glovinsky v. Cunard S. S. Co.*, 6 Misc. Rep. 338, 26 N. Y. Supp. 751.

Where the property has a market value, that is the correct measure of damage: *Spooner v. Hannibal etc. R. Co.*, 23 Mo. App. 403. But baggage usually consists of partly worn wearing apparel, and the value of such property for the use of the plaintiff, and not the market value, is the true gauge of liability: *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368, 25 South. 712; *Parmelee v. Raymond*, 43 Ill. App. 609; *Fairfax v. New York etc. R. Co.*, 73 N. Y. 167, 29 Am. Rep. 119, affirming 43 N. Y. Super. Ct. (11 Jones & S.) 18; *Simpson v. New York etc. R. Co.*, 16 Misc. Rep. 613, 38 N. Y. Supp. 341; *Texas etc. Ry. Co. v. Cook*, 2 Wills. Civ. Cas. Ct. App. (Tex.), sec. 661; *Galveston etc. Ry. Co. v. Fales* (Tex. Civ. App.), 77 S. W. 234. And see *Wamsley v. Atlas S. S. Co.*, 50 App. Div. 199, 63 N. Y. Supp. 761.

A passenger can recover only the value of the goods lost or destroyed, where it does not appear that the carrier, at the time of receiving the baggage, was informed of facts which would render probable special damages. It has accordingly been held that in an ordinary action to recover for lost baggage, no allowance should be made for increased traveling expenses, or for the loss of an engagement as teacher of a school, resulting from the loss of the baggage: *Texas etc. Ry. Co. v. Taylor*, 3 Will. Civ. Cas. Ct. App. (Tex.), sec. 192; nor for loss of profits and earnings of a dentist, due to the loss of dental instruments: *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356; nor for loss of profits arising from a delay in delivering goods: *Texas etc. Ry. Co. v. Willis*, 3 Will. Civ. Cas. Ct. App. (Tex.), sec. 71. Nor are expenses in searching for lost baggage recoverable in such action: *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *St. Louis etc. Ry. Co. v. Hindsman*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 207; *Texas etc. R. Co. v. Ferguson*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 1254. Inconvenience, annoyance and mortification arising from the loss form no part of the legal damages, and recovery should not be allowed therefor: *Houston etc. Ry. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W. 487.

In *Schalscha v. Third Ave. R. Co.*, 19 Misc. Rep. 141, 43 N. Y. Supp. 251, a violin, carried by a passenger, a professional violinist, was damaged by the negligence of the company's servant in starting the car suddenly, and the measure of damages was held to be the expense of restoring the property to soundness, compensation for the loss of it during the period of disability, and the difference in its value before and after the injury.

b. **For Delay.**—For delay in delivering personal baggage a common carrier is liable only for the value of the use of the property to the owner during such delay: *St. Louis etc. Ry. Co. v. Hindsman*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 206; *Texas etc. Ry. Co. v. Taylor*, 3 Will. Civ. Cas. Ct. App., sec. 193; *Gulf etc. Ry. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. 303. The cost of clothing, purchased on account of a trunk being delayed, is too remote to be allowed as an item of damage: *Texas etc. Ry. Co. v. Douglas* (Tex. Civ. App.), 80 S. W. 487.

A passenger, suing for the loss of a trunk, need not receive it where it was tendered after suit brought and a year after delivery to the company: *Lake Shore etc. Ry. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724. But if a portion of the contents of a trunk only is injured, and it is within a reasonable time tendered to the plaintiff, then it is his duty to accept the trunk and its contents, and his recovery will be limited to such goods as are lost or damaged: *Gulf etc. Ry. Co. v. Jackson* (Tex. App.), 15 S. W. 128.

c. **Place of Destination as Fixing Damages.**—In case of injury to, or loss of, baggage, the damages must be measured on the basis

of the value of the baggage at the place of destination: *Lake Shore etc. Ry. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724. And this is so even though it be lost by an initial carrier, the damages not being measured at an intermediate point, though it be where the initial carrier's line connects with the terminal carrier's: *Galveston etc. Ry. Co. v. Fales* (Tex. Civ. App.), 77 S. W. 234. See, however, *The Mayors v. Mason*, 5 Kan. 670, holding the value at the point of shipment controls.

XVI. Conflict of Laws.

The law of the place where the contract is to be performed governs: *Curtis v. Delaware etc. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271. So where plaintiff bought a ticket from Philadelphia to Atlantic City, New Jersey, from a New Jersey corporation, operating a railroad between those two places, and he delivered his trunk at Philadelphia and the trunk was lost, but it did not appear where, the liability of the company was to be determined by the law of New Jersey: *Brown v. Camden etc. R. Co.*, 83 Pa. St. 316. In *Mexican Nat. R. Co. v. Ware* (Tex. Civ. App.), 60 S. W. 343, a passenger contracted with an initial carrier in Texas for transportation to Mexico and return. It was held that the contract was not concluded in Mexico, and was not performed till the passenger had been returned to Texas, and that the law of the latter state determines the carrier's liability.

In *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665, plaintiff and defendant entered into a contract in England for an ocean passage, one of the conditions of which exempted the carrier from any loss arising from his negligence. Such a stipulation was valid in England, but contrary to public policy in Massachusetts. The supreme court of the latter state held the contract enforceable there, it not being illegal or immoral, although had it been made in Massachusetts it would have been void.

Where a passenger bought of an English company a ticket for an ocean voyage from an American to an English port, the ticket stipulating that it should be governed by the English law, this was held not to render valid a condition therein relieving it from liability for negligence, such being contrary to the public policy of this country: *The New England*, 110 Fed. 415.

XVII. What Actions will Lie.

Trover will lie against a common carrier where the goods have been lost to the owner by his act, as where they have been delivered to the wrong person by mistake, or under a forged order; but for the mere omission of the carrier, as where it was lost or stolen, and cannot be delivered to the owner, the appropriate remedy is assumpsit, or a special action on the case: *Hawkins v. Hoffman*, 3 Hill, 586, 41 Am. Dec. 767; *Tolano v. National Steam Nav. Co.*, 28

N. Y. Super Ct. (5 Rob.) 318, 85 How. Pr. 496, 4 Abb. Pr., N. S., 316. A wrongful and willful detention of plaintiff's baggage and refusal to deliver it is a conversion: *McCormick v. Pennsylvania Cent. R. Co.*, 99 N. Y. 65, 52 Am. Rep. 6, 1 N. E. 99.

A shipowner, who refuses to carry a passenger whom he agreed to carry, and proceeds on the voyage without giving him reasonable time to remove his baggage, is liable in trespass for carrying such property away: *Holmes v. Doane*, 69 Mass. (3 Gray) 328.

An action by a person, about to become a passenger, to recover for so negligently keeping his trunk that it was rifled of its contents, before his arrival at the station and payment of his fare, is one *ex delicto*: *Corry v. Pennsylvania R. Co.*, 194 Pa. St. 516, 45 Atl. 341.

In *Millard v. Missouri etc. R. Co.*, 86 N. Y. 441, a passenger purchased a railroad ticket, entitling him to carry a certain amount of baggage. He also checked a trunk containing merchandise, paying extra compensation therefor, and advising the agent of its contents. The trunk was destroyed by fire. In a prior action brought to recover for the loss of baggage, it was held that no recovery could be had for the merchandise, but only for the baggage. The plaintiff then sued to recover for the merchandise, and the former action was held no bar thereto, as the two actions were not for parts of one entire indivisible demand, but were based upon separate contracts.

XVIII. Who May Sue.

a. **In General.**—It is not necessary that a passenger be the owner of baggage carried by him, to entitle him to recover for its loss, but it is sufficient if he is liable to the owner therefor: *Illinois Cent. R. Co. v. Matthews*, 24 Ky. Law Rep. 1766, 72 S. W. 302.

b. **Principal Suing Where Agent was Passenger.**—How far a principal may sue where his agent was the passenger, traveling with goods of the former, presents a question on which the authorities are divided. In *Weed v. Saratoga etc. R. Co.*, 19 Wend. 534, which was an action of assumpsit by a principal for goods lost, which had been carried by his agent as passenger, it was held that the contract was one with the agent, for breach of which the former could not maintain an action. And in *Southern Kan. Ry. Co. v. Clark*, 52 Kan. 398, 34 Pac. 1054, it was said: "Personal baggage, limited in quantity, is usually transported by carriers of passengers as an incident to the transportation of the person, without extra charge. The contract to transport a passenger is usually a personal contract. If injury results to his person, or his personal effects transported as baggage, there can be no doubt that the railroad company is liable to him, and him alone, when occurring under such circumstances as to create liability. The fact that he is engaged in the service of another at the time, and that his transportation is paid for by his employer, cannot diminish his individual right to safe

transportation. We fail to perceive that the facts that his fare is paid for by his employer, and that the occasion for his making the journey is the prosecution of the business of his employer, in any manner affect the contract with, or liability of, the railroad company. It does not appear in this case that, at the time he purchased his ticket, anything was said with reference to his employment, nor that, at the time he checked his baggage, any mention was made of the fact that the samples he carried belonged to the plaintiffs." See in accord, *Missouri Pac. Ry. Co. v. Liveright*, 7 Kan. App. 772, 53 Pac. 763; *Stimson v. Connecticut R. R. Co.*, 98 Mass. 83, 93 Am. Dec. 140; *Alling v. Boston etc. R. Co.*, 126 Mass. 121, 30 Am. Rep. 667. See, also, *Cattaraugus Cutlery Co. v. Buffalo etc. Ry. Co.*, 24 App. Div. 267, 48 N. Y. Supp. 451.

In *Grant v. Newton*, 1 E. D. Smith, 95, the plaintiff employed his son on his own business and sent him on a journey at his own expense, furnishing for his use on the trip a traveling trunk and clothing, which were lost through the carrier's negligence. It was held that the plaintiff could recover in an action on the case, but not on the contract, thereby distinguishing *Weed v. Saratoga R. Co.*, 19 Wend. 534.

The opposite view is to the effect that a contract made by a traveling agent to carry his samples engaged in prosecuting the business of his principal, inures to the latter's benefit, and he has a right to declare himself and sue upon the contract: *Lake Shore etc. Ry. Co. v. Hochstim*, 67 Ill. App. 514; *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208; *Fort Worth etc. Ry. Co. v. Rosenthal Millinery Co.* (Tex. Civ. App.), 29 S. W. 196.

c. **Partners or Joint Owners.**—In *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845, a carrier was held not liable to a firm for injury to property belonging to such firm, where it was carried as the personal baggage of a passenger, although he was a member of the firm, the contract being made with the individual, with whom the firm was not in privity.

Where the plaintiffs were joint owners of a chest, but owners in severalty of its contents, and it was shipped as baggage on defendant's road, a check therefor being issued to them jointly, it was held, in a joint action to recover for the loss thereof, that by issuing the check to the plaintiffs jointly, the company entered into a joint contract with them, and that it could not insist that the contract be severed and separate actions be brought thereon: *Anderson v. Wabash etc. R. Co.*, 65 Iowa, 131, 21 N. W. 485.

d. **Husband.**—Where baggage consisting of articles which had been in use by the plaintiff, his wife and child, were lost, it was held that the plaintiff was the proper person to sue, although he was not a passenger by the train which took the baggage, having taken another train, he being sufficiently represented by his wife: *Curtis v. Delaware etc. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271.

For loss of the wife's paraphernalia, the husband must sue, when he has paid for the articles and furnished them, and has not made a gift thereof to his wife: *Curtis v. Delaware etc. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271; but where such a gift is shown, the wife may bring the action: *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *The State of New York*, 7 Ben. 450, Fed. Cas. No. 13,328.

e. **Father.**—Where the infant daughter of the plaintiff was provided by the latter with wearing apparel and jewelry, in fulfillment of his obligation to give her suitable maintenance, the legal title thereto remains in him, and he may sue for their loss, the daughter being treated as his legally constituted agent: *Prentice v. Decker*, 49 Barb. 21. And it has been held that a father, transporting baggage of his daughter and receiving checks therefor, may maintain an action against the common carrier for its loss, upon the contract, independent of his right as father. The contract for transportation was made with him, and as holder of the checks, which correspond to a bill of lading, he could sue as consignee: *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575.

XIX. Burden of Proof and Evidence.

a. **Proof of Delivery and Failure to Produce Make Out Prima Facie Case.**—Proof of the delivery of the trunk to the carrier in good condition, and its loss, or redelivery in a damaged condition, make out a prima facie case, and the burden of exonerating himself is on the carrier, nondelivery being prima facie evidence of negligence: *Garvey v. Camden etc. R. Co.*, 4 Abb. Pr. 171, 1 Hilt. 280; *Caldwell v. Erie Transfer Co.*, 13 Misc. Rep. 37, 33 N. Y. 993; *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155, 21 Am. St. Rep. 729, 26 N. E. 248; *Camden etc. R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481. In *Cleveland etc. Ry. Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. 523, a complaint was held sufficient to establish a cause of action which averred a delivery of the goods for carriage by the owner, a demand by him for them at the place of destination, and an absolute, unqualified and continued refusal by the carrier to deliver them. But where there is evidence that the trunk was lost on the journey, this dispenses with a proof of demand and refusal: *Garvey v. Camden etc. R. Co.*, 4 Abb. Pr. 171, 1 Hilt. 280.

b. **Baggage Check in Evidence of Receipt of Baggage.**—A baggage check does not embody the contract of carriage, but is a voucher or means of identification: *Cleveland etc. Ry. Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. 523; *Isaacson v. New York etc. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142; and its possession by a passenger is prima facie evidence of a receipt by the carrier of the baggage represented thereby: *Davis v. Michigan etc. R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Chicago etc. R. Co. v. Clayton*, 78 Ill. 616; *Chicago etc. R. Co. v. Steear*, 53 Neb. 95, 73 N. W. 466; *Earle v.*

Cadmus, 2 Daly, 237. See, also, *Kansas Pac. Ry. Co. v. Montelle*, 10 Kan. 119; *Atchison etc. R. Co. v. Brewer*, 20 Kan. 669. And the same applies where a passenger on a line delivers up to a connecting carrier the check of the first company and receives that of the second: *Ahlbeck v. St. Paul etc. Ry. Co.*, 39 Minn. 424, 12 Am. St. Rep. 661, 40 N. W. 364. See, also, *Denver etc. R. Co. v. Roberts*, 6 Colo. 333.

It is also *prima facie* evidence that the baggage was in good order when received by it, and to relieve itself from liability must show that the baggage was in substantially the same condition when delivered to its owner, as when received by it: *St. Louis etc. R. Co. v. Hawkins*, 39 Ill. App. 406.

It has been held that as a trunk is the usual means of conveying baggage, a check is evidence of a delivery of a trunk, the burden being on the carrier to show that the baggage delivered was not a trunk: *Dill v. South Carolina R. Co.*, 7 Rich. (S. C.) 158, 62 Am. Dec. 407.

It is immaterial when the baggage comes to the possession of the carrier, whether at the time the check is issued or at a subsequent time. So where a railway company received a passenger's check for baggage, which had not then arrived by another road, and gave its own check for the same, and it appeared that it surrendered the passenger's first check to the other railroad company, this was held sufficient, in the absence of proof to the contrary, to show receipt of the baggage by the company so surrendering the first check: *Chicago etc. R. Co. v. Clayton*, 78 Ill. 616.

c. *Statements of Carrier's Agents.*—A passenger on a train, as soon as practicable after arrival, presented to the company's baggage agent a check for his baggage and demanded the same. The agent could not find it, but took the number of the check and requested the passenger to call again. On the same evening the passenger returned to the depot, and was told by the agent that he had made further search and could not find the baggage. The court held that the acts and declarations of the agent were competent evidence for the passenger in an action by him against the carrier for the loss of the baggage: *Baltimore etc. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617. But the declarations of baggage-men, not constituting a part of the *res gestae*, are not binding on the railroad company, in an action by a passenger to recover for injuries to a trunk: *Atchison etc. R. Co. v. Wilkinson*, 55 Kan. 83, 39 Pac. 1043. So an admission by the superintendent of a railroad company on presentation of the plaintiff's claim for lost baggage, that he had a good claim, constitutes no part of the *res gestae*, but related to a past transaction, and is inadmissible against the principal: *Green v. New York etc. R. Co.*, 12 Abb. Pr., N. S., 473.

d. **Proof as to Contents of Trunk.**—In a suit for the nondelivery of a trunk, testimony to show what were the contents of the trunk at the time it was packed, some weeks before its delivery to the carrier, is admissible, although the carrier can only be held responsible for its contents at the time of receiving it: *Sugg v. Memphis etc. Packet Co.*, 40 Mo. 442.

BURROUGHS v. CUTTER.

[98 Me. 178, 56 Atl. 649.]

GUARDIAN AND WARD—Guardians' Sales must be Limited to the Title or Interest of Their Wards.—Hence, if land devised to a minor, her heirs, or assigns, provided she reaches the age of twenty-one years or leaves issue, is sold by her guardian under the license of the probate court, the title of the purchaser is destroyed by her death without issue before reaching the age specified. (p. 394.)

EXECUTOR'S POWER OF SALE for the Benefit of a Specified Person cannot be exercised by him after the executor's death. Though property is devised to a minor, provided she reaches the age of twenty-one years or leaves issue, and the executor is given power to dispose of the whole of the estate for the support, clothing and education of such minor, yet if the executor dies without executing the power, it does not pass to the minor or her guardian, so as to become subject to a probate sale, and a sale made by such guardian under the order of court is void. (pp. 394, 395.)

WILLS, Suits to Construe.—If a suit to construe a will has been maintained and the estates of the devisees sufficiently defined for their guidance and that of the administrator, a subsequent suit cannot be sustained for the determination of questions arising between the heirs or representatives and the grantees of a deceased devisee. (pp. 395, 396.)

EQUITY.—A Suit will not be Sustained to Avoid a Multiplicity of Actions where it does not appear but one action will determine all questions of title between any two claimants or sets of claimants. (p. 396.)

WILLS.—A Suit to Construe a Will cannot be Entertained on the ground that a guardian has sold the estate of his ward who claimed under the will, but the sale is void and the guardian does not know what to do with the money received from the purchasers under his attempted sale. If threatened with conflicting suits, he may bring a bill of interpleader against the conflicting claimants. (p. 396.)

Real action in which the parties claimed under the will of Helen J. Purington, deceased. Also a suit in equity against Selina Purington, administratrix, and Solomon Haskell, and Albert H. Burroughs for the construction of the same will. The prayer of the bill was as follows: "Wherefore to save a multiplicity of suits, your orator prays that the court will construe

the provisions of said will, and will particularly determine: 1. Whether, under said will, such title to these several parcels of real estate described therein vested in said Marie J. Purington as to enable her guardian to sell and convey the same under proper proceedings in the probate court, to provide means necessary for the support and education of his ward. 2. If this question is answered in the affirmative, and if the sale of the Burrough's lot was otherwise valid to whom shall the guardian pay the balance in his hands, as stated in the ninth paragraph. 3. And also determine and state whether any, and if any, what interest or estate under the terms of said will vested in said Dora Purington or her heirs. 4. And for such further and other relief as the nature of your complainant's case may require and to your Honors may seem meet."

F. M. Ray, for the plaintiff Burroughs, in action at law.

J. H. Drummond, Jr., and William Lyons, for the defendant Cutter, in action at law.

J. H. Drummond, J., and William Lyons, for the plaintiff Cutter, in equity.

F. M. Ray, Enoch Foster, O. H. Hersey, L. T. Mason, Gorham M. Weymouth and Wilford G. Chapman, for the defendants, Hersey, administrator, and others.

¹⁸⁰ EMERY, J. The first case is an action at law, a writ of entry, to recover possession of a parcel of land in Westbrook. The second case is a bill in equity to determine the construction of the will of Helen J. Purington deceased. We will first consider the former case, the action at law.

1. The plaintiff shows title as devisee under the will of Helen J. Purington deceased, by the first and second clauses of which the demanded land was devised to Marie J. Purington, her heirs and assigns forever, provided she reached the age of twenty-one years or left issue, and in case she died without issue before arriving at that age, the demanded land was devised to Mr. Burroughs, the plaintiff, in fee. Marie J. Purington died without issue before becoming of age, and hence by the terms of those clauses the demanded land vested in the plaintiff in fee: Hersey v. Purington, 96 Me. 166, 51 Atl. 865.

The defendant claims title under a sale and conveyance of the demanded land to him by the probate guardian of Marie J. Purington, made before her death and after the death of the testatrix, under a license from the probate court.

If nothing further were made to appear, it is clear that such sale and conveyance were futile to divest the plaintiff of his estate under the will, and that judgment must be for the plaintiff. The guardian could convey no more than the ward could, and the ward's estate in the demanded land utterly ceased at her death.

But the defendant goes further and invokes the fourth clause of the will as follows: "I order and direct my executrix herein named to apply all, or whatever is necessary, of the rents, profits and income of my real and personal estate to the support and education of my said daughter ¹⁸¹ Marie J. Purington, giving her a high school, and if she desires a seminary or collegiate, education and should the rents, profits and income of my estate, real and personal prove insufficient for that purpose, I order and direct my executrix to first sell the real estate situated on the westerly side of Spring street in said Westbrook, and after the proceeds of the same shall have been applied to the support, clothing and educating as aforesaid of my said daughter, Marie J.; and should they prove insufficient, I order and direct my executrix to next sell the house and lots situated on Stroudwater street near the Portland and Rochester Railroad, and should that also prove insufficient, for said purposes, I order and direct my executrix to sell the house and lot situated at the corner of Main and Stroudwater streets, being the one in which I now live; and it is my wish and desire, and I so order and direct that nothing contained in the second (2) provision herein made shall prevent, or in any way interfere in, my executrix disposing of the whole of my estate, real, personal and mixed, for the support, clothing and educating as aforesaid of my said daughter Marie J. Purington."

In the second clause of the will the devise to the plaintiff is made contingent on the land not having been sold under this fourth clause. Dora Purington was appointed executrix but had died without having disposed of any part of the real estate of the testatrix under the fourth clause, and before the death of Marie and before the beginning of proceedings by the guardian of Marie to make sale.

Upon the death of Dora, the executrix, did her power or interest in the demanded land, under his fourth clause of the will, pass to Marie, or her guardian, so as to become the subject of a probate sale of real estate? We think not. There is no provision in the will that it should, and we know of no such provision in any statute or rule of law. The testatrix must have

intended that some person or persons other than Marie herself, a minor, should dispose of the property and expend the proceeds. In *Clifford v. Stewart*, 95 Me. 41, 49 Atl. 52, the will read "I give to my grandchildren one thousand (\$1000) to each one, and I wish and direct that this shall be devoted and expended for their education." The grandchildren were minors and the court held they were incapable in law of receiving and applying ¹⁸² the funds for themselves, and that the testatrix must have intended some other person to hold the fund and execute the trust.

The defendant argues that the administrator de bonis non with the will annexed, after the death of the executrix, could not execute the power or hold the interest devised under the fourth clause, since the trust and confidence of the testatrix were reposed only in the executrix, Dora. If this argument be sound, the a fortiori the guardian of Marie could not exercise the power and trust so reposed. He is further removed from the testatrix, and her estate than is the successor to the executrix.

The defendant argues also that the interest of Dora, the executrix, in the land under the fourth clause of the will was heritable, and that Marie, as an heir of Dora, inherited half the land upon Dora's death. As already explained, the estate of Dora under the fourth clause, whatever it was, was solely to enable her to execute the trust or power therein conferred, and upon her death was to vest only in such persons, if any, as were empowered to execute that trust or power. Marie, the infant beneficiary, was not empowered by the will or by the law to exercise that power: *Clifford v. Stewart*, 95 Me. 41, 49 Atl. 52.

The question is mooted who could exercise this power or execute this trust, if not the guardian of Marie? That question does not arise in this case, and hence is not answered. The plaintiff, however, cites upon the point: Rev. Stats. 1883, c. 64, sec. 21; *Clifford v. Stewart*, 95 Me. 46, 49 Atl. 52, and other cases in Maine under that statute.

It follows that the defendant took no title from the conveyance to him, and that judgment must be for the plaintiff.

2. The will of Helen J. Purington disposed of her entire estate real and personal. It has been fully construed by this court at the suit of the administrator de bonis non with the will annexed, as reported in *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865. In that opinion the estates of all the devisees were defined sufficiently for their guidance and that of the administrator, and no further opinion was asked for. The costs of that

suit were made a charge on the estate. The present bill is brought by one who is neither administrator, nor devisee, nor even heir. The remaining questions are not between ¹⁸³ devisees, nor between administrator and devisees, but only between the heirs or representatives and grantees of a deceased devisee, and only concern title to real estate. Such questions mooted by persons claiming under such devisees should be determined in an action at law, or under some circumstance by a bill in equity to quiet title. They do not concern the estate of the testatrix, and are not within the scope of the statute giving the court jurisdiction in equity to construe a will: *Jackson v. Thompson*, 84 Me. 44, 24 Atl. 459; *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865; *Burgess v. Shepherd*, 97 Me. 522, 55 Atl. 415.

Nor can the bill be maintained under the head of avoidance of multiplicity of actions. So far as appears, one action will determine the question of title finally as between any two claimants or sets of claimants.

Nor can the bill be maintained for the purpose of informing the guardian of Marie J. Purington what to do with the money he received from purchasers under his attempted sales of land. If he is only a stakeholder and is threatened with conflicting suits, he may bring a bill of interpleader against the conflicting claimants. The question is not within the scope of the statute under which this bill was brought.

No other grounds are suggested upon which the bill can be sustained, and we think it must be dismissed for want of jurisdiction in equity, but without costs since the respondents have not objected on that ground.

In the action at law judgment for the plaintiff with damages assessed at one dollar. Bill in equity dismissed.

The Powers of Guardians at Common Law are discussed in the monographic note to *Schmidt v. Shaver*, 89 Am. St. Rep. 257-316.

The Powers of Executors at the common law are discussed in the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 171-207.

On Suits in Equity to Construe Wills, see *Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914.

SOPER v. LAWRENCE BROTHERS COMPANY.

[98 Me. 268, 56 Atl. 908.]

COTENANTS, Statute, When Applies Between.—A statute declaring that when lands have been conveyed by the state for the nonpayment of taxes, and the grantee or his successors in interest have paid taxes for twenty years subsequently to the recording of the tax deeds, and have held such exclusive, adverse and continuous possession as comported with the ordinary management of wild lands, no action shall be maintained by any former owner to recover such lands, provided, however, that the statute shall not apply to actions between cotenants, such proviso must be held to apply only as to persons who claim as tenants in common, and not to those who claim as exclusive owners. (p. 401.)

ONE TENANT IN COMMON may Disseise Another. (p. 402.)

ADVERSE POSSESSION by a Cotenant.—A Grantee in a Warranty Deed purporting to convey an estate in severalty is not presumed to be a tenant in common, but a tenant in severalty, and if he holds exclusive possession claiming in severalty, his possession is adverse to other persons who are tenants in common with his grantor. (p. 404.)

CONSTITUTIONAL LAW.—The Constitutionality of a Statute is Presumed where the contrary is not shown beyond a reasonable doubt. (p. 405.)

CONSTITUTIONAL LAW—Statutes Unconstitutional in Part. A statute requiring a claimant of land which has been sold for taxes to pay the amount of the taxes before the trial of an action involving the validity of the sale is, as to such provision, unconstitutional and void, but this does not require the statute to be declared void as a whole, if such provision is not connected in meaning, nor co-operative in purpose, with the other provisions of the statute. (p. 405.)

CONSTITUTIONAL LAW—Statute of Limitations.—A statute providing that persons claiming under tax deeds who have paid all taxes for the period of twenty years after the recording of such deeds, and have held such adverse, continuous, exclusive and peaceable possession during that time as comports with the ordinary management of wild lands shall not be subject to any action to recover such lands by any person who during such time has not paid any of such taxes or done any other act indicative of ownership, is constitutional. (p. 406.)

CONSTITUTIONAL LAW—Statute of Limitations having a Retroactive Operation.—Statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect. (p. 408.)

Taber D. Bailey, for the plaintiff.

Orville D. Baker and A. K. Butler, for the defendant.

²⁷² **WHITEHOUSE, J.** This is an action of trover to recover the value of a large quantity of logs alleged to have been cut by the defendant company on township No. 3, range 6, west

of the Kennebec river in Somerset county. The case comes to this court on the plaintiff's motion to set aside a verdict in favor of the defendant, and on exceptions to the ruling of the presiding judge.

The defendant company admitted that it had cut logs on the township in question within six years prior to the date of the writ, and claimed that it had a legal right so to do by reason of its ownership in fee of the south half of the town, and by virtue of permits from the owners of the north half. It was also contended in behalf of the defense that the plaintiff's action was barred by the statute of limitations enacted in 1895 entitled "An act to make state tax sales more effectual": Pub. Laws 1895, c. 162; Rev. Stats. 1903, c. 10, secs. 153, 156.

It was admitted that township No. 3, range 6, in question pertained to the "Bingham Purchase," and that the title to the whole of it was at one time in William Bingham. The plaintiff claimed to ²⁷³ own 29-72 of the township in common and undivided, and deriving title from the commonwealth of Massachusetts introduced deeds conveying to him several fractional interests showing in the aggregate a record title to about one-third of the town.

The defendant derived title to the south half of the town from A. and P. Coburn through several mesne conveyances, all deeds of warranty duly recorded. October 1, 1872, A. and P. Coburn conveyed the entire township to A. and W. Sprague by deed of warranty recorded October 8, 1872. September 1, 1873, A. and W. Sprague conveyed the whole township to the Coburn Land Company by deed of warranty recorded September 19, 1873, and as a part of the same transaction the Coburn Land Company reconveyed the township to A. and P. Coburn by deed of mortgage with covenants of warranty which was recorded October 31, 1873. This mortgage was duly foreclosed the following year, and thus by this series of recorded deeds of warranty, A. and P. Coburn claimed to have acquired full title to the entire township, and in 1880 Abner Coburn, acting for himself and the heirs of his brother Philander, conveyed the south half of the town to Wildes and Snow by deed of warranty duly recorded August 16, 1880, in consideration of thirty-three thousand dollars. October 27, 1885, the south half was conveyed by Wildes and Snow to Lawrence Brothers and by Lawrence Brothers to the defendant company March 13, 1893, both by deeds of warranty duly recorded. The Coburns and their heirs and devisees still retain the title acquired by them to the north half of the town.

In rebuttal the plaintiff introduced further evidence tending to show that at the time A. and P. Coburn conveyed the whole town to A. and W. Sprague in 1872, by deed of warranty, they only had a recorded title to about one-fourth of it.

Thus while this action of trover was brought primarily to recover damages for the conversion of the logs described in the writ, the decision of the cause necessarily involves the question of title to the township from which the logs were taken.

1. Section 1 of chapter 162 of the Public Laws of 1895, to which reference has been made, reads as follows: "When the state has taxed wild land, and the state treasurer has deeded it, or part of it, for nonpayment ²⁷⁴ of tax, by deed purporting to convey the interest of the state by forfeiture for such nonpayment and his records show that the grantee, his heirs or assigns, has paid the state and county taxes thereon, or on his acres or interest therein as stated in the deed, continuously for the twenty years subsequent to such deed; and when a person claims under a recorded deed describing wild land taxed by the state, and the state treasurer's record shows that he has, by himself or by his predecessors under such deed, paid the state and county taxes thereon, or on his acres or interest therein as stated in the deed, continuously for twenty years subsequent to recording such deed; and whenever, in either case, it appears that the person claiming under such a deed, and those under whom he claims, have, during such period, held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine, and it further appears that during such period no former owner, or person claiming under him, has paid any such tax, or any assessment by the county commissioners, or done any other act indicative of ownership—no action shall be maintained by a former owner, or those claiming under him, to recover such land, or to avoid such deed, unless commenced within said twenty years, or before January 1, 1900. Such payment shall give such grantee or person claiming as aforesaid, his heirs or assigns, a right of entry and seisin in the whole, or such part, in common and undivided, of the whole tract as the deed states, or as the number of acres in the deed is to the number of acres assessed."

But section 4 of the act declares that "This act shall not apply to actions between cotenants, nor to actions now pending in court, nor to those commenced before January 1, 1900."

It satisfactorily appears from the testimony that all of the conditions specified in section 1 applicable to the facts of this

case were fulfilled by the defendant and its predecessors in title respecting the south half, and by the defendant's licensors and their predecessors as to the north half of the township in question. They claimed under recorded deeds describing wild lands; the record of the state treasurer shows that they paid the taxes; they held for more than twenty years such exclusive, peaceable, continuous and adverse possession ²⁷⁵ of the township as comports with the ordinary management of the wild lands in Maine, and during that time no former owner or person claiming under him paid any tax or assessment or did any other act indicative of ownership. The verdict of the jury establishing these facts was clearly warranted by the evidence.

But the plaintiff contended that as there was no adverse possession of the township at common law during this period and as he only claimed to own a fractional part of it, the Coburn heirs and the defendant company must be tenants in common with him, and hence, by the express terms of section 4, the act of 1895 did not apply to this case.

The presiding justice overruled this contention "because the Coburn Land Company in 1873 had a deed which was put upon record on the 19th of September, 1873, not of a fractional interest, but of the whole town, and they have claimed, not as co-tenants with somebody else, but they have claimed to be the exclusive owners of the whole town up to the time that in 1880 they divided it and sold the whole of the south half of the town. And the Lawrence Brothers and their predecessors, the Wildes, did not claim, did not have a deed of a fractional interest, undivided interest; they were not in possession certainly claiming to be tenants in common with anybody else, because their deed was of the whole of the south half, and they claim, it is said, to be the owners of the whole of the south half. Now, if they had a deed of a fractional interest, undivided interest of the south half, or if the deed to the Coburns in the first instance, or the Coburn Land Company had been of an undivided interest in it, then the contention of the learned counsel for the plaintiff would be applicable, and this statute would not affect his client's right to maintain an action."

It is the opinion of the court that this ruling was correct. It gives to the statute a construction manifestly in harmony with the intention of the legislature. It had been repeatedly held by this court that title to wild lands could not be acquired by adverse possession by merely taking a deed of a township or tract of timber land, running lines around it, keeping off trea-

passers and making occasional lumbering operations upon it for a period of twenty years. ²⁷⁶ The exercise of such acts of ownership had not been deemed sufficient or effectual to establish title by disseisin of the true owner: *Chandler v. Wilson*, 77 Me. 76; *Hudson v. Coe*, 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249. Thus while title to farming land might be acquired by twenty years of such "adverse" possession as comports with the ordinary management of that kind of land by the owner, title to wild lands could not be acquired by twenty years of the qualified possession above described, although it was ordinarily the only kind of occupancy of which wild lands are capable. It was the obvious purpose of that portion of the statute of 1895, applicable to this case, to extend the same relative protection to possessory titles to wild lands that all other lands enjoyed under the law. It declares that "when a person claims under a recorded deed describing wild lands, etc.," and has "held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine," no action shall be maintained to recover the land if all the other requirements of the act are fulfilled.

The provision of section 4 that the "act shall not apply to actions between cotenants" must be considered in connection with the language of section 1 and construed with reference to the object to be accomplished. If the acts enumerated are performed by one who "claims by virtue of a recorded deed to be the owner of the entire tract, and one who has maintained such qualified possession for twenty years in assertion of an exclusive title to the whole tract," the statute applies; but if the same acts are done by one who has a recorded deed of only a fractional part, and during the period of twenty years has only claimed as a tenant in common with another and all his acts of ownership have been admittedly done as a cotenant, and not as an exclusive owner, the statute does not apply. It thus becomes a question of fact in each case whether the acts of occupation were done in subordination to the record title or in repudiation of it. If they were done as a disseisor in defiance of the true owner, the statute applies notwithstanding the plaintiff may have discovered a defect in the defendant's record title, and may show title in himself as cotenant. Bracton's rule is still an apt direction: "*Quaerendum est a iudice quo animo hoc fecerit*": *Coke on Littleton*, 153 b; 8 Mod. ²⁷⁷ 55; *Martin v. M. C. R. R. Co.*, 83 Me. 103, 21 Atl. 740. The intention guides the entry and fixes its character. Even one tenant in common may dis-

seise another. As stated by this court in *Richardson v. Richardson*, 72 Mo. 409: "One tenant in common may disseise another of the whole or of a part of the common estate. It is true that prima facie the possession of the defendant would be held to be in accordance with his title. He would be rightfully in possession as a tenant in common, and that would be held to be the character and extent of his occupancy, in the absence of evidence to indicate the contrary. But here, according to the plaintiff's own account, when her title accrued, and from that time to the date of the writ, the defendant by his lessee was in actual possession of the quarry, under claim of title adverse to the plaintiff, denying her title and holding her out. The evidence shows a state of facts which amounts to a disseisin, even as between tenants in common."

In *Bigelow v. Jones*, 10 Pick. 162, 163, the court say: "But it appears in the present case that Baldwin, under whom the defendant claims, entered under a deed purporting to convey the whole estate. He entered claiming the whole, and until the levy after mentioned, held the actual possession of the whole, under such deed and claim, nor has the plaintiff ever entered to regain his seisin as cotenant." "When it is considered that Baldwin did not enter and hold as a tenant in common, but under a deed conveying the whole, that the whole was levied on as the property of Baldwin and seisin delivered of the whole, we think the defendant is to be taken and deemed a stranger, and that these acts amount to a disseisin of the plaintiff, in the same manner as if he had been sole seised."

In *Bradstreet v. Huntington*, 5 Pet. 402, 442, one tenant in common undertook to convey the whole premises and the grantee entered into actual possession intending to claim the whole. The court say: "There was no tenancy in common, because Potter entered in fact in his own right, under a deed conveying a fee simple in the entirety. . . . He entered under that deed as a sole, exclusive, absolute owner in fee; this is altogether inconsistent with an entry to the use of himself and another": *Willison v. Watkins*, 3 Pet. 53.

So too in *Clapp v. Bromagham*, 9 Cow. 531, the court say: 278 "These parties, it is said, stood in the relation of tenants in common to each other; and the possession of one of them was, in judgment of law, the possession of all of them; and in support of the position it is said that the title of the defendant was derived from the same source with that claimed by the petitioners; and it was contended that the defendant entered under

the title vested in Peter, as tenant in common with the petitioners; and that his position could not be adverse to them, but inured to their benefit. But is it true that the defendant's entry was as tenant in common? There is no color for the suggestion. On the contrary, the bill of exception clearly shows that he entered as purchaser of the whole, and held as tenant in severalty, claiming to be the sole and exclusive owner; that his title was, from its commencement, adverse to the petitioners; he never held in common with them, nor acknowledged any right in them or any of the heirs of William Bromagham the ancestor; he purchased of Peter as being the sole proprietor, and who at the time claimed to be, and was supposed to be the exclusive and absolute owner of the farm; and he has from that time to the commencement of this suit continually claimed and held the premises in exclusion of all others, and has the sole seisin": See, also, *Parker v. Proprietors*, 3 Met. 91, 101, 37 Am. Dec. 121; *Watson v. Jeffrey*, 39 N. J. Eq. 626; *Foulke v. Bond*, 41 N. J. L. 534; *Prescott v. Nevers*, 4 Mason, 326, Fed. Cas. No. 11,390.

But no citation of authorities is required to establish the proposition that one who enters under a warranty deed of the entire premises is never presumed to be a tenant in common but a tenant in severalty. By the express terms of his deed he acquires, not an undivided interest, but the entire estate. In the case of wild lands, possession under such a deed is by the terms of the statute in question, "such as comports with the ordinary management of wild lands in Maine," and if continued for twenty years bars the right of action.

The statute does not apply to "actions between cotenants." It is competent for the plaintiff to prove that during all the years in question he claimed title only to an undivided share of the land and thus sustained the relation of a cotenant. It is equally competent for the defendant to prove that during the same period he was not a ³⁷⁰ tenant in common with anyone, but was claiming and occupying the entire estate. With respect to both plaintiff and defendant, the character and quality of the possession must be determined by the acts of ownership and by the intention as disclosed by all the circumstances.

In the case at bar, it has been seen that the defendant and its predecessors claimed and occupied the entire south half of the township in question under recorded warranty deeds, and cut a portion of the logs sued for on the north half of the town under permits from the Coburns, who also claimed and held

that part of the town under recorded warranty deeds. The purchasers of the south half paid thirty-three thousand dollars for the land, and they and the defendant expended thirty-five thousand dollars more in permanent improvements for the purpose of taking off the lumber. It was not in controversy that this was done in good faith and in full confidence that they had acquired under these deeds an absolute and exclusive title to the whole of the land purchased. It was not in controversy that the Coburns on the north half, and the defendant and its predecessors on the south half exercised various acts of ownership on the several tracts by cutting timber and permitting operations, by leasing portions of the land for the erection and maintenance of permanent sporting camps and by employing agents to protect the township against fires; and it was admitted that for nearly thirty years prior to the date of the writ, they had paid all state and county taxes assessed upon the town, as shown by the state treasurer's records. It was not claimed that during any part of this period, either the plaintiff, or any of his predecessors in title, had paid any tax whatever to the county or to the state, or had done any act whatever indicative of ownership. During all this period the defendant and its predecessors were at no time holding in submission to a record title in another, but in assertion of an absolute title in themselves; they were at no time holding as tenants in common with another, but as exclusive owners of an entire estate. The action is not "between cotenants" within the meaning and contemplation of the statute in question. The act was obviously designed to operate as a statute of repose through the confirmation of ancient titles; but the construction contended for by the plaintiff ²⁸⁰ would tend to defeat and not to effectuate this beneficent purpose. A persistent search for technical defects in ancient titles of wild lands is quite likely to be rewarded with success; and if one who has for half a century been in the exclusive possession of a township, exercising all the acts and enjoying all the rights of ownership, claiming the entire tract under a recorded warranty deed, must be deemed, contrary to all his acts and intentions, to be a tenant in common with the purchaser of an abandoned title to a fractional interest in the town, the consequence would be continued agitation, and the statute would cease to be one of repose.

2. The second part of the argument of the learned counsel for the plaintiff is devoted to the discussion of the proposition that

the act in question violates both the state and federal constitution and is therefore inoperative and void.

The power of the judicial department of the government to prevent the enforcement of a legislative enactment by declaring it unconstitutional and void is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. The constitutionality of a law is to be presumed until the contrary is shown beyond a reasonable doubt: *State v. Rogers*, 95 Me. 94, 85 Am. St. Rep. 395, 49 Atl. 564; *State v. Lube*, 93 Me. 418, 45 Atl. 520; *Cooley's Constitutional Limitations*, 6th ed., 217. "Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section and yet be perfectly distinct and separable so that the first may stand though the last fall": *Cooley's Constitutional Limitations*, 210.

In this case the attention of the court is called in limine to the fact that a statute of the same effect as the third section of this act was declared unconstitutional in *Bennett v. Davis*, 90 Me. 102, 37 Atl. 864. But section 3 is wholly independent of the other sections of the act. It requires the party claiming under a tax sale to pay to the ²⁸¹ clerk the amount of the tax before the trial of an action involving the validity of the sale. It is neither connected in meaning nor co-operative in purpose with the other provisions of the act, but is so clearly distinct and separable that its validity or invalidity is entirely immaterial in the consideration of those provisions of the act involved in the case at bar.

But the constitutional objection to which a large part of the argument of plaintiff's counsel is devoted is that the statute "compels a person in the enjoyment of all his rights to institute proceedings against an adverse claimant to retain those rights, therefore imposing a grievous and expensive burden upon him."

In presenting this objection he quotes a passage from *Cooley's Constitutional Limitations*, page 455, that "one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified, to test the validity of a claim

which the latter asserts but takes no steps to legally enforce," and cites numerous authorities in support of the statement.

There is no occasion to question the soundness of this doctrine. It is sufficient to observe that it does not appear to be applicable to the provisions of the statute here in question or to the facts of this case. It would be applicable to a case precisely the reverse of the one at bar.

It has been seen that here all the provisions of the statute are designed and adapted to protect and not to extinguish the rights of one who is in the possession and enjoyment of his property. As already stated, the legislature deemed it just to recognize the practical distinction between the acts constituting the occupation and enjoyment of wild lands and those accepted as proof of the possession of cultivated lands. The statute protects no one unless for twenty years he has not only paid all the taxes upon the land, but during all that time has also had such "exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine," and unless it further appears that no former owner, during all that time, has paid any such taxes "or done any other act indicative of ownership."

²⁸² It has also been seen that with reference to the contending parties in the case at bar, the facts enumerated in the statute have all been established by the findings of the jury. It has been found that the defendant and his predecessors in title had for more than twenty years been in the exclusive and adverse possession of the township, and that the plaintiff for more than twenty years had done no act indicative of ownership and had not been in the occupation or enjoyment of the property.

The second objection raised by the plaintiff is that the statute "impairs, disturbs and destroys vested rights by acting retrospectively on titles in existence when it was passed, by changing the principles and nature of those facts by means of which those titles had existed and been preserved in safety."

In support of this proposition, the counsel cites *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 286, 11 Am. Dec. 79, and the objection appears to be stated in the language of the opinion in that case. The doctrine there laid down is undoubtedly sound law as applied to the facts of that case and to the statute there brought in question. But the provisions of the statute then under consideration were so radically different from those at bar that the decision in that case is not an authority to sustain the plaintiff's contention here. On the contrary, the

great principle there enunciated, upon which the validity of every such statute of limitations must depend, is a conclusive answer to the leading objections relied upon by the plaintiff in the case at bar. It has been seen that by the express terms of the fourth section of the statute of 1895, the act does not apply "to actions now pending in court nor to those commenced before January 1, 1900." It is not only not retrospective, but is distinctly made prospective only in its operation, and the reasonable period of five years after the date of the enactment is allowed during which all controversies respecting such titles might be adjusted according to "the principles and the nature of those facts by means of which those titles had existed" before the passage of the act. On the other hand the sixth section of the statute of 1821 considered by the court in the Laboree case above cited, was made applicable in express terms to any "action which has been or may hereafter be brought," etc. In ²³³ the opinion the court say: The whole section was declared by the court to have been enacted "for the purpose of abolishing the distinction between a possession under a claim of title on record, and a possession without any such claim or pretense of title." Although this statute, like that of 1895, undoubtedly had the effect to change "the principles and the nature of those facts by which titles had before been acquired," the court unhesitatingly declare that so far as the act was prospective in its operation it was not liable to any constitutional objection, and that in all cases the legislature had authority to enact such statutes of limitations, provided a reasonable time after the passage of the act was allowed for the prosecution of existing claims. As the statute of 1821 allowed no time whatever for the prosecution of such claims after the passage of the act, it was held unconstitutional so far as it was retrospective in its operation. "The authority of the legislature to pass statutes of limitations," say the court, "in the form in which they are usually enacted will not be denied. Such statutes have been considered salutary in their consequences. With respect to personal actions they serve to render people attentive to the early adjustment of demands, and prevent the disturbance of settlements which have been made but of which the proof may have been lost. . . . The limitation of real actions is equally salutary; and the community has doubtless derived much advantage from those laws which have gradually reduced the time after which the owners should be barred of their actions. But all such laws have allowed a reasonable time within which they might prosecute their claims and make

their entries. A sense of right and justice seems to have dictated this provision."

This allowance of a reasonable time for the prosecution of claims after the passage of an act of limitation made to take effect upon existing rights is the settled principle by which the constitutionality of all such acts is tested. "It is essential," says Judge Cooley, "that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action"; though what shall be considered a reasonable time must be settled by the judgment of the legislature. And the courts will not inquire into the wisdom of its decision in establishing the period of legal bar ²⁸⁴ unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice: Cooley's Constitutional Limitations, 450, and cases cited. See, also, Wood on Limitation of Actions, sec. 11, and cases cited.

So in *Terry v. Anderson*, 95 U. S. 632, the court say: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect: *Hawkins v. Barney*, 5 Pet. 457; *Jackson v. Lamphire*, 3 Pet. 280; *Sohn v. Waterson*, 17 Wall. 596; *Christmas v. Russell*, 5 Wall. 290; *Sturges v. Crowninshield*, 4 Wheat. 122. And it is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain. . . .

"In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable."

As to all pre-existing titles the statute of 1895 involved in the case at bar is unquestionably a statute of limitations, and it declares in explicit terms that it shall not apply to pending actions nor to those commenced before January 1, 1900, thus allowing nearly five years for the prosecution of existing claims after the passage of the act.

It is not in question that this was a reasonable time. The plaintiff's writ bears date September 18, 1902, and his action is accordingly subject to the operation of the first section of the statute of 1895 hereinbefore quoted.

This conclusion that the statute is to be construed as a statute of limitation and of repose, supported as it is by an entire unanimity of judicial authority both state and federal, affords a sufficient answer to all of the above constitutional objections specified in the argument ²⁸³ of counsel, and renders it unnecessary to give them further consideration in detail.

It is accordingly the opinion of the court that the statute of 1895, as above construed, is not in contravention of any provision of the state of federal constitution.

Motion and exceptions overruled.

If a Cotenant conveys the entire property, this constitutes an ouster of his co-owners, and the possession of the grantee may be adverse to them: Beall v. McMenemy, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134; Marray v. Quigley, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869; Sudduth v. Sumeral, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883, and cases cited in the cross-reference note thereto.

A Statute May be Void in Part and valid as to the remainder, unless the valid and invalid portions are so intimately connected as to warrant the belief that the legislature intended them as a whole: Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982; Ballentine v. Willey, 3 Idaho, 496, 31 Pac. 994, 95 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

A Statute Providing that if the Owner of Land, his heirs or assigns, shall fail to pay all arrearages of taxes levied thereon, or which ought to have been levied before a certain date, such land shall be forfeited to and vest in the state without judicial proceeding, has been held to deprive the owner of his property without due process of law: Parish v. East Coast Cedar Co., 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718, and see the cases cited in the cross-reference note thereto.

On Shortening the Statutory Period in which actions can be brought, see Tice v. Fleming, 173 Mo. 49, 72 S. W. 689, 96 Am. St. Rep. 479, and cases cited in the cross-reference note thereto.

MORROW v. MOORE,

[98 Me. 373, 57 Atl. 81.]

STATUTE OF FRAUDS—Deed Signed but not Delivered.—An oral contract for the sale of lands is not taken out of the statute of frauds as to the vendor by his signing and acknowledging a conveyance pursuant thereto and placing it in the hands of his attorney, if it remains within the grantor's control. (p. 412.)

FRAUD, Concealment of Willingness to Sell Property at a Less Price.—If a vendor makes an oral and nonenforceable contract for the sale of real property which he declares his unwillingness to perform, he is under no obligation to disclose to the vendee the subsequent formation of a purpose to abide by such contract, and is not guilty of fraudulent concealment in entering into a new contract with his vendee for a greater price without disclosing such change of purpose. (pp. 412, 413.)

RESCISSIION—A Partial Rescission is not Allowed by Law.—One who has sufficient cause to rescind a contract for fraud must rescind the whole or none. (p. 413.)

Forrest Goodwin, for the plaintiff.

S. J. and L. L. Walton, for the defendant.

³⁷⁵ **WISSELL, C. J.** Action of assumpsit upon a bank check given by the defendant to the plaintiff. The defense is a want of consideration, and that the check was obtained by the plaintiff by means of fraudulent misrepresentations and a fraudulent concealment of a material fact. The case comes to the law court upon a report of the evidence.

The check in suit was given as a part of the following transaction: The plaintiff, who lived in the state of Connecticut, owned real estate, consisting of a lot of land and the buildings thereon, in the village of Madison in this state; the defendant being desirous of purchasing this property, after some correspondence with the plaintiff, sent his father to Connecticut to see the plaintiff and negotiate for its purchase; the father went, saw the plaintiff, informed him of his errand, inquired the price of the property, and after various offers made by the one side and the other, they agreed upon a sale and purchase of the property for the sum of \$3,750, in addition to which the purchaser ³⁷⁶ was to pay the amount of an insurance premium recently paid by the plaintiff, making in all the sum of \$3,786. It was further agreed at the time that the plaintiff should have the deed drawn by Mr. Small, an attorney at Madison, sent to the plaintiff for the signatures of himself and wife, and then returned to the attorney at Madison to be delivered by him to the

defendant upon the payment of the purchase price; this method of carrying out the transaction being suggested and insisted upon by the plaintiff—a matter of some importance as showing the position and relation of Mr. Small to the parties.

Shortly after this the plaintiff wrote two letters to Mr. Small, directing him to draft the deed, informing him of the purchase price, giving him certain instructions in regard to an existing lease upon a portion of the property, and saying that he should expect him to look out for his (the plaintiff's) interests in the matter. The deed was drafted by Mr. Small according to instructions and sent to the plaintiff for the signatures of himself and wife and for acknowledgment, but by that time the plaintiff had concluded not to sell the property at the price agreed upon and so informed the defendant by letter; thereupon the defendant started for Connecticut, saw the plaintiff and finally a new trade was concluded between them, whereby the defendant was to pay the sum of \$3,975 for the property. This amount was made up by calling the purchase price \$4,000 but an allowance of \$25 was made to the defendant on account of his traveling expenses. Then and there the defendant gave the plaintiff the check in suit for \$189 and agreed to pay the balance of \$3,786 to Mr. Small in Madison upon the delivery of the deed.

This was on March 6, 1902, but in the meantime, on March 4, 1902, the plaintiff had again changed his mind and concluded to carry out the first trade to sell for \$3,786, and had forwarded the deed, signed by himself and wife, and duly acknowledged, to the attorney in Madison with instructions to deliver the same upon the receipt of the above sum. The defendant left Madison for Connecticut upon the morning of March 5th, the same day, but before this last letter from the plaintiff was received by Mr. Small, and without any knowledge of this letter. The defendant claims that he had no ³⁷⁷ knowledge of the fact that the plaintiff had concluded to carry out his first trade and to sell the property for the sum of \$3,786 until after the second trade was made and he had given his check for \$189 in pursuance thereof, and that the plaintiff then first informed him that he had already sent the deed to Mr. Small to be delivered upon the payment of the sum first agreed upon. After more or less controversy between the parties arising out of the information then, as he claims, first obtained, the defendant started for home, and while on the way directed payment upon this check to be stopped by a telegram to the bank upon which it was drawn.

But notwithstanding this, the defendant upon his return home carried out the trade for the purchase of the property by paying to Mr. Small the sum required, \$3,786, and by receiving delivery of the plaintiff's deed.

There is no great conflict in the testimony about these facts, except that the plaintiff claims that this information in regard to the deed having been sent to Mr. Small for delivery was given to the defendant before the check in suit was drawn by the plaintiff and given him. But we think that this conflict is immaterial, and that it is not necessary to determine the issue of facts thus raised, because assuming that the defendant's position in that respect is the correct one, and that he had no knowledge of this fact until after the check had been given, it does not constitute a defense to this suit upon the check.

The first contract between the plaintiff and the defendant's father, acting for the latter, was wholly oral, and being for the sale of lands was not enforceable under our statute. The plaintiff had a legal right to refuse to carry out the terms of that unenforceable contract. It did not become enforceable against the plaintiff by his signing a deed, so long as that deed remained in his possession or under his control, and it was equally under his control while it was in the possession of his attorney. That Mr. Small, throughout the transaction, was and acted as the attorney for the plaintiff, and that the deed was not simply sent to him to be held in escrow until the performance of some condition, is clearly apparent from the evidence in the case: See *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124. So that the possession of the deed by the plaintiff's attorney was the possession of the plaintiff, ³⁷⁸ and the deed was as fully subject to his control as if in his manual possession.

Nor do these facts, the signing of the deed by the plaintiff and its being sent by him to his attorney, constitute a sufficient memorandum in writing to take the contract out of the statute of frauds. It was still an unexecuted deed because undelivered and still in the possession and under the control of the grantor: *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124.

When, on March 6th, the defendant visited the plaintiff and they concluded a new contract for the sale of the property, there was no duty imposed upon the plaintiff to inform the defendant that he had previously concluded to sell for a less price, nor that he had already signed a deed for a smaller consideration, so long as that deed remained in his possession or subject to his control. Although he had determined to sell the property at a

certain price, he had the right until he did sell or make a valid contract of sale, to get a larger price if a purchaser was willing to pay it. An owner of property may have determined to sell that property at a certain price, but he is under no obligation to communicate that fact to a prospective purchaser. So that as there was no duty upon the plaintiff to disclose these facts above referred to, it was not a fraudulent concealment to withhold this information. These were not material facts which he was bound to disclose to a person who was desirous of purchasing the property.

Moreover, the defendant, after being in full possession of all of these facts, completed the transaction to the extent of paying the remainder of the purchase price and by taking a deed of the property. If he had had sufficient cause to rescind the contract by reason of fraud upon the part of the plaintiff, he should have done so in whole, by refusing to take the deed, so that the plaintiff would have retained the title to his property. The law does not allow a partial rescission, whereby the party claiming the right to rescind can retain the beneficial part of a contract and refuse performance of his part.

Judgment for plaintiff for \$189 and interest from March 10, 1902, the date of the representation of the check and refusal of payment, and for protest fees.

A Deed placed in escrow beyond the control of the grantor, to be delivered upon his death, is valid. It is otherwise, however, if the delivery to the third person is conditional, or the grantor retains any control over the instrument: *Lippold v. Lippold*, 112 Iowa, 134, 84 Am. St. Rep. 331, 83 N. W. 809; *Osborne v. Eslinger*, 155 Ind. 351, 80 Am. St. Rep. 240, 58 N. E. 439. See *Dyer v. Skadan*, 128 Mich. 348, 87 N. W. 277, 92 Am. St. Rep. 461, and cases cited in the cross reference note thereto; monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 554.

FLEMING v. COURTENAY.

[98 Me. 401, 57 Atl. 592.]

BANKRUPTCY.—An Assignee in Bankruptcy may Refuse to Take Possession or Receive the Title to onerous property or such as will be a burden instead of a profit. (p. 419.)

BANKRUPTCY, Election of Assignee to Take or not Take Title to Property.—An assignee in bankruptcy is required to elect within a reasonable time whether he will take title to onerous property, and if within such time he does not elect to take the property, he is deemed to elect to reject it. (p. 419.)

BANKRUPTCY, Property, When Remains in Bankrupt for Failure of Assignee to Elect to Take Title.—Whenever an assignee elects to reject or when it must be presumed that such has been his election, an asset, whatever it is, remains in the bankrupt. (p. 419.)

BANKRUPTCY, Assignee, When Presumed to have Elected not to Take Title to an Unliquidated Claim.—If an assignee having information of the existence of an unliquidated claim in favor of a bankrupt for more than twenty-two years neglects to assert title thereto, it will be presumed that he has elected not to accept this asset of the estate, believing it to be burdensome and unprofitable, and if he files and settles his account declaring that he has no assets of any kind in his possession, the election is final and irrevocable. (pp. 419, 420.)

BANKRUPTCY, Election of Assignee not to Take Title, Effect of a Subsequent Sale Under Order of Court.—A sale of a claim in favor of a bankrupt made after his estate had been in bankruptcy more than twenty-two years, and after the assignee is presumed to have elected not to accept it as an asset, and the order of court authorizing the sale, do not prevent the heirs of the bankrupt from insisting that such sale is therefore unavailing and passes no title to the purchaser. (pp. 421, 422.)

PLEADING—Amendment Changing Parties, When not Permissible.—A plaintiff suing in his individual capacity cannot amend the complaint so as to sue as executor and thereby recover in that capacity. (p. 422.)

O. D. Castner, Harvey N. Shepard and Enoch Foster, for the plaintiff.

Robert Cushman and J. E. Moore, for the defendant.

405 WISSELL, C. J. On November 3, 1863, George W. Lawrence, of whose estate the defendant is administrator de bonis non, entered into a contract with the United States government to construct, according to plans and specifications, an iron-clad steam battery or monitor, afterward called the "Wassuc." The contract price was \$386,000, but it was stipulated in the contract that the government might at any time during the progress of the work made such alterations and ad-

ditions to the plans and specifications as might be deemed necessary or advisable, and should pay therefor a fair and reasonable rate.

Upon the same day of this contract with the government, Lawrence made a contract with James A. Maynard, now deceased, and under whom the plaintiff claims by virtue of an assignment from his assignee in bankruptcy, which title will be later referred to, whereby the parties to this last contract agreed to jointly construct this monitor according to the plans and specifications to be furnished by the government. Provisions were made in this contract in relation to the services to be performed by each of the parties and as to the compensation of each therefor and for a division of the profits of the enterprise, which are not now important because of a subsequent contract in relation to a settlement between the parties of all matters growing out of the construction of this monitor.

⁴⁰⁸ The construction of the vessel was very much delayed, for various reasons, but it was finally completed, delivered to, and accepted by the government on October 4, 1865. This delay was at least partially caused by the changes in and additions to the plans and specifications made by the government, for which large extra compensation was claimed and received.

On December 9, 1865, an informal agreement of settlement was made between these parties, but this became superseded by a formal agreement under seal made between them on December 12, 1865, whereby Lawrence was to immediately pay Maynard the sum of \$8,000 in cash; it provided for a division of tools and materials between them; Lawrence was to pay all indebtedness incurred by them in the construction; the contract also contained this clause: "And the said Lawrence further agrees to pay to the said Maynard one-half of whatever sum he may receive from the United States on final settlement for said monitor, over and beyond the sum of \$546,000, including all sums already received."

By a letter dated May 1, 1867, Lawrence informed Maynard that he had at that time received on the contract the sum of \$543,721.79, and for gun carriages \$3,500, making a total of \$547,221.79, from which he claimed that there should be deducted his personal expenses and other expenses incurred in obtaining the latter payments, amounting to \$1,148, leaving a balance of \$546,073.79. It is claimed that through some inadvertence the sum stated to have been received for the gun carriages was \$100 in excess of the sum actually received, and

that consequently Maynard at that time was not entitled to receive anything from Lawrence, if it were proper to deduct the expenses incurred, or, if the expenses should not be deducted that he was at that time only entitled to receive, at most, one-half of \$1,121.79, the excess over the sum stated in the clause of the contract quoted. Upon the part of the plaintiff claim is made that Lawrence had in fact at that time received a larger amount than reported, but in view of our conclusion it is unnecessary to consider these contentions.

Lawrence died November 18, 1887, and his widow, Thankful M. ⁴⁰⁷ Lawrence, was appointed administratrix of his estate in the month of December following. The administratrix subsequently applied to Congress for relief and for additional compensation for the construction of this monitor. After many disappointments and the failure of both houses to pass a bill for her relief during the same Congress, both houses finally concurred in the passage of an act, approved October 1, 1890, wherein it was provided that "the claims of George W. Lawrence for further compensation for the construction of the United States monitor 'Wassuc' might be submitted to the court of claims."

In pursuance of this act of Congress the administratrix, on October 24, 1890, filed in the court of claims of the United States her petition to be allowed additional compensation for the construction of the monitor, which, she claimed in her petition, the estate was entitled to by reason of the many changes made by the government in the plans and specifications, the failure of the officials of the department to seasonably furnish such plans and specifications as they were required, and on account of other delays caused by the department officials.

While her claim was pending before Congress the administratrix made a contract with one McKay, wherein she agreed to give him the exclusive control of the prosecution of this claim before Congress or in the courts, and to pay him as compensation for his services fifty per cent of all sums collected. While the claim was pending in the court of claims a new agreement was made whereby his compensation was increased to sixty per centum.

On February 15, 1897, the court of claims filed an opinion in the case and ordered judgment for the claimant for the sum of \$36,385.08, and on July 23, 1897, two treasury warrants, one for \$14,554.04 and the other for \$21,831.04, were issued, both payable to the order of the defendant as administrator de bonis

non of George W. Lawrence, deceased, the administratrix having resigned and the defendant having been appointed in the meantime. It will be noticed that the smaller of these warrants was for forty per cent, and the larger for sixty per cent of the judgment of the court of claims, the two aggregating the amount of the judgment. The smaller of these two warrants was collected by the defendant, while the larger ⁴⁰⁸ was indorsed over to McKay in accordance with the agreement that he should receive sixty per cent of the amount collected as compensation for his services.

This action is to recover of the estate of Lawrence one-half of the whole amount received by him in his lifetime and of the amount awarded to his estate by the court of claims, in excess of \$546,000 under the agreement of settlement of December 12, 1865.

A great many objections are urged against the maintenance of this suit, some of which go to the merits of the cause, while others are more or less technical in their nature. As we feel constrained to decide that for one reason, at least, the action cannot be maintained, it is unnecessary to consider the numerous objections to the maintenance of the action, other than the one, which, we think, must be sustained.

This is as to the title of the plaintiff to the claim in suit and her right to maintain this action. In relation to this question the following facts are important: Upon May 19, 1876, James A. Maynard, then of Newton, Massachusetts, was adjudged a bankrupt by the United States district court, for the district of Massachusetts, upon his voluntary petition; on June 10, 1876, Thomas Weston, Jr., of Newton, Massachusetts, was appointed assignee and on the 13th of that month accepted the trust; on December 5, 1876, the bankrupt petitioned for his discharge, stating in his petition "that no assets had come into the hands of the assignee"; one creditor only proved his claim and that was for a sum less than \$20." On December 30, 1876, the assignee presented his account for settlement, showing some small disbursements for officers' fees and for the publication of notices, and also showing that he had received "no assets or property of any kind." This was accompanied with a petition asking for the allowance of such account, in which he says, "that as such assignee he had conducted the settlement of the said estate."

Upon this petition the assignee's account was examined, found correct and allowed, and it was ordered "that the said assignee be discharged according to the provisions of the twenty-

eighth section of the bankrupt act of March 2, 1867." On February 2, 1877, the ⁴⁰⁸ bankrupt received his discharge. During the proceedings, the date does not appear, the assignee made a declaration that he had been unable to find any assets, goods or credits belonging to the estate, and that none had come to his knowledge or possession.

On June 28, 1899, something over twenty-two years after the estate of Maynard in bankruptcy had been finally closed, and after the bankrupt had received his discharge, and the assignee had presented and settled his final account and had been discharged from the trust, the assignee presented to the district court of the United States for the district of Massachusetts, a petition setting forth the bankruptcy of Maynard in 1876, and his appointment as assignee, and saying, "that there were no assets of any value in said estate that came to the possession or knowledge of said assignee or petitioner"; and "that your petitioner has now been offered by Mrs. Alice E. Fleming of Boston in said district, a daughter of said deceased bankrupt, \$100 in cash for all of the assets if every name and nature belonging to the estate of the said James A. Maynard"; and asking that he be authorized by a decree of the court to make sale of all of such assets to the said Alice E. Fleming for the sum of one hundred dollars in cash. Upon the same day, without any notice upon the petition, a decree was filed authorizing Weston to sell and convey to Alice E. Fleming "all of the assets of every name and nature belonging to the estate of the said bankrupt for the sum of \$100 dollars cash, and to make, execute and deliver a proper deed conveying the same to said purchaser." This decree was signed as follows: "By the court, F. S. Fiske, deputy clerk."

Upon the same day as the date and filing of the last petition and of the decree thereon, Weston, in pursuance of the decree made a bill of sale or assignment to this plaintiff of "all of the assets of every name and nature belonging to the estate of the said bankrupt."

This is the title under which the plaintiff sues, the action being in her own name, in her individual capacity, and a copy of the bill of sale or assignment having been filed with the writ when the action was entered in court. The question is whether or not under the foregoing circumstances, Weston, on June 28, 1899, at the time ⁴¹⁰ of the transfer and assignment by him to the plaintiff had any title to this claim against the estate of Lawrence, which he could assign to the plaintiff, and upon

which she could maintain an action in her own name. We are of the opinion that this admits of only one answer, and that in the negative, and are constrained to hold that this action cannot be maintained.

It is, of course, true that by virtue of the bankruptcy proceedings this unliquidated claim against Lawrence or his estate, as well as all other assets and estate of the bankrupt, not exempt, whether mentioned in the bankrupt's schedules or not, passed to the assignee; but it is equally clear and well settled by a long line of decisions of the federal courts that an assignee in bankruptcy may refuse to take possession of onerous properties or such as will be a burden instead of a profit. As shown by the deposition of Weston this unliquidated claim, although not mentioned in the bankrupt's schedules, was known to him during the time that he was assignee. He testifies that he talked the matter over with Mr. Maynard, but that there was no money to press the claim and that there seemed to be no occasion for him to do so as there was but one claim proved against the estate, and that very small. Again, he testifies in answer to an interrogatory: "My impression is that I made some inquiries about it [this claim] and found that it would be expensive and be attended with a great deal of trouble and time, and I think that I found out that it would be resisted, and I did not think it was worth while under the circumstances for me to do anything about it. I can't say that I dropped it. That's all that I did."

It is not only well settled, as above stated, that an assignee may refuse to take possession of onerous properties, or such as would be burdensome instead of profitable to the estate, subject undoubtedly to the control of the court, but also that an assignee in such a case is required to elect, within a reasonable time, whether or not he will take any particular property of the estate; and that if within such reasonable time he does not elect to take the property, it is deemed an election to reject it. When he elects to reject, or when it must be presumed that such has been his election, the asset, whatever it is, remains in the bankrupt. This doctrine was early stated in this ⁴¹¹ country in *Smith v. Gordon*, 6 L. R. 317, Fed. Cas. No. 13,052, and in *Amory v. Lawrence*, 3 Cliff. 523, Fed. Cas. No. 336, and has since been universally followed. In *Dushane v. Beall*, 161 U. S. 515, 16 Sup. Ct. Rep. 638, the chief justice stated the doctrine in this way: "It is well settled that assignees in bankruptcy are not bound to accept property which, in their judgment, is of

an onerous and unprofitable nature, and would burden instead of benefiting the estate; and can elect whether they will accept or not after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course." And again, in the same case: "If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action, or forbearance to act, indicates in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, J., in *Smith v. Gordon*, 6 L. R. 317, Fed. Cas. No. 13,052, he, with such knowledge, 'stands by without asserting his claim for a length of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto": See, also, *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53, and *Lancey v. Foss*, 88 Me. 215, 33 Atl. 1071. A further citation of authorities would not be useful.

In this case, although the assignee had information in regard to the existence of this unliquidated claim, for more than twenty-two years he neglected to assert any title thereto. If nothing else appeared, the irresistible inference from his neglect to affirmatively assert his claim for these many years would be that he had elected not to accept this asset of the estate, believing it to be burdensome and unprofitable. But much more does appear confirmatory of this inference, if not sufficient to show a definite declaration or distinct action upon his part not to accept the claim. Although having knowledge of its existence he made declaration that he had been unable to find any assets, goods or credits belonging to said estate and that none had come to his knowledge or possession. He filed and settled his final account showing disbursements but no assets or property of any kind. In his petition for the allowance of this account, he states that "he has conducted the settlement of the said ⁴¹² estate." He allowed the estate to be finally closed and received a discharge from his office of assignee, while this claim was in existence. He testified that he came to the conclusion, after investigation, that it was not worth while to attempt to enforce the claim.

In all of these ways he affirmatively showed an election not to accept this asset of the estate, because it was burdensome and supposed to be unprofitable. Even after the lapse of more than twenty-two years, during which time the bankrupt died and the

bankruptcy act of 1867 was repealed, when, on the 28th of June, 1899, he petitioned for leave to sell all of the assets of the estate for the sum of \$100, he states in that petition, "that he entered upon his duties as such assignee and duly discharged all of the duties of said trust," and again, "that there were no assets of any value in said estate that came to the possession of (or) the knowledge of said assignee or petitioner."

It is not necessary to decide whether or not an assignee in bankruptcy, who has received his discharge as such because the estate has been closed, can thereafter assert title to a portion of the property of the bankrupt, and enforce or sell the same. We are unable to perceive how a person who takes property in a fiduciary capacity can have any such right or title after he has performed the duties of and has been discharged from the trust, and various cases have been cited which hold that after the expiration of his trust he has no such right or title. But, in any event, the fact that an assignee does not assert his right to an asset of a bankrupt estate during the time that he holds the trust and that the estate is closed and he is discharged from the trust without any such assertion on his part, is strong evidence of his election not to accept. So that, in this case, we not only have the forbearance of the assignee to take any action in the assertion of his claim, during the time that he was assignee and for more than twenty-two years afterward, but we also have the positive acts of the assignee above referred to, which clearly and irresistibly show, in our opinion, a deliberate intention to reject this particular claim belonging to the bankrupt's estate.

We do not think that the action of the district court of the district of Massachusetts in making the decree referred to can be ⁴¹² regarded as an adjudication to the contrary. No reference was made in this petition to this claim, or to any circumstances in regard to it, the court had no means of knowing that the assignee sought authority to sell an asset which he had repudiated twenty-two years before, and, in fact, the assignee himself apparently was not aware that a claim of this magnitude, or of any value, existed, because in that latter petition he says that there were no assets of any value which came to his possession or knowledge. No notice was given upon this petition, there could have been no adjudication of this question; the petition, the decree and the assignment were all filed and made upon the same day. Neither do we think that it is any answer to this result that in this case, until after the judgment of the

court of claims, this claim was uncertain and unliquidated. This contingent claim with all of its uncertainties might have been sold by the assignee for what it was worth, or for what it would bring, during the time that he was assignee.

It follows that the title to this claim against the Lawrence estate, which the assignee refused to take, remained in the bankrupt: See the cases above cited. And, upon his death, went to his personal representatives. It is suggested by the counsel for the plaintiff that if the court should decide that the action could not be maintained by the plaintiff in her individual capacity, that she was in fact the executrix of the will of James A. Maynard and that the writ might be amended by making her a party plaintiff in that capacity. Unfortunately, this cannot be done. Our statutes in relation to amendments are very liberal and allow the summoning in of additional defendants, or the coming in of additional plaintiffs, and even the striking out of one or more plaintiffs, when there are two or more, but they do not allow the substitution of one party plaintiff or defendant for another. In *Glover Co. v. Rollins*, 87 Me. 434, 32 Atl. 999, it was decided that the statutes do not authorize the substitution of a new defendant for the only one originally named in the writ. In *Duly v. Hogan*, 60 Me. 355, it was decided that this could not be done indirectly, by first summoning additional defendants, and then discontinuing as to the original defendant. In *Jones v. Sutherland*, 73 Me. 157, 158, it was decided that a writ could not be ⁴¹⁴ amended by inserting the name of a plaintiff when there was no plaintiff named therein before.

There is no more identity between a person suing as executor, upon a cause of action accruing to his estate, and the same person suing in his individual capacity, upon a cause of action accruing to himself, than there is between two entirely different persons. It is true, that in *Bragdon v. Harmon*, 68 Me. 29, where a plaintiff was described in the writ as executor, the court held that an amendment could be allowed by striking out the words "executor, etc."; but the reason of this, as expressly stated in the opinion, was because the cause of action was described as one accruing to the plaintiff in his own right, and consequently the words allowed to be stricken out were simply *descriptio personae*. That case is no authority for the power of the court to allow an amendment whereby a new plaintiff would be substituted, or even the same person as plaintiff but in an entirely different capacity. In this very case, when it came to the

law court before upon exceptions to a ruling on a demurrer to the defendant's plea in abatement (*Fleming v. Courtenay*, 95 Me. 128, 49 Atl. 611), it appeared that the plaintiff had joined in the same writ counts in which the cause of action was alleged as accruing to the estate and other counts in which the cause of action was alleged as accruing to her individually. It further appeared that she was not executrix at that time. But, inasmuch as the counts alleging that the cause of action accrued to her individually were sufficient, with a slight amendment, she was allowed to amend her writ by striking out the counts alleging that the cause of action accrued to the estate which she represented and by making the slight amendment necessary in the counts declaring upon the cause of action in her own right, upon the authority of *Bragdon v. Harmon*, 69 Me. 29. This having been done, the action then became entirely an action in her own name. In *Winch v. Hosmer*, 122 Mass. 438, the court, in construing the Massachusetts statutes in relation to amendments, somewhat broader than ours, held that these statutes "permit the substitution of a new plaintiff," but this is contrary to the past and present construction of our statutes upon the subject by this court.

The case having come to the law court upon a report of the ⁴¹⁵ evidence, our decision is, that, upon the foregoing findings of fact, and for the reasons above given, the entry must be judgment for defendant.

For Recent Decisions in Bankruptcy cases, see Crosby v. Spear, 98 Me. 542, post, p. 424, 57 Atl. 881; McKittrick v. Cahoon, 89 Minn. 383, post, p. 606, 95 N. W. 23; Old Town Bank v. McCormick, 96 Md. 341, 94 Am. St. Rep. 577, 53 Atl. 934; Bernhardt v. Curtis, 109 La. 171, 94 Am. St. Rep. 445, 33 South. 125.

CROSBY v. SPEAR.

[98 Me. 542, 57 Atl. 881.]

JURISDICTION, When Exclusive.—When a court, state or national, once takes into its possession a specified thing, no court, except one having a supervising control or superior jurisdiction in the premises, has the right to interfere with and change that possession. (p. 424.)

BANKRUPTCY, Replevin for Property in the Possession of the Assignee.—An action of replevin cannot be maintained in a state court against an assignee in bankruptcy who has taken and holds possession of property as such assignee and claims it to be a part of the estate of the bankrupt. (p. 425.)

George W. Heselton and A. M. Goddard, for the plaintiff.

Orville D. Baker, for the defendant.

545 POWERS, J. The sole question raised by the report is whether these two actions of replevin can be maintained in the state court.

F. Elbridge Drake of Gardiner, remaining partner of F. E. Drake & Co., filed his voluntary petition in bankruptcy May 21st, and was duly adjudged bankrupt by the United States district court of Maine on May 26, 1900. The defendant was thereupon appointed and qualified as trustee of the individual and partnership estate of the bankrupt, and took possession of the store fixtures constituting the property replevied, claiming title to them as trustee. These fixtures were in the bankrupt's possession at the time of the adjudication and were included by him in his schedules as a part of the partnership estate, and he also there stated that he understood they would be claimed by the plaintiff. July 3, 1900, the plaintiff sued out these two writs of replevin, and under them the property in controversy was taken from the possession of the trustee in bankruptcy and delivered to the plaintiff.

It is familiar doctrine that when a court, state or federal, has once taken into its jurisdiction a specific thing, no court, except one having a supervisory control or superior jurisdiction in the premises, has a right to interfere with and change that possession. This principle is fully illustrated and ably vindicated by Mr. Justice Matthews in *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355, cited and relied upon in *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. Rep. 1007, and is necessary to prevent unseemly and vexatious collision between the state and federal courts. It applies as well to property held by the state as

by the United States courts "excepting those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States."

⁵⁴⁴ We are unable to distinguish this case from *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. Rep. 1007. It was there held, "after an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of the referee in bankruptcy at the time when the action of replevin is begun."

There the property was in the possession of the referee, here it was in the possession of the trustee. The latter was as much the officer and agent of the district court as the former. It matters not what particular officer of the court is holding the property or what may be his title. He holds it as the agent of the court whose representative he is. His possession is its possession. It brings it within the jurisdiction of that court, and from that jurisdiction it cannot be taken by any process issuing out of this court. An adverse claimant may bring suit in the state court and try the title to the property; but after the jurisdiction of the bankruptcy court has once attached he cannot take the property in specie out of the possession of that court or of any of its agents: *Truda v. Osgood*, 71 N. H. 185, 51 Atl. 633; *Weeks v. Fowler*, 71 N. H. 221, 51 Atl. 624.

The filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction, and on adjudication and qualification of the trustee, the bankrupt's property is placed in the custody of the bankruptcy court: *International Bank v. Sherman*, 101 U. S. 403; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. Rep. 269.

The decision here reached is not based upon any express provision of the bankrupt act of 1898 conferring exclusive jurisdiction upon the United States court in actions relating to the estate of the bankrupt. On the contrary, it is conceded that this court has concurrent jurisdiction of all questions of title to property derived through the bankruptcy proceedings. A party claiming the same may prosecute any remedy, to which he is entitled, that does not involve a withdrawal of the property from the custody of the officer and of the jurisdiction of the court, in any court, state or federal, having jurisdiction of the parties and the subject matter. The objection ⁵⁴⁵ to these actions of replevin is that, after the bankruptcy court has taken the property into its possession, they change the judicial custody of the

property and aim to transfer its actual possession to a new court and a new jurisdiction.

We are aware that the supreme court of New Jersey in a recent case, *Cook v. Scovel*, 68 N. J. L. 484, 53 Atl. 682, have held that the state courts have jurisdiction of an action of replevin brought against a trustee in bankruptcy who claims that the goods in controversy belonged to the bankrupt. No reference is made in the opinion to *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. Rep. 1007, above mentioned, and the only case cited in support of the decision is *Clafin v. Houseman*, 93 U. S. 130, where an assignee in bankruptcy brought suit in a state court under the thirty-fifth section of the bankrupt act of 1867, to recover the amount collected by the defendant on a judgment against the bankrupts recovered within four months before the commencement of the proceedings in bankruptcy. It was there held that where neither by express enactment nor necessary implication exclusive jurisdiction is given to the federal courts, the state courts having competent jurisdiction in other respects may be resorted to for the enforcement of rights acquired under the laws of the United States. The question of the transfer from one jurisdiction to another of property in custodia legis was neither involved nor discussed, and we cannot regard *Clafin v. Houseman*, 93 U. S. 130, as opposed to the doctrine of *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. Rep. 1007, or *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355.

Our conclusion is, that the property replevied from the trustee was at the time in his possession as an officer and agent of the bankruptcy court, and therefore within its custody and exclusive jurisdiction; and that it could not be taken out of its jurisdiction by any process issuing from a state court.

In accordance with the stipulation of the parties the entry in both cases must be, plaintiff nonsuit. Judgment for return of the property.

In Case of a Conflict of Jurisdiction between two courts of concurrent jurisdiction, the one which first acquires cognizance of a controversy is entitled to retain it to the exclusion of the other to the end of the litigation: *Spiller v. Wells*, 96 Va. 598, 70 Am. St. Rep. 878, 32 S. E. 46; *Reisner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep. 54, 36 S. W. 53; monographic note to *Plume etc. Mfg. Co. v. Caldwell*, 29 Am. St. Rep. 310-318.

If an Estate in Bankruptcy is being administered by a federal court, no other court can interfere and wrest from it the possession and jurisdiction first obtained, or any part thereof: *Turrentine v. Blackwood*, 125 Ala. 436, 82 Am. St. Rep. 254, 28 South. 95. See, in this connection, *State v. Superior Court*, 28 Wash. 35, 92 Am. St. Rep. 826, 68 Pac. 170.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

SPUCK v. LOGAN & UHL.

[97 Md. 152, 54 Atl. 989.]

FRAUDULENT CONVEYANCE.—If There is a Running Account between buyer and seller, the buyer making payments from time to time, but having a debit balance continuously against him, the seller is a subsisting creditor in respect to fraudulent conveyances by the buyer. (p. 430.)

FRAUDULENT CONVEYANCE—Subsequent Creditors.—If a conveyance is merely colorable, and a secret trust and confidence exists for the benefit of the grantor, it is subject to attack by subsequent as well as prior creditors. (p. 431.)

FRAUDULENT CONVEYANCE.—A Conveyance Intended to Defraud One Creditor may be avoided by another standing in like relation. (p. 431.)

FRAUDULENT CONVEYANCE—Judgment, Claims not Reduced to.—The fact that a creditor has not reduced his claim to judgment does not prevent a conveyance from being fraudulent as to him, but only affects his remedy; when he establishes his claim by judgment, his right to attack the conveyance relates to the time of the transfer, in the absence of intervening rights. (p. 432.)

FRAUDULENT CONVEYANCE—Purging by Paying Consideration.—If there is fraud in fact on the part of both grantor and grantee, the conveyance is not validated by the grantee subsequently paying full consideration. (p. 433.)

Robert H. Smith, for the appellants.

S. S. Field, for the appellees.

153 BOYD, J. This is an appeal from a decree declaring certain deeds 154 fraudulent and void as against the appellees, who are creditors of Christian Spuck, and directing a sale of

the property mentioned therein. On the eleventh day of January, 1898, Spuck and wife conveyed two ground rents in the city of Baltimore to Solomon Haas, and on April 30th of that year Haas and wife conveyed them to William Deehring, one of the appellants, in pursuance of the original arrangement made between them when deed of January 11th was made. Each of those deeds recites a consideration of \$850, but it was admitted that no consideration was in fact paid at the time of the execution or delivery of either of them, and it is conclusively shown by the testimony that the transfers were made to prevent one Charles H. Snack from recovering against Spuck on any judgment he might obtain in a suit for damages, instituted on March 1, 1898. Deehring, Haas and Spuck admit that such was the object of the deeds and that no consideration was in fact paid. Snack, who had been in the employ of Spuck, claimed he was injured by reason of the latter negligently allowing the machine which Snack was operating to become in an unsafe, dangerous and unsuitable condition, which he claims resulted in the loss of his arm, and he claimed \$10,000 damages in the declaration filed by him. That suit was never tried and is still pending in one of the courts of Baltimore City. On October 3, 1899, Deehring loaned Spuck \$400, for which he took his note, payable one year after date, and on October 3, 1900, a new note was given payable twelve months after date. Deehring owned a leasehold interest in one of the lots and he agreed with Spuck in December, 1900, to purchase the two ground rents for \$850—\$450 in cash and the cancellation of the \$400 note. The cash was paid and the note surrendered, and there seems to be no doubt about the price named being a fair estimate of the value of the property. Deehring and wife, and Spuck and wife then conveyed the two lots to J. W. Oast, by deed dated December 19, 1900, in which the consideration recited was \$5 and the same day Oast conveyed them to Deehring and his wife—¹⁵⁵ the same consideration being mentioned in that deed. Mr. Strohmeier, who drew these deeds, testified that: "While examining the title, I discovered that there had never been a lease executed for the ground rent which was intended to be conveyed to Mr. Deehring, and for the purpose of wiping out any flaw by putting the property in fee in Mr. Deehring I suggested that Mr. and Mrs. Spuck and Mr. and Mrs. Deehring convey to Mr. Oast, by which deed all the interest of all the parties was conveyed to Mr. Oast and then a deed by Mr. Oast to Mr. and Mrs. Deehring." He also said that the orig-

inal conveyance by Spuck and wife to Deehring "was an assignment of a leasehold interest in one of these lots, subject to a ground rent of \$26.26," and in reply to the interrogatory: "Had any leasehold interest been previously created?" replied, "No, sir, there had not."

The principal question presented by the record may be thus stated: As the deeds executed in 1898 were confessedly made by or at the instance of Spuck and accepted by Deehring for the express purpose of preventing any recovery by Snack, for damages alleged to have been sustained by him for the injury he held Spuck responsible for, and as the title was thus kept in Deehring until December 19, 1900 (although Spuck regularly collected the ground rents and acted as owner), are the deeds of the latter date fraudulent, so far as the appellees are concerned, conceding that full consideration was then paid for the lots conveyed? A number of questions are involved in this case, but inasmuch as it would not afford the appellees relief to set aside the two deeds of 1898 unless those executed in 1900 can be, the validity of the latter is the important inquiry. It will be well to first ascertain the relation that existed between Spuck and the appellees. The latter obtained a judgment against the former before this bill was filed on an account running from January 1, 1898, to February 5, 1901. In the early part of the account the course of dealing seemed to be that for purchases made one month Spuck paid the appellees the next month. That was apparently continued for some time, although the indebtedness was growing. On ^{15th} January 1, 1898, there was a balance from the previous year of \$305.84, which was paid that month, but an indebtedness of \$383.43 was incurred that day which was paid in February, and the balances struck in the account filed were as follows: December 31, 1898, \$574.61, which was the amount of purchases in that month; June 30, 1899, \$741.60, the amount purchased in June; January 1, 1900, \$785.07, which is \$135.51 more than the purchases during the previous December, and finally on February 5, 1901, there was a balance of \$1,031.32 on which \$6.95 was paid in October. There never was a time from January 1, 1898, to the filing of this bill when the appellees were not creditors of Spuck, and on December 19, 1900 (the date of the last deed), he owed them \$923.85. It cannot be said, therefore, that the appellees were not subsisting creditors of Spuck when he made the deed of January 11, 1898, although the amount owing to them at that time was subsequently paid. But before it was

paid Spuck had in the meantime incurred other indebtedness to them for a larger amount, and that course of dealing continued between them until finally Spuck was indebted to the appellees in the sum stated. If that was all, we would find difficulty in reaching the conclusion contended for by the appellants, that the appellees were merely subsequent creditors. In *Paulk v. Cook*, 39 Conn. 572, it was contended that the debts which existed at the time of the conveyance attacked was made had been paid with one exception, and that a voluntary conveyance could only be impeached by existing, and not by subsequent, creditors, but that court thus replied: "This principle clearly has no application where there has been a continued, unbroken indebtedness. The debts are owed, though they may be due to new creditors. It is a most unsubstantial mode of paying a debt, to contract another of equal amount. It is the merest fallacy to call such an act getting out of debt." In *Wait on Fraudulent Conveyances*, section 103, that author, in speaking of the subject, says "the case should be treated as if the prior indebtedness had continued throughout, or as a case of a continued or unbroken indebtedness." In this case there is all the more reason to ¹⁵⁷ adopt that rule, as Spuck was indebted to the appellees (not merely to new parties) constantly and without interruption from January 1, 1898, and to say that under those circumstances they must be denied any rights that subsisting creditors have against a fraudulent conveyance would be protecting fraud by a distinction that should not be made in favor of the guilty against the defrauded.

But if such distinction could be made, it would not avail the appellants. There can be no doubt that whatever fraud was committed on January 11, 1898, when the first deed was made, continued up to the execution of the deeds of December 19, 1900. The real ownership of those lots was in Spuck during all that time. He collected the rents and did everything an owner of ground rents could do. Deehring does not pretend to have had any interest in them, and he held them to protect Spuck from Snack and professed to the world to have paid their value for them when he had not paid a dollar. He does not claim that the \$400 represented by the note was intended to be applied to the purchase of them, but on the contrary he swore that was a loan. He was during all that time concealing the true ownership of the property with the confessed intention of hindering one asserting a claim against Spuck. In effect he, by the deed to him said, "This is my property, and I have paid \$850 for

it," when in fact it was Spuck's property, and he had paid nothing for it. During the whole time he thus held the property the fraud was as great as it was the day it was begun, by the transfer of the property—in fact it was probably more injurious, as other people were likely to be affected by it. During the latter part of 1899 and in 1900, Spuck was getting more in debt to the appellees, and, as we have seen, he owed them on December 19, 1900, \$923.85. In *Jones v. King*, 86 Ill. 229, it is said the rule is settled that where the conveyance is merely colorable and a secret trust and confidence exists for the benefit of the grantor, it is void not only against prior but subsequent creditors, and the reason of the rule is given in a quotation from *Bump on Fraudulent Conveyances*, that, "it is in ¹⁵⁸ such case a continuing fraud, and may actually operate as such, as well in reference to debts contracted after as before the conveyance": See, also, 14 Am. & Eng. Ency. of Law, 268. There would seem, therefore, to be no room to doubt that the deeds of 1898 were not only liable to be successfully attacked by creditors of Spuck in existence when they were made, but could be by any persons who became such creditors while the title to the lots were held under those deeds, or either of them.

In 14 Encyclopedia of Law, 266, it is said: "It is not necessary, however, that the fraud should have been directed particularly against the complainant. A conveyance executed to defraud one creditor may be avoided by any other occupying a similar position; that is a fraudulent intent against an existing creditor will avoid the conveyance as to all existing creditors, and a conveyance made with like intent against a subsequent creditor may be avoided by any standing in that relation." It was said in *Cooke v. Cooke*, 43 Md. 522, that the object of the statute of Elizabeth, chapter 5, "was the suppression of frauds, and ought to receive a liberal construction." We there quoted from *Twyne's Case*, 3 Coke, 83, "that the statute of 13 Elizabeth, chapter 5, extends not only to creditors, but to all others who had cause of action or suit, or any penalty or forfeiture," and we added, that "since then it has been repeatedly held to embrace actions of slander, trespass and other torts." In *Welde v. Scotten*, 59 Md. 72, we repeated in substance that language, and it was there said that a creditor who had obtained judgment for personal injuries had such a cause of action as justified him in attacking any conveyance made pending the suit, as fraudulently made and executed against him, if he had cause to so suppose,

and that he could either go into equity to set aside the conveyance or purchase the property at a sale under a fieri facias and institute an action of ejectment. It is said, however, on behalf of the appellants that in those cases judgments had been obtained, and until a judgment is obtained a person occupying the position of Snack cannot have a conveyance set aside on the ground ¹⁵⁹ of fraud. If it be conceded that section 46 of article 16 is not broad enough to enable Snack to file a bill to set aside the conveyance until he obtains judgment, does that necessarily preclude the appellees from doing so? We have already said that they could have filed a bill to set aside the deeds of 1898. If they had done so, there would seem to be but little room to doubt that Snack could have sought relief against the proceeds of sale. In *Gebhart v. Merfeld*, 51 Md. 325, a deed was set aside and objection was made to the form of the decree because "all persons having claims against the Engels are notified to file their claims without regard to their nature," and this court said with reference to that: "It is a mistake to suppose that the statute of Elizabeth only avoids deeds and conveyances coming within its provisions as to creditors. It enacts that every conveyance made to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, etc., shall be void" and continues with what we have quoted from *Cooke v. Cooke*, 43 Md. 522. The court there in effect said that such a claim as Snack had might be filed, but, it being unliquidated, we think the correct practice would be to give such plaintiff a reasonable opportunity to have his case determined at law, before distributing the proceeds, although, of course, he should use due diligence in the prosecution of his suit. If that were not so, the plaintiff in such action might be prevented from any recovery, if creditors who were entitled to proceed without judgment had the property sold before he could get his judgment. But this case does not depend upon the question whether Snack could at the time have filed a bill to set aside those deeds. He is undoubtedly included in the terms of the statute of Elizabeth, if, as is conceded, the transfers were made to delay, hinder or defraud him. The fraud was in the transfer of the property, with that intent, and merely because he had not yet obtained a judgment did not make the intent to delay, hinder or defraud him less fraudulent. The fact that he had not obtained a judgment only affected his remedy and if he establishes his claim by judgment, his right to attack the deeds relates ¹⁶⁰ back to the

time of the transfers, provided, of course, no intervening rights of bona fide purchasers, etc., stand in the way. Although not a creditor in the technical sense, until he gets a judgment, he occupies a similar position to that of a technical creditor under the statute of Elizabeth and an intent to hinder, etc., him affected the validity of the deeds just as if he had been a creditor in the sense that term is ordinarily used.

Under these circumstances, are the deeds of 1900 valid? Payment of full consideration is not sufficient to protect Deehring, if the conveyance was not bona fide. "If it be established that the deed was made by the grantor and accepted by the grantee with intent to hinder, delay and defraud the creditors of the former, it matters not that full consideration has been paid": *Chatterton v. Mason*, 86 Md. 236, 37 Atl. 960; *Downs v. Miller*, 95 Md. 602, 53 Atl. 445. In 14 *Encyclopedia of Law*, 475, it is said that "a fraudulent grantee can by no subsequent matter confirm the deed to him or purge it of its vice, so as to render it effectual as a conveyance to vest a title in himself." For that statement the author cites *Halcombe v. Ray*, 1 Ired. (23 N. C.) 340. See, also, *Halbert v. Grant*, 4 T. B. Mon. 581; *Bunn v. Ahl*, 29 Pa. St. 391, 72 Am. Dec. 639; *Head v. Harding*, 166 Ill. 353, 46 N. E. 890; *Gentry v. Field*, 143 Mo. 413, 45 S. W. 286; *Martin v. Rice*, 24 Mo. 581; *Lynde v. McGregor*, 13 Allen, 172; *Bump on Fraudulent Conveyances*, secs. 628, 629. We are aware that there are authorities of high standing apparently in conflict with that statement of the law. In most of them the apparent conflict is not real when the facts are examined. There have been cases in which it would have been very inequitable to hold the grantee in a deed responsible, or cause him to lose property which he subsequently paid for, or gave the creditors of the grantor the benefit of, merely because he had accepted a voluntary conveyance, although he did so in good faith and without intending to defraud anyone. But when there is fraud in fact on the part of both grantor and grantee and there has been no attempt to return the property thus fraudulently acquired to the grantor, there must be some very peculiar facts proven to justify ¹⁶¹ a court in declaring that the fraud is purged by a subsequent payment of a consideration. As was said in *Bunn v. Ahl*, 29 Pa. St. 391, 72 Am. Dec. 639: "There is no valid repentance without entire restitution, when this is possible; and a judgment obtained in order to defraud creditors cannot be purified by merely abandoning the fraudulent purpose and using it for an honest one. All the

benefits of the fraudulent arrangement must be foregone." In Massachusetts the doctrine that a fraudulent conveyance may be purged of the fraud by a matter ex post facto has been carried as far as in any court of such high standing brought to our notice, but *Lynde v. McGregor*, 13 Allen, 172, it was said: "But no authority has been found, and we cannot believe that any exists, for the proposition that where a contract expressly and intentionally fraudulent has been made, it is possible to give it a partial validity by any subsequent payment or advance in part, without rescinding the whole. If any part of the original purpose is fraudulent, the whole may be avoided, though made upon sufficient consideration. And in like manner, if any part of the fraudulent purpose remain, it vitiates the whole." Without quoting from other cases or attempting further to reconcile them, it seems to us there can be no question about the invalidity of the deeds of 1900 under the facts proven, some of which we will recall as reflecting upon this branch of the case.

Spuck and Deehring both went on the stand and swore to circumstances which the law condemns as fraud in fact. The one conveyed and the other received these lots with the deliberate intent to do what the law pronounces fraudulent. Taking them with that intention Deehring held them over two years and a half under a deed that professed that full consideration had been paid for them, and that they were his and not Spuck's. In the meantime he had become a creditor of Spuck for nearly half of the value of the property. He got that indebtedness paid in full and paid the balance in cash. Two months afterward Spuck made an assignment for the benefit of his creditors and paid less than one per cent to his other creditors. If Deehring had paid full value at the time ¹⁸⁹⁸ the property was originally conveyed to him, the fraudulent intent with which the deed was taken would still have made it void, and upon what principle can it be said that although the conveyance was originally executed and accepted in fraud, yet when the grantee paid for it several years afterward his payment was bona fide and therefore gave it new life, freed from the infirmities attaching to a fraudulent instrument? During that time he apparently checked Snack from all efforts to obtain a judgment—at least his suit was not brought to trial, and if the deed to Deehring was bona fide, as it purported to be, it would perhaps have been useless for Snack to get judgment, if he was entitled to it; and, after accomplishing that Deehring now claims the property by paying \$450 and surrendering a note which was

not at the time worth its face value, if we are to judge from what the other creditors got, under an assignment made two months later. Under those circumstances it is clear that he could not have held these lots under the deed of April, 1898, and can he by this new deed get any better title? We think not. We have already quoted the testimony of the conveyancer as to the reasons for adopting that plan. It was because he thought there was some defect in the deed from Spuck to Deehring. The deeds are not set out in the record, and hence we do not know what the recitals are, beyond what we find in some memoranda of them, which refer to both deeds of 1900 as "conveying the same property for recited consideration of \$5." They do not state it to be \$850 as those of 1898 did, which was, we presume, because the conveyancer was simply aiming to correct the defect he had discovered, and for that reason doubtless united Mr. and Mrs. Spuck with Mr. and Mrs. Deehring in the deed to Mr. Oast. But for the supposed defect discovered by the conveyancer, they would probably have relied on the old deeds—certainly as between Spuck and Deehring they would have been sufficient—Spuck could not have recovered the lots from Deehring, by reason of his participation in the fraud, and after the purchase money was paid him, there could have been no possible ground for him to base any claim for ¹⁰⁰ them. Therefore Spuck by joining in the new deed to Mr. Oast conveyed nothing, so far as these ground rents are concerned, even if it was necessary to perfect the leasehold title. But beyond all that the suit of Snack was still pending and although Spuck had the additional intention of getting the purchase money, it is not shown that his intent or that of Deehring to hinder Snack ever lessened one particle from what it was originally was, and the presumption is that it still continued as there was so far as the record discloses as much reason for it then as before. There might have been some indication of repentance and a desire to restore Snack to the position he occupied before the deeds of 1898 were made, if the property had been reconveyed to Spuck, but that was not done. The transaction was in effect an attempted payment of the purchase money named in the fraudulent deeds, which in our opinion could not confirm them or purge them of the fraud, for, as we have said, if that had been paid when the deeds of 1898 were made, they would still have been fraudulent by reason of the intent to hinder Snack. In the new deeds five dollars was named as the consideration, and the only instruments where the consideration of \$850 is

mentioned are those of 1898. Spuck and Deehring thus undertook to convey to a third party a title not only tainted with fraud, but up to that time admitted to be so held as to make it fraudulent, with the understanding that it should immediately be conveyed to Deehring and his wife. If Deehring had conveyed that title without having Spuck to unite in the deed with the understanding that it should at once be reconveyed to him and his wife, it certainly could not be pretended that he would thereby have acquired any better title than he had under the deeds of 1898, and how can the fact that Spuck united in it give the transaction any validity? If Mrs. Deehring had been a bona fide purchaser for value, without any knowledge of the prior transaction, there might be some ground for contending that her interest could not be reached, but the proof shows that the cash paid was Deehring's money, which he had deposited in bank in the joint names of himself and wife, and the note used in part payment was his.

¹⁰⁴ We have not thought it necessary to dwell on the fact that Mrs. Deehring was the daughter of Spuck; or to discuss the probabilities of knowledge by her and her husband of Spuck's financial condition, although they are circumstances proper to be considered with the other facts. Nor have we discussed the use of the money paid by Deehring to Spuck. If the appellees actually received \$143 of the \$400 borrowed from Deehring, when the note was given in 1899, as appellants contended, that fact cannot reflect on this question. It is not pretended that the appellees knew how Deehring was holding the property, or that they ever had the slightest reason to suppose that Spuck had borrowed any money from him. They received none of the cash payment of \$450, although considerably more than half of Spuck's indebtedness was due to them. Nor will we attempt to point out all the different ways by which the appellees and other creditors have probably been injured by the conduct of these parties—one is sufficient. In July, 1900, the appellees employed counsel to examine the records. He reported that Spuck had no real property, so far as he could find—that he had owned two ground rents which he conveyed to Haas on January 11, 1898. If the deeds of 1898 had not been made and on December 19, 1900, Spuck had conveyed the lots to his son in law, Deehring, is it not probable that when he made the deed of trust, less than two months after that date, the appellees or some of the creditors would have investigated the transaction? If they had done so they might at least have

avoided the preference Deehring obtained for the \$400 debt Spuck owed him, but when they found the transfers of 1898, which recited a proper consideration, they were easily misled by them; and if the deeds of December, 1900, were apparently made to correct errors they would not suggest any fraud in the original transaction, even if the records had been again examined which would have seemed useless. But this only illustrates how such fraudulent transactions do in fact injure creditors, and therefore how proper it is for courts to strike them down when the circumstances justify it.

¹⁰⁵ We are of opinion that by reason of the facts disclosed in this record the court below was right in declaring all of the deeds fraudulent and void, as against the appellees. The decree provides for the sale "of the two ground rents," and therefore the leasehold interest of Mr. Deehring was not intended to be affected by it. That interest should not be sold, and understanding that to be the meaning of the decree, we will affirm it.

Decree affirmed, the appellants to pay the costs.

If a Conveyance is actually fraudulent as to existing creditors, and merely colorable, and the property is held in secret trust for the grantor who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors: Brundage v. Cheneworth, 101 Iowa, 256, 63 Am. St. Rep. 382, 70 N. W. 211. Other cases discussing the right of subsequent creditors to attack fraudulent transfers are: Quimby v. Williams, 67 N. H. 489, 68 Am. St. Rep. 685, 41 Atl. 862; Lander v. Ziehr, 150 Mo. 403, 51 S. W. 742, 73 Am. St. Rep. 456, and cases cited in the cross-reference note thereto; Ames v. Dorrah, 76 Miss. 187, 71 Am. St. Rep. 522, 23 South. 768; Cole v. Brown, 114 Mich. 396, 68 Am. St. Rep. 491, 72 N. W. 247; Rudy v. Austin, 56 Ark. 73, 35 Am. St. Rep. 85, 19 S. W. 111; monographic note to Ragerman v. Buchanan, 14 Am. St. Rep. 750-754. As to whether a conveyance may be purged of fraud and thereby given validity, see Caldwell v. Walker, 76 Miss. 879, 71 Am. St. Rep. 545, 25 South. 929.

BOARD OF SUPERVISORS v. TODD.

[97 Md. 247, 54 Atl. 963.]

CONSTITUTIONAL LAW—Judiciary, Imposing Political Duties Upon.—A statute providing that whenever as many voters of a county as represent one-half of the votes cast at the last election for governor shall petition the circuit court to submit the question of granting liquor licenses at the next congressional election, the court shall issue an order to the sheriff for an election on that question, requires the court to perform nonjudicial duties, and offends constitutional provisions that the three branches of the government shall be kept separate, and that no judge shall hold any other political trust or employment. (p. 443.)

Alonzo L. Miles, Joseph N. Ulman, Samuel J. Harman, Samuel R. Douglass and Miles & Stanford, for the appellants.

John H. Handy and Elmer H. Walton, for the appellees.

259 JONES, J. The act of assembly of 1896, chapter 195, a public local law of Wicomico county, enacted in its first section "that whenever such of the registered qualified voters of Wicomico county, or of any election district, city or town thereof, as constitute one-half of all the votes cast for all of the candidates for governor at the last election in said county, or in an election district, city or town thereof, shall petition the circuit court for said county for the submission, at the next regular congressional election held in said county of the question of granting or not granting any license for the sale of intoxicating liquors for beverages therein, the said circuit court shall, within ten days after the receipt of said petition, issue an order for an election on this question to the sheriff of the county, whose duty it shall be to give the same notice and perform all other acts required of him for the holding of elections under the election law of this state, and subject to like penalties in case of his default in his performance of said duties."

The second section enacts "that such election shall be held and conducted under the provisions of the election law applicable to the said county." The third section provides that after an election so held there shall be no other such election within four years. The fourth section provides how the question thus to be submitted to vote shall be indicated on the ballots; how the preference of the voters upon the question is to be made to appear and be ascertained; how the ballots are to be counted and canvassed in respect to this question; how the result of the voting is to be certified; and how notice is to be given of the

result in case it shall "appear that the majority of the votes cast is against the sale of intoxicating liquors for beverages." The succeeding sections of the law in question are provisions for carrying into effect the prohibition of the sale of intoxicating liquors for beverages in the county, election district, city or town as the case may be, according to the submission made in respect to locality, when it appears that a majority of the votes cast upon "the question of granting or not granting any license for the sale of intoxicating liquors," etc., is against the granting of such license.

200 This case arises under this law and originated in a petition for the writ of mandamus filed in the court below on the twenty-fourth day of October, 1902, by the appellees, George W. Todd and William A. Crew, against the appellants, in which it is alleged that the petitioners "together with four hundred and forty (440) other voters and residents" of the ninth election district of Wicomico county, on the eighteenth day of October, 1902, presented to the circuit court for that county a petition verified by affidavit praying the court "to submit to the voters of said district the question of granting or not granting any license for the sale of intoxicating liquors for beverages therein . . . in pursuance of the provisions contained in section 1 of chapter 195 of the acts of assembly of Maryland of 1896"; that upon "the hearing of said petition and the motion of the objectors thereto" the said court passed the following order: "No sufficient cause to the contrary having been shown it is this twenty-third day of October, 1902, ordered by the circuit court for Wicomico county, Maryland, that in pursuance of section 1, chapter 195 of the acts of 1896, the sheriff of Wicomico county, Maryland, shall submit to the voters of the ninth election district of Wicomico county the question of granting or not granting licenses for the sale of intoxicating liquors for beverages in said district and the clerk is hereby directed to serve a copy of this order on the said sheriff of Wicomico county immediately; that in pursuance of said order the sheriff on the twenty-fourth day of October, 1902, notified the county commissioners of said county and on said day the county commissioners notified the supervisors of election of said county; but said supervisors refused "to advertise the question" and were "preparing the official ballots to be used in said district without any provision for the submission of the aforesaid question to the voters." It is then prayed that the writ be issued "directed to the said supervisors of election of Wicomico county," who

are the appellants here, "commanding them to advertise said question, and to prepare the official ballots to be used in the ninth district of Wicomico county—at the election to be held on November 4, 1902, in accordance with the provisions of section 4 of said chapter 195 of the acts of 1896."

²⁰¹ Upon this petition the court below passed an order that cause be shown immediately by the appellants why the writ of mandamus should not issue. On the same day that this order was passed the appellants filed their answer in which they admitted the allegations of fact in the petition and rested their refusal to advertise the question of granting or not granting licenses for the sale of liquor and to place such question upon the ballots at the approaching election as set out and stated in the petition upon the ground that the act of 1896, chapter 195, is unconstitutional and void; that if not unconstitutional it is in conflict with the provisions of chapter 202 of the act of 1896 from which the appellants, as supervisors of elections derived all of their powers and authority over elections in said county; and that by section 47 of the said chapter 202 of the act of 1896, "all questions of local concern which are to be submitted for approval to the vote of the people" of a county must be certified to the board of supervisors of elections by the county commissioners of the county not less than thirty days before the election at which such question is to be submitted; and that the question of granting or not granting any license for the sale of intoxicating liquors in the ninth election district of Wicomico county had not been so certified thirty days before the election as a question to be submitted for approval. The appellees demurred to the answer; and upon hearing the court on the same day the answer was filed, October 24, 1902, ordered the writ of mandamus to issue as prayed. From such order this appeal was taken.

In the view we take of this case the ground of defense first set up in the answer of the appellants against the application for mandamus is sufficient to dispose of the case upon this appeal and it will be unnecessary to consider any other. We think it advisable to dispose of it upon this ground because future litigation under the law in question will thus be avoided. The legislature has seen fit to prescribe as a condition for the law (chapter 195 of the act of 1896), being called into existence and put into operative effect, that an application shall be made to the circuit court for Wicomico county for a submission ²⁰² of the question of the adoption of the law, to the voters

of the county or of a town or election district of the county as the case may be; that the said court shall order the submission of such question to a vote upon conditions prescribed; and that upon the vote being had a majority of the votes of the locality to be affected, according to the submission, shall appear to be in favor of putting the law into operation. The existence of the law with operative effect is made to depend upon the observance of these prescribed proceedings, the initial step in which is the application to, and the order from, the circuit court for the submission of the question, whether the law shall be put into effect, to the voters within the territorial limits to be affected.

The question raised is as to the validity of this legislation. The inquiry as to this is whether it is within the constitutional power of the legislature to impose upon the judiciary, or invest them with, a function of this character, and whether the judiciary in the attempt to discharge such a function are not acting without constitutional warrant. In making this inquiry we are not dealing with any question of expediency or policy; nor can we have regard to the question whether, in the particular instance, the legislature has prescribed a course of proceeding best adapted to the accomplishment of a laudable object. The public policy involved in the inquiry is determined and fixed in our Bill of Rights and the constitution—the fundamental law; and we are limited to the question of constitutional power. As was said in the case of *Thomas v. Owens*, 4 Md., at page 225, “under our system of government its powers are wisely distributed to different departments; each and all are subordinate to the constitution, which creates and defines their limits; whatever it commands is the supreme and uncontrollable law of the land.” This distribution of the powers of our state government was declared in our original Bill of Rights accompanying the constitution of 1776 in this language: “That the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other”: Bill of Rights 1776, art. 6.

There are a number of decisions of this court having reference to this article of the Bill of Rights sanctioning its wisdom and enforcing practically the principle involved in the declaration. Only those which may have more immediate reference to the case at bar need be referred to. Among those which arose under the constitution of 1776 is that of *State v. Chase*, 5 Har. & J. 297, in which Judge Buchanan, in the

course of his opinion, says: "New judicial duties may often be unnecessarily imposed, and services, not of a judicial nature, may sometimes be required. In the latter case, a judge is under no legal obligation to perform them" which was to say that the opinion of the court was that duties, "not of a judicial nature," could not legally and constitutionally be imposed upon the courts or the judges.

In the subsequent constitutions adopted in this state in 1851, 1864 and 1867 the declaration, which has been quoted from the Bill of Rights of 1776, has been incorporated, and emphasized by adding thereto this language of exclusion "and no person exercising the functions of one of the departments shall assume or discharge the duties of any other": Art. 6, Bill of Rights, Const. 1851, art. 8 in each of the constitutions of 1864 and 1867. And in each of these subsequent constitutions there is this further declaration, "no judge shall hold any other office, civil or military, or political trust or employment of any kind whatsoever under the constitution and laws of this state or of the United States or any of them": Art. 30, Bill of Rights, 1851, art. 33 in each of the constitutions of 1864 and 1867.

The force of the opinion of the court speaking through Judge Buchanan in case of *State v. Chase*, 5 Har. & J. 297, is enhanced, therefore, not only by the subsequent more emphatic declarations of the fundamental law in reference to the separation of the powers of government but by the express inhibition against the exercise by a judge of any other "political trust or employment whatsoever." It would seem thus to be made evident in our fundamental law that the policy and intent of that law is that the courts and judges provided for in our system ²⁶⁴ shall not only not be required but shall not be permitted to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function; and that the exercise of any power or trust or the assumption of any public duty other than such as pertain to the exercise of the judicial function is not only without constitutional warrant but against the constitutional mandate in respect to the powers they are to exercise and the character of duties they are to discharge. In accord with this are recent decisions of this court. In the case of *Robey v. Prince George's County*, 92 Md. 150, 48 Atl. 48, a statute which required the judges of the circuit court to approve the accounts of certain county officers before payment of the same by the county commissioners was held unconstitutional as to this re-

quirement because it imposed on the judges a nonjudicial duty. For the same reason in the case of *Beasley v. Ridout*, 94 Md. 641, 52 Atl. 61, a statute that imposed upon the judges of the circuit court the duty of appointing members of a board of visitors for the county jail of Anne Arundel county was pronounced unconstitutional.

Therefore to test the constitutionality of the law here in question in respect to the duty assigned by it to the circuit court we have only to inquire whether the duty so assigned to the court is a judicial duty. It is quite unnecessary to undertake to define here the essential qualities of a judicial act or to prescribe the precise limits to be observed by the legislative branch of the government in assigning duties to the judiciary. Such attempt could, in its results, only be misleading and confusing. It would not be practicable to lay down a rule for all cases; and it would be inappropriate that the courts should undertake to do this. It is only necessary in this case to say that counting the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for governor, and ordering an election, is not a judicial function, is a proposition that would seem to be too plain to need argument to enforce it. The order which by the statute here under consideration the court ²⁶⁵ is required to pass is not to be the result of any judicial inquiry. It is not to be passed in the course of, or in connection with, any judicial proceeding. It is not to be made as preparatory or preliminary to the bringing of any matter within the judicial cognizance; nor as a means necessary or appropriate to aid, in any way, the efficient and appropriate exercise of the judicial function. In short, there is no view in which the duty to pass the order, required by the statute, presents itself as a judicial act. In assuming the duty to pass the order in question, therefore, the court assumes a political trust or duty distinct from its constitutional duty as a court. Again, if the court can be required to take one step in proceeding to hold an election for the object indicated in the statute in question, or for such other purpose as the legislature, within its powers, may see fit to order an election, why may not all the duties in connection with the holding of such election be devolved upon the courts. Why may they not be required to name time and place of holding such election, appoint the judges and clerks of election, canvass the votes and declare and certify results? The initial step in holding such

elections would be no more judicial in its character than all the other necessary proceedings therein. It is not reasonable to impute to the fundamental law, in view of the declarations therein heretofore noticed, an intention to make the courts subject to have devolved upon them duties so distinct from those pertaining to the exercise of the judicial function, and which could be imposed to such an extent as to seriously interfere with the efficient discharge of the duties of the judicial office. This being so, the provision of the act of 1896, chapter 195, which requires of the circuit court for Wicomico county the duty of ordering elections as therein prescribed is repugnant to the constitution and Bill of Rights and therefore void. As these elections, by the terms of the act, must depend upon the orders from the circuit court the act must fail.

No reference has been made to authorities or precedents in other states among which there is more or less conflict as to ~~the~~ the questions herein considered. It is sufficient that the views expressed and the conclusions reached seem to be the logical and inevitable consequence of the principles embodied in our organic law, and of our decisions expounding them. As authorities, however, maintaining similar views in analogous cases we may refer to *Dickey v. Hurlbut*, 5 Cal. 343, and *Case of Supervisors of Election*, 114 Mass. 249, 19 Am. Rep. 341.

As a result of our views we must reverse the order of the circuit court for Wicomico county from which the appeal in this case was taken.

Order reversed with costs to the appellants.

A Statute of Massachusetts directing the justices of the supreme court to appoint supervisors of election has been held unconstitutional, because that duty is not a judicial function: Case of Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341.

CONNECTICUT FIRE INSURANCE COMPANY v.
COHEN.

[97 Md. 294, 55 Atl. 675.]

FIRE INSURANCE—Misconduct of Appraiser.—When the amount of a loss is submitted to appraisement, an appraiser is not the agent of the party nominating him, so that he can, without the co-operation or connivance of that party, deprive him of the fruits of his insurance by inaction or bad faith. (p. 448.)

FIRE INSURANCE—Misconduct of Appraiser.—The fact that an appraisement of the amount of loss is defeated by the appraiser nominated by the insured does not necessarily bar his right to sue on the policy; it is sufficient to such right that the failure of the appraisement was without fault on the part of the insured, and for that purpose it is unnecessary to ascertain that the insurer was the cause of the failure. (p. 450.)

George Whitelock and John B. Deming, for the appellant.

Jacob J. H. Mitnick and Charles F. Harley, for the appellee.

²⁰⁷ SCHMUCKER, J. This is an appeal from a judgment of the Baltimore City court in favor of the appellee in an action of assumpsit against the appellant company on a policy of fire insurance. The policy is in the standard form, insuring to the extent of two thousand dollars merchandise located in the appellee's store in Baltimore City. It contains the usual clause providing that in the event of a loss by fire to the insured goods and a disagreement as to the amount of the loss it shall be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, the two so chosen to first select an umpire and the appraisers then to estimate and appraise the loss, and failing to agree to submit their differences to the umpire, the award in writing of any two to determine the amount of the loss.

²⁰⁸ The policy further provides that the loss shall not become payable until sixty days after due notice and proof "including an award by appraisers when appraisal has been required" and that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire."

The insured goods were damaged by fire on August 26, 1901, while the policy was in full force. A disagreement as to the amount of loss caused by it having arisen between the appellee

and the adjuster representing the company, the appellee requested that the extent of the loss be ascertained by an appraisal. The appellee named Louis Applefeld as one of the appraisers and the appellant named Albert H. Likes as the other and a formal agreement for an appraisal was drawn up and signed by the parties on October 29, 1901. This agreement authorized Applefeld and Likes (together with a third person to be first appointed by them as required by the policy of insurance and to act as umpire on matters of difference only) to appraise and estimate the actual cash value of and the loss and damage by fire to the property described in the policy.

The two appraisers failed to agree upon an umpire and as a result no appraisal was made. Each appraiser was a witness in the case and gave his version of the cause of their disagreement. The evidence, although conflicting, tends to prove that the appraisers met promptly after their appointment and three names were proposed, two by Applefeld and one by Likes, of persons from whom to select the umpire, but after taking a day for reflection each rejected the name or names suggested by the other. After that interview no further attempt seems to have been made to proceed with the appraisal. Likes testified that he rejected Applefeld's nominees partly because he had reason to believe that they had sold some of the insured goods to Applefeld, although it does not appear that he informed the latter of his reasons for the rejection. ~~200~~ Applefeld gave as his reasons for rejecting Likes' nominee that he did not know him. He further testified that he requested Likes to suggest additional names, but the latter refused to do so. Likes, on the contrary, testified that when no choice of an umpire was made from the three names first mentioned he at that same interview proposed to submit a list of six names of representative business men of Baltimore and let Applefeld select one of them, but the latter rejected the proposition. Applefeld testified that when he declined to accept the person proposed by Likes for umpire Likes said, "If you are not satisfied with him I will get out of it." Likes denied having said so, but he admitted having told Mr. Deming, the company's adjuster, that he would prefer to step out, and let them get another appraiser in his stead. There was also testimony tending to show that after the failure of the appraisers to select an umpire, the company's adjuster called on the appellee's attorney and told him that Likes would resign as an appraiser and that the company was considering whether they would name an-

other appraiser in his place, and that he, the adjuster, would let the attorney know in a few days, but he never gave him any further information on the subject.

The effort at an appraisement which was initiated on October 29, 1901, having produced no practical result up to December 24, 1901, the appellee on that day brought the present suit on the policy. The appellant filed the general issue pleas and also a special plea setting up the terms of the policy in relation to an appraisement of the amount of loss in case of a fire and a disagreement as to the extent of the loss resulting therefrom and averring that a disagreement as to the amount of the loss by the fire had occurred and that appraisers had been selected, the agreement for an appraisement had been executed and that the defendant had in good faith done all in its power to procure the making of the appraisement but that the appraisement was still pending and unconcluded.

To this plea the appellee replied: 1. That the appraisement had been abandoned by the appellant; 2. That the failure to appraise was not caused by the fault of the appellee; and ~~and~~ 3. That the failure of the appraisers to select an umpire and the abandonment of the appraisement had occurred without fault on the part of the appellee. The issue was made up by rejoinders to these replications.

There is but one bill of exceptions in the record and that brings up for our review the action of the court below in rejecting the defendant's first and second prayers. The prayers are as follows:

1. If the jury shall find that the plaintiff's appraiser Louis Applefeld prevented the selection of an umpire on matters of difference between the appraisers named in the agreement of October 20, 1901, offered in evidence, and that there has been no appraisement and estimate of the actual cash value of, and the loss and damage by fire to, the property of the plaintiff described in the defendant's policy of insurance as stipulated in said agreement then the verdict of the jury must be for the defendant.

2. If the jury shall find that the failure to reach an appraisement and estimate of the actual cash value of and the loss and damage by fire to the insured property of the plaintiff in accordance with the agreement of October 29, 1901, offered in evidence was due to the failure of Louis Applefeld, the plaintiff's appraiser, to do in good faith all that he could reasonably be expected to do to agree with the defendant's ap-

praiser Albert H. Likes upon a suitable umpire in accordance with said agreement then the verdict of the jury must be for the defendant.

These two prayers plainly present the proposition that an appraiser, named in such an agreement as appears in this record, is to be regarded as the agent of the party who nominated him in so far at least that he can, without the co-operation or connivance of that party, deprive him of the entire fruits of his insurance by pursuing a policy of inaction or bad faith in performing the duties of the appraisement. To that proposition we cannot give our assent. It is fundamental to the conception of such an appraisement, which is in effect an arbitration, that the persons selected to make it should be free from the control or direction of the respective parties whose interests have been confided to them and should act independently and upon their own judgment. If it could be shown that an appraisement ³⁰¹ had been arrived at through pressure or control exercised over the appraisers or any of them by one of the parties to the submission that fact would be sufficient to avoid the appraisement. This is equally true whether an entire controversy is covered by the arbitration or, as in the present case, only a single element of it is submitted for determination. It being thus the duty of the parties to the submission to abstain from all interference with the appraisers it would be manifestly unjust, when they have observed such abstinence, to hold them responsible for the negligence or misconduct of the appraisers. In order to defeat the rights of a party to a submission to an appraisement by reason of the conduct of the appraiser the evidence should connect the party himself with that conduct. The legal principles involved in this case have already been passed upon by this court in *Caledonian Ins. Co. v. Traub*, which three times has been before us, in 80 Md. 214, 30 Atl. 904, 83 Md. 533, 35 Atl. 13, and 86 Md. 86, 37 Atl. 782. The policy of insurance which formed the subject of that suit was similar in its terms to the one now under consideration and contained a like provision for an appraisement of the amount of loss in case of a fire. After a fire had occurred, appraisers to determine the amount of loss were appointed, under that provision, and they selected an umpire, and the three had partly done their work when the appraiser who had been nominated by the assured withdrew without any apparent good reason. The other appraiser and the umpire then completed the appraisement. It therefore became necessary for the court to pass

upon the effect and legal consequences of the provisions of the policy relating to an appraisal. The appraisal in that case was held to be not binding on the parties because it had not been made in accordance with the stipulations of the policy, which contemplated joint action by both appraisers at every stage of the arbitration, the umpire having had no authority to act except where they differed in their estimates. In the court's opinion in that case in 83 Md. 533, it is said: "The withdrawal of the appraiser appointed by the insured without any apparent good reason and with no explanation except such as is given by the telegram ³⁰² above mentioned ought to have been the subject of an inquiry by the jury. It ought to have been left to them to determine whether the failure of the appraisal was in any way caused by the agency or procurement of the insured. . . . On the hypothesis that Reinhart (the withdrawing appraiser) was their agent they would be responsible for his action, and if it caused the failure of the appraisal, there can be no recovery in this suit. Because this inquiry was not submitted to the jury in any of the plaintiff's prayers, the judgment must be reversed. If the appraisal failed without the fault of the insured the failure would not be an impediment to their right of recovery if they could maintain their suit upon other grounds."

The law as thus stated was affirmed when the case was here for the last time in 86 Md. 86, 37 Atl. 782, the court then prefacing its opinion with the statement that: "On the former appeals the law of the case was fully discussed and finally settled and there are but few new questions presented for decision now." The appellant contends that, notwithstanding this distinct affirmance of the court's reasoning and conclusions in the former appeals, the opinion in 86 Maryland must be regarded as having modified the law because of the presence in that opinion of the statement: "Though it would have been undoubtedly competent for the appellant to show that the failure of the appraisers or arbitrators to reach a conclusion was due to the misconduct or bad faith of the appellees or their agent Reinhart or their appraiser Rosenfeld." Although that expression, apart from its context, apparently gives color to the appellant's contention, it must be observed that it was used in affirming the action of the lower court in withholding from the jury certain interrogatories, which the appellants sought to require them to answer, because there was no evidence in the case "which could possibly furnish the jury with an answer to them."

The expression as thus used was not necessary to the determination of that matter, and it was not intended to reverse or modify the full and deliberate expressions used in the opinion upon the former appeal defining the effect upon the ³⁰³ rights of the insured of a failure to complete an appraisement, without his fault. We regard the propositions asserted in the opinion in 83 Maryland in Traub's case, as conclusive of the present appeal, in so far as to require us to hold that unless the jury were satisfied from the evidence in the case that the failure or abandonment of the appraisement was caused by the fault of the appellee, it constituted no impediment to his right to recover. The rejected prayers of the defendant failed to submit that question to the jury and were for that reason properly rejected.

The conclusions which we have reached in the case now under consideration and in Traub's case are not in conflict with the weight of authority elsewhere. The cases all agree that when the policy provides for ascertaining the amount of loss by appraisement, both the insured and the insurer, who have submitted the amount of a loss to appraisement, must act in good faith and each must do his part to have the appraisement completed, but only one case, so far as we are informed, has held that the failure of an appraisement through the conduct of the appraisers, without the fault of the insured, interposed any impediment to his right to recover on his policy. Ordinarily, the insured does his part toward the success of the appraisement by uniting in good faith in the selection and appointment of the appraisers and furnishing them all needed facilities and opportunities for the inspection and examination of the insured property and the ascertainment of its value, and then abstaining from all attempts to influence or interfere with them in the discharge of their duty.

In a number of cases cited by the appellant the insured was held entitled to recover on his policy in spite of the failure of an attempted appraisement of the amount of his loss when that failure had been caused by the unreasonable attitude and conduct of the insurer's appraiser. From these cases the appellant contended that it must be held conversely that the insured was barred from recovering on his policy when the appraisement had been defeated by the acts of the appraiser nominated by him. That does not necessarily follow. It is ³⁰⁴ in our judgment sufficient to maintain the right of the insured to sue in such cases to find that the failure of the appraisement was with-

out fault on his part, and it is unnecessary for that purpose to ascertain that the insurer was the cause of the failure. The title of the insured to maintain his suit rests upon his policy and not upon the conduct of the insurer in relation to the appraisalment. He may, when the policy provides for an appraisalment, be estopped from bringing his suit by his own conduct in reference to the appraisalment, but if his conduct in that connection be free from fault he is not estopped from suing by the failure of the appraisalment from other causes.

It is further to be observed that in most of the cases cited by the appellant in this connection there was evidence tending to implicate the insurance company itself in the conduct of the delinquent appraiser. That is true of the cases of *Uhrig v. Williamsburgh etc. Ins. Co.*, 101 N. Y. 362, 4 N. E. 745; *Hamilton v. Liverpool etc. Ins. Co.*, 136 U. S. 255, 10 Sup. Ct. Rep. 945; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. 844; and *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. 1041. In the last-mentioned case, which was cited by the appellee, but was much relied on by the appellant in argument, the court in its opinion not only held that the appraisalment clause of the policy was inoperative because there had been no real effort to agree upon the loss by the parties themselves, but also found from the evidence that the appraisalment had "failed in consequence of the perverse conduct and want of good faith of the insurance companies represented by their adjuster and appraiser." All of these cases were in substantial accord with us upon the main question in this case in refusing to hold that the insured was prevented from maintaining a suit on his policy by a failure of an appraisalment which occurred without fault on his part.

In the case of *Davenport v. Insurance Co.*, 10 Daly, 535, the court of common pleas of New York held that where appraisers had been selected, to fix the amount of loss by a fire under a policy similar to the one now before us, and they failed to agree upon an umpire, the insured, although not at ³⁰⁵ fault himself, was not entitled to at once institute an action on his policy; that it was his duty to suggest the name of a new appraiser and make further attempts at procuring an appraisalment. No authority was there relied on, except that of an earlier case in the same court. Without meaning to say that there are no circumstances under which it would be the duty of an insured to suggest the name of a new appraiser and make further

efforts for an appraisalment before bringing suit on his policy, we do not think that the appellee was bound to do so, under the facts of this case, before he brought the present suit.

The judgment appealed from must be affirmed.

Judgment affirmed with costs.

For Authorities bearing upon the decision in the principal case, see *Christianson v. Norwich etc. Ins. Soc.*, 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379, and cases cited in the cross-reference note thereto; *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 South. 936, 74 Am. St. Rep. 43, and cases cited in the cross-reference note thereto. If the appraisalment of the amount of loss is prevented by the conduct of an appraiser appointed by an insurance company, the failure of the appraisalment does not bar the right of the insured to bring an action on his policy: *Niagara etc. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; *Brock v. Dwelling-House Ins. Co.*, 102 Mich. 583, 47 Am. St. Rep. 562, 61 N. W. 67.

GARRISON v. UNITED RAILWAYS AND ELECTRIC COMPANY.

[97 Md. 347, 55 Atl. 371.]

STREET RAILWAY—Time Limit of Transfer.—If the time within which a transfer may be used expires through the failure of the railway company to run cars frequently enough, that fact does not make the transfer good, and a passenger presenting it may lawfully be ejected from the car if he refuses to pay another fare. (p. 454.)

STREET RAILWAY—Expelling Passenger After He Tenders Fare.—When a conductor has given a passenger a reasonable opportunity to pay his fare, which he persistently refuses to do, and has begun to expel him, the expulsion may be completed, although he thereafter tenders his fare. (p. 455.)

Hyland P. Stewart, for the appellant.

B. H. Griswold, Jr., and J. P. Thom, for the appellee.

650 **McSHERRY, C. J.** There are two controlling questions arising on this record and they are presented by the prayers submitted at the conclusion of the evidence. The bill of exceptions brings up for review only the rulings on the prayers. The first question is this: Was the trial court right in ruling that a transfer delivered to the appellant by the conductor of the appellee's Lombard street line was void after the expiration of the time limited on its face for its use? The court below held that the

³⁵¹ transfer was void and accordingly granted the appellee's second prayer and rejected the appellant's first prayer. The second question is this: Was the conductor of the Wilkins avenue car, upon which the appellant attempted to use the transfer, justified in ejecting the appellant when the latter refused to pay his fare and after the conductor had stopped the car in order to eject the appellant, though after the car had been stopped for that purpose a companion of the appellant offered to pay the fare? This question was answered by the trial court in the affirmative by the granting of the defendant's fifth prayer. Besides the two controlling questions just stated there are some subsidiary inquiries which will be considered later on.

1. It appears that the appellant with two friends boarded a car of the appellee at the corner of Lombard and Carey streets in Baltimore about 3:40 or 3:45 on the afternoon of March 6, 1901. They paid their fares and asked for transfers to the Wilkins avenue line going south. The conductor gave the transfers as requested and punched the date, the hour 3:50, and the transfer point, Gilmor and Lombard streets. The transfers were limited as to the time within which they could be used, and the time thus limited was indicated by the punch marks which the conductor made. It is alleged by the appellant, and for the purposes of this discussion it will be assumed to be true, that no car passed south on Wilkins avenue until after the time limited for the use of the transfer had expired. By the act of assembly of 1900, chapter 313, the street-car company of Baltimore City is required to issue transfers. The first proviso in that enactment reads: "Provided, that such company shall give a free transfer, when the same shall be requested upon the payment of each cash fare, which transfer shall be good at all points of intersection of lines of said railway for a continuous ride." The appellant and his friends boarded the first car going south on the Wilkin's avenue line and presented the transfers. The time within which they could be used had then elapsed, and the conductor refused to take them. He demanded the payment ³⁵² of the regular fare. This was refused, and the car was stopped and the conductor went in search of a policeman. When the conductor returned with a policeman and re-entered the car, he requested the appellant and his companions to get off the car. This they refused to do, and one of them offered to pay the fare, which the appellant alleges the conductor refused to receive. According to the appellant's testimony the conductor grabbed the appellant viciously by the shoulders and shoved him violently

out of the door of the car and up against the heavy metal controller severely hurting his left arm. The fare was again tendered by the appellant's companions and after much parley was accepted, and the car was started and the appellant proceeded to his destination. The policeman flatly contradicted the statement of the appellant with respect to the alleged use of force.

It has been insisted by the appellant, against whom the jury rendered a verdict and against whom a judgment for costs was entered, that the appellee company has no authority to limit the time within which a transfer must be used. We cannot accede to this contention. Whilst the act of 1900, chapter 313, contains no specific provision declaring for what length of time the transfer shall be good, it is obvious that it does not contemplate that no reasonable regulation shall be made upon the subject. In the nature of the case, regard being had to the character and the magnitude of the business of conveying on street-cars hundreds of thousands of passengers, it would seem to be a very proper precaution for the company to protect itself against imposition by affixing to the transfers, which it is required to issue, a limit beyond which they should not be available for use. When thus limited they are void and do not entitle the holder to ride on the cars after the expiration of the time specified by the punch marks. The statute makes the transfers good for a continuous ride. That language would seem to exclude the notion that there can be no time limit fixed. A continuous ride does not mean a ride interrupted by a considerable interval of time. If the time within which the transfer may be used expires by reason of the failure ³⁶³ of the company to run its cars frequently enough, that fact does not make the transfer good or authorize a conductor to honor it. In such circumstances it is the plain duty of the passenger to pay his fare; but he is not without remedy. If by the company's fault the transfer expires before the holder has had an opportunity to use it and in consequence he is required to pay and does pay his fare, he would have his action against the company. But if it were held that in spite of the expiration of the transfer the conductor was still obliged to accept it, the company would be exposed to flagrant imposition without any means of protecting itself. The transfer, like a railroad company's ticket, is the evidence of the passenger's right to ride: *United Rys. etc. Co. v. Hardesty*, 94 Md. 661, 51 Atl. 406; *Western Md. R. R. Co. v. Stocksedale*, 83 Md. 245, 34 Atl. 880; *Blocher v. Baltimore etc. R. R. Co.*, 27 Md. 277. If the transfer, like the ticket, is void on its face, it is not a token

of the holder's right to be transported on the carrier's conveyance. In *Philadelphia etc. R. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97, the liability of the company was placed upon the ground that the ticket was apparently good on its face. This is distinctly pointed out in *Western Md. R. R. Co. v. Stocksedale*, 83 Md. 245, 34 Atl. 880. In the case at bar the transfer was void on its face when the appellant attempted to use it. It, therefore, did not entitle him to ride on the Wilkins avenue car, and the conductor was justified in demanding the appellant's fare, and upon the refusal of the latter to pay, the conductor was warranted in ejecting him. There was consequently no error committed in rejecting the appellant's first prayer and in granting the appellee's second prayer. The appellee's third and fourth prayers were also properly granted. The legal propositions which they embody are fully sustained by what has been said thus far in this judgment.

2. Both upon authority and principle it is clear that when the conductor has given the passenger a reasonable time and opportunity to pay the fare and the passenger has persistently refused to comply, and the conductor has begun the process of expulsion by stopping the car or by applying force to the passenger, when necessary, "the passenger thereupon forfeits ³⁵⁴ his rights as a passenger, and his ejection may be completed even though he may thereafter tender the performance demanded": *Hutchinson on Carriers*, sec. 591A. This doctrine is supported by many adjudged cases: *Georgia etc. Ry. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53, and notes; 5 Am. & Eng. Ency. of Law, 2d ed., 597, note 1. There was, consequently, no error committed in granting the appellee's fifth prayer.

The appellant's third prayer related to punitive damages. It was rejected. The jury having decided that the appellant was not entitled to recover any damages at all it becomes unnecessary to consider whether the prayer correctly defined the measure of exemplary damages.

What we have said in treating of the appellee's second prayer is all that is required to show that the court was entirely right in overruling the appellant's special exception to that prayer.

Finding no errors in the record the judgment will be affirmed, and it is so ordered.

Judgment affirmed with costs above and below.

As to the Rights and Duties of a Street-car Passenger whose transfer is rejected by the conductor, see Kiley v. Chicago City Ry. Co., 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794; O'Rourke v. Citizens' St.

Ry. Co., 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872. Consult, also, *Monnier v. New York Cent. R. R. Co.*, 175 N. Y. 281, 96 Am. St. Rep. 619, 67 N. E. 569; *Kansas City etc. R. R. Co. v. Foster*, 134 Ala. 244, 92 Am. St. Rep. 25, 32 South. 773; *Krueger v. Chicago etc. Ry. Co.*, 68 Minn. 445, 64 Am. St. Rep. 487, 71 N. W. 693; *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65, 28 Am. St. Rep. 913, 11 S. E. 737. As to the effect of time limits in railway tickets, see *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146, and cases cited in the cross-reference note thereto; *Norman v. Southern Ry.*, 65 S. C. 517, 95 Am. St. Rep. 809, 44 S. E. 83; *Cleveland etc. Ry. Co. v. Kinsley*, 27 Ind. App. 135, 87 Am. St. Rep. 245, 60 N. E. 169. It seems that when a passenger refuses to comply with the requirements of a carrier as to the payment of his fare or the production of his ticket, and steps are taken for his expulsion, he cannot, by tendering compliance, entitle himself to carriage and make his subsequent expulsion unlawful: See the monographic note to *Commonwealth v. Power*, 41 Am. Dec. 477; *Hoffbauer v. Delhi etc. R. R. Co.*, 52 Iowa, 342, 35 Am. Rep. 278, 3 N. W. 121; *Pease v. Delaware etc. R. R. Co.*, 101 N. Y. 367, 54 Am. Rep. 699; *Louisville etc. R. R. Co. v. Harris*, 9 Lea, 180, 42 Am. Rep. 668.

COURTNEY v. WILLIAM KNABE & CO. MANUFACTURING COMPANY.

[97 Md. 499, 55 Atl. 614.]

EVIDENCE, Parol to Vary Contract.—If a Vendor writes to his vendee, "I beg to confirm sale to you of the following mahogany," and the vendee in reply to the letter states that the "same is correct as to quantities, terms, etc., as specified," the letters do not contain the contract of sale, but refer to a contract already made. Parol evidence is therefore admissible to show what that contract was. (p. 459.)

RES JUDICATA.—The Term "Parties" Includes those who are directly interested in the subject matter of the suit, knew of its pendency, and had the right to control and direct or defend it. (p. 460.)

RES JUDICATA.—If in Replevin the Pleas of non cepit and property in another are interposed, a judgment for the defendant which does not order a return of the property, does not estop the parties in a subsequent suit from questioning the title of such defendant. (p. 461.)

COMMERCIAL AGENCY.—False Representations to a commercial agency are admissible in evidence to show, in connection with other representations, fraud in the purchase of merchandise on the part of the buyer, of such a character that the seller may avoid the transaction. (p. 464.)

SALE—Delivery and Acceptance.—If There is Evidence tending to show that a purchaser refused to accept lumber because unsatisfactory in quality, and merely permitted it to be put in his yard for the mutual convenience of the parties, an instruction to the jury to find an acceptance, without informing them what facts amount to an acceptance, is faulty. (p. 465.)

Arthur G. Brown and Thomas C. Weeks, for the appellants.
Randolph Barton and James M. Ambler, for the appellee.

⁵²³ PAGE, J. This suit was brought by the appellants, trustees of H. Clay Tunis, to recover the price of certain mahogany lumber alleged to have been sold by Tunis to the appellees. The narration contains two money counts and a special count. The defendants plead the general issue. The judgment being for the appellees the appellants have appealed.

Five exceptions were taken at the trial. The first four to ⁵²⁴ the admission of evidence; the fifth to the ruling of the court on the prayers.

The first and third exceptions raise the same questions, and will be considered together. To maintain the issues on their part the plaintiffs offered the following letters, viz.:

"Baltimore, July 2, 1900.

"Messrs. William Knabe & Co., City.

"Dear Sirs: I beg to confirm sale to you of the following mahogany mentioned upon my list, a copy of which I inclose, namely all the 5-8, all the 4-4 No. 1 and 2 and 4-4 select, common 10 to 16 feet long, all of the 5-4 and 6-4 and 8-4, except the common and culls, and end lengths from 4-4 No. 1 and 2 and select common 8 to 9 and 3 to 7 feet long, as you may be able to use to advantage being the amount furnished up to 100M ft. Price on the 5-8 to be six cents per foot, and on the balance eleven cents per foot, delivered in your yard, delivery to be made this month. Terms: Four equal payments to be made on November 10, 1900, January 10, 1901, February 10, 1901, and March 10, 1901.

"Yours truly,

"H. CLAY TUNIS."

"Baltimore, July 6th, 1900.

"Mr. H. Clay Tunis, City.

"Dear Sir: Referring to your favor of the 2nd inst., confirming order given to your Mr. Welch, for mahogany, beg to say, that the same is correct, as to quantities, terms, etc., as specified.

"Kindly advise us two or three days before you have the lumber brought to the city, as we will have to make some preparations for receiving it into our yards.

"Yours truly,

"WILLIAM KNABE & CO.

"J. N. H."

A witness then testified that he had made the sale referred to in the letter of Knabe & Co. on behalf of Tunis; and on cross-examination said the Knabes "were to judge whether the lumber suited their purposes by the approval and inspection of it, upon its arrival in Baltimore"; whereupon the counsel for the defendants asked him if the agreement (contained in the letter) was "the original contract," and was it (the lumber) to be subject to their (Knabes) approval and inspection. ⁵²⁵ In the third exception, the witness was further questioned as to the making and substance of the verbal contract through the agency of the witness. These questions, and the answers, were objected to upon the grounds that the letters contained the contract, and that parol evidence could not be admitted to add to or vary it; but the court overruled the objection and held the letters did not contain the original contract, and the defendant had "a right to go into what the original contract" was.

The question presented by these exceptions therefore is whether the letters contained, or were intended by the parties to contain, the contract; or whether they were intended merely to refer to a contract that had already been made and to confirm it. It is too plain for argument that if it was intended to reduce the contract to a writing which should be the expression of what the parties had done, or intended to do, all previous stipulations, negotiations and terms are supposed to be embodied in the writing, and parol evidence is not admissible to add to or vary it: *Artz v. Grove*, 21 Md. 456. And it is equally plain that if an offer is communicated by letter and an acceptance is made, the offer becomes a contract between the parties: *Stockman v. Stockman*, 32 Md. 207; *Hand v. Evans Marble Co.*, 88 Md. 231, 40 Atl. 899; *Wills v. Carpenter*, 75 Md. 84, 25 Atl. 415.

Is this case within any of the principles set forth in the cases cited above? It seems to us clear that the letter of Tunis was not intended to and did not import more than a confirmation of a transaction that had been theretofore made by Welch, the agent of Tunis. Tunis' letter specially so states: "I beg to confirm sale to you," etc.; and what follows this assumes that a sale had already been made of the lumber mentioned, to be delivered and paid for as stated. Knabe & Co.'s reply shows that they so regarded it. They say "your favor of the 2d inst. confirming order given to your Mr. Welch, etc." The letter of Tunis does not admit of a construction that would amount to an offer to sell. It refers exclusively to a prior transaction,

and only "confirms" a sale that had already been made by Welch, who, as it appears from ⁵²⁶ the evidence, was his "hardwood salesman." Nor does Tunis in his letter undertake to state the contract of sale except as to "quantities, terms, etc." As to all other conditions, if any, no reference at all is made. As we have already said, it also seems to be clear that the Knabes so construed the letter, for in their reply they do not accept an offer, but only acknowledge the receipt of the Tunis letter, which they say "confirms order given to your Mr. Welch"; and then they add "that the terms of the order as contained in the letter is correct as to quantities, terms, etc., as specified." If no order had been given to Welch as agent of Tunis, then there would be no evidence of a contract of sale in the case; and if there was such an order, that was the thing the parties by their letters confirmed. What was the "order" thus confirmed? Evidence was admissible to show what it was. So far as stated in Tunis' letter, and admitted to be correct in Knabe's letter, no evidence was required because to that extent both parties had admitted its terms; but these admissions went no farther than stated, and if there were other features, not stated in the letters, that had been agreed to by both parties, it was competent for either party to show what features of the order had been omitted from the letters. It was the whole order as given to Welch, and not a part of it, that Tunis "confirmed." It was therefore the order in its entirety that constituted the contract of sale between the parties. We find no error in these rulings.

The plaintiffs further to maintain the issues on their part then offered in evidence the docket in the case of Uptegrove & Co. v. Tunis, being an action to replevin brought by the former against the latter to recover from the latter the lumber which is the subject of this suit. After the introduction of these, and also the original papers, as well as the testimony taken therein, and also the instructions granted and refused by the court, the appellees offered evidence tending to prove that Tunis had fraudulently purchased the lumber from Uptegrove & Bros. and therefore had fraudulently obtained possession of it. The appellant objected to the reception of ⁵²⁷ this evidence. The court, however, overruled these objections as well as a motion to strike out and exclude such evidence as had already gone to the jury subject to the appellants' objections; and these rulings constitute the second exception. The ground of the appellants' objection to this evidence was and is that the title to the lumber had been finally adjudicated in the replevin suit, and therefore

in the present case the title was no longer an open question. It is well established that a former judgment upon the same subject matter operates as an estoppel between the same parties, provided that it appears by the record or other proof that the matter in issue was decided in the former suit: *Whitehurst v. Rogers*, 38 Md. 512; and the term "parties" include those who are directly interested in the subject matter of the suit, knew of its pendency and had the right to control and direct or defend it: *McKinzie v. Baltimore etc. R. R. Co.*, 28 Md. 175.

It is shown by the evidence, and not contradicted, that Knabe & Co. had full knowledge of the former suit. Mr. Ernest Knabe testified that he "had an understanding and agreement with Uptegrove, at the time he laid the replevin, to get possession of the lumber, that he (Knabe) would aid him provided Uptegrove would aid him." Whatsoever, therefore, was decided in the replevin suit as to title is now *res adjudicata* in the present case.

Now, what was decided in the former suit, as appears by the record or other proof? Two pleas were there interposed, first, *non cepit*, and second, property in William Knabe & Co.; the replication was property in the plaintiff (Uptegrove), and not in Knabe & Co.; the verdict and judgment were for the defendant, but the court in the judgment did not order a return of the property. Unexplained, the judgment and verdict could have been rendered, either upon a finding that the property was not in the possession of the defendant (*Herzberg v. Sachse*, 60 Md. 433); or that the plaintiff had not title or right of possession as against the defendant (*Seldner v. Smith*, 40 Md. 612); or that the title and right of possession was in Knabe & Co. It is impossible to determine, however, from ⁵²⁸ the form of the verdict, upon which of these grounds the decision of the court (who sat as judge and jury) was placed. Nor do the instructions granted by the court throw any light upon this difficulty. There were only two prayers granted. One, upon the court's own motion, wherein the pivotal fact, upon which the defendant's right to a verdict depended, was whether or not the goods were in the "possession of the defendant at the time of the institution of the proceedings." If there had been no other instruction than this, it might seem that the question as to the right of possession of, or title to, the property was not decided at all, but only that the defendant did not take, or was not in the possession of, the property. The other prayer granted was that there was no other evidence offered legally sufficient to entitle the plaintiff to recover. This covered all the possible grounds upon which the

plaintiff could recover under the issues in the case. The proof adduced in the case, as appears by the record, covered all the possible defenses under the evidence that was offered, viz, as to the title of Tunis as well as that of Uptegrove; and whether the lumber at the time of the bringing of the suit had been, or then was, in the possession of the Knabes. It therefore appears that several distinct matters were in issue under the pleadings and proof upon any one of which the verdict and judgment could have been rendered, and no extrinsic evidence was adduced in this case from which it can be determined upon which of them the judgment was rendered. If the judgment had been for the plaintiff, the same difficulties would not have been presented, for if such had been the case, the effect of the judgment would have been at most to decide that the right to the possession was in the plaintiff, and upon this hypothesis this case would then be within the rulings in *McKinzie v. Baltimore etc. R. R. Co.*, 28 Md. 174; and in that case where the pleas being non cepit and property in another, it was held that the pleas imposed upon *McKenzie* the onus to prove title in himself, and as he had done so successfully the judgment in his favor operated as an estoppel between the same parties. The court in its opinion, in this case, noted a distinction between the facts before them and those presented in *Warfield & Mactier v. Walter*, 11 Gill & J. 83, where the pleas being the same the verdict and judgment were against the plaintiff. The court referring to that case said: "Had the verdict and judgment been for the plaintiffs, the judgment would have been conclusive and operated as an estoppel, because the title of the plaintiffs was the matter in issue. But being adverse to the plaintiffs, the verdict only went to the extent of declaring that the title was not in them, and could not be regarded as declaring title in anyone else." In the case at bar, however, where there was evidence of the actual possession of the property by Knabe & Co. at the time of the suit, the verdict and judgment might have been made upon the finding of the non-possession of the defendant at the time of bringing of the suit. The judgment, therefore, could not operate as an estoppel in this suit, whereby the parties are prevented from showing that there was no title in the defendant, Tunis. In *Whitehurst v. Rogers*, 38 Md. 518, this court announced the same doctrine. It was there said: "It is not necessary to the conclusiveness of the former judgment that issue should have been taken in the precise point which is controverted in the second trial; it is sufficient if that point was essential to the former verdict." We have seen

that in the former case the determination of the title was not essential to the finding of the judgment and verdict that were rendered, and not being conclusive, evidence tending to prove that Tunis had obtained the possession of the lumber by fraud was properly admitted.

The fourth exception is to the admissibility in evidence of certain reports by the Dun and Bradstreet Mercantile Agencies. Evidence had gone to the jury showing that the lumber in dispute had belonged to William E. Uptegrove & Bro., a corporation, that this company had agreed to sell it to Tunis, and thereafter before the purchase money had been paid, Tunis sold a large part of it to William Knabe & Co.; that after Tunis began its delivery, the Knabes refused to accept, on the ground that it did not come up to the requirements ⁵³⁰ of their contract (with Tunis), but agreed to permit the balance to be stored in their yard for their mutual convenience; and that Tunis, having made default in his payment to Uptegrove, the latter, upon inquiry found that Tunis had imposed upon him by false representations; and therefore elected to rescind the sale and resume the possession of that part of the lumber which had not been sent to the yard of the Knabes. For the purpose of showing some of the false representations by which Uptegrove & Co. had been induced to sell to Tunis, the defendant offered in evidence certain statements of Tunis, made to Uptegrove by himself or through his agent, Welch, and that Uptegrove himself, prior to the sale, had examined the reports of these mercantile agencies, and that the representations contained in these reports as to the financial condition of Tunis, together with the false statements made by Tunis by himself or through his agents, constitute the inducement which led Uptegrove to extend credit to Tunis, who at that time was hopelessly insolvent, with no expectations of paying his creditors. The offer and report of the mercantile agency was made and admitted by the court, "subject to the proof of its authenticity"; and subsequently, by the granting of the fourth prayer of the defendant, the jury were directed "to exclude from their consideration all of the reports furnished by R. G. Dun & Co. to Uptegrove outside of the matters testified to by said Robert W. Brown, as stated to him by said Tunis or obtained from the books of said Tunis by his direction."

The witness Brown, who made the statements contained in the reports, testified that in May, 1900, he called on Tunis for a statement of his financial condition, and was told by him,

"that it was as good as it was when he made the previous statement (that is the statement of July, 1899), and that the figures in that would practically be good." The witness reported this and the statement was given out by the agency. In the spring of 1900, he had made a statement of his affairs as of 1899, July 1st, from the books shown to the witness by Tunis in response to a request to be informed as to ⁵³¹ his condition. It therefore appears that the reports as to Tunis' affairs came directly from him. The admissibility of these reports were especially excepted to, for the following reasons: Because, 1. They had not been sufficiently authenticated; 2. There was no evidence that they were not correct at the time of the purchase of the lumber by Tunis (about June, 1900); 3. No evidence that Uptegrove & Co. relied on the truth of said reports; 4. No evidence that such reports were made by Tunis with design of imposing and cheating Uptegrove, or the public generally, in respect to the sale of said lumber.

After what has already been said, the first of these reasons requires no further attention. The fourth reason raises the question as to the motives of Tunis in issuing the statements that may reasonably be imputed to him in the absence of any express proof on the subject.

In Blum's Case, 94 Md. 388, 51 Atl. 26, where the defendants were indicted for obtaining goods on false pretenses, representations, etc., exception was taken to the admission of the testimony of an expert accountant to testify as to the details of a statement of the financial condition of the traverser, made by one of the firm of Blum Bros. & Harris to a reporter of R. G. Dun & Co. and by him reduced to writing and examined by the accountant in connection with the books. The court ruled this evidence out, because it had not been so clearly established that the statements to the agency were made with the fraudulent purpose to use such agency as an instrument in accomplishing a fraud upon his vendor or some other dealer as to justify the court "in saying that a fraud was perpetrated through the medium of the agency of a character sufficient to justify criminal prosecution therefor." To support this view the case of Deckerhoff v. Brown, 64 Md. xiii, 2 Atl. 723, is cited wherein the rule laid down in Victor v. Renlein, 33 Hun, 549, is approved, that "when the only representations made are those furnished to sellers by these agencies, it must be ⁵³² clearly shown that the accused buyer made the statements to the agency with the fraudulent intent to use such agency as an instrument in accomplishing a

fraud upon his vendor or some other dealer." In the case at bar, there were other representations, alleged to be false, made by Tunis, which it is contended contributed to induce Uptegrove to sell the lumber and extend a credit to Tunis. So that the question here is not whether, standing alone, false representations to such agencies are sufficient to establish a fraud of a criminal character, but whether such reports can be offered for the purpose of showing, in connection with other representations, fraud and deceit in the purchase of merchandise on the part of the buyer, of such a character that the seller may avoid the transaction.

Now for the sake of argument, assuming that the reports were false, and were known to be so by Tunis, they must have been made to the agency that they might be communicated to others and be believed by them. They were made to a concern whose business, it is well known, is to disseminate among business men the character and standing of all other men of business, with whom they may have transactions, that require credit and capital. A statement to them to be disseminated broadcast, if known to be false at the time it was made, could only be made for the purpose of securing a larger credit than would have been possible if only the strict truth had been given. This view, which is apparently reasonable, has been adopted by most of the courts of the country. In the case of *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 33, 38 Am. Rep. 389, a leading case, the court said: "It is not essential that a representation should be addressed directly to the party who seeks the remedy for having been deceived and defrauded by means thereof." "A person furnishing information to such an agency can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance in giving credit to the parties, and if a merchant furnishes to such an agency a willfully false statement of his ⁵³³ circumstances, or pecuniary ability, with intent to obtain a standing and credit to which he knows he is not justly entitled, and thus to defraud whoever may resort to the agency and in reliance upon the false information there booked, extend a credit to him, there is no reason why this liability to any party defrauded by this means should not be the same as if he had made the false representation directly to the party injured." Of similar import are the following cases: *Soper Lumber Co. v. Halstead & Harmount Co.*, 73 Conn. 547, 48 Atl. 425; *Genesee Co. Sav. Bank v. Barge Co.*, 52 Mich. 164, 17 N. W. 790, 18 N.

W. 206; *In re Epstein*, 109 Fed. 874; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 402; *Nicholls v. McShane* (Colo. App.), 64 Pac. 375.

The appellant offered seven prayers, all of which were rejected and the appellee six, all of which were granted.

The first and second prayers of the appellants instructed the jury that the letter of Tunis and the reply of the Knabe & Co. constituted the contract for the sale of the lumber, and was therefore bad for reasons already stated. The second prayer is open to the additional objection that it ignores all the evidence respecting the manner in which the Knabes became possessed of the lumber, and Uptegrove's relation to it. The third, seventh and fifth prayers were defective in that the jury is told that the suit in replevin established conclusively that the title to the lumber was not in Uptegrove. The fourth prayer was properly rejected. There was evidence in the cause tending to show that Knabe had refused to accept the lumber, because it was not of satisfactory quality, and had merely permitted the lumber to be put in his yard for the mutual convenience of the parties; and in view of this it became and was a matter of law, upon all the testimony in the case, whether there had been an acceptance by the Knabes. To instruct the jury therefore to find an acceptance, without informing them what facts amounted to an acceptance, was calculated to mislead them and therefore was faulty. The prayer practically denies that Knabe & Co. had the power to reject all or any part of the lumber, if, when part of it had been delivered, it was found it did not measure up to the ⁵³⁴ standard fixed by the contract. The jury should have been told explicitly what the legal effect would be, if they found that Knabe had rejected, or attempted to reject, the lumber after part of it had been received. The sixth prayer is open to the same objection and in addition that it instructed the jury there was no evidence that the purchase of the lumber was fraudulent on the part of Tunis.

The modification added by the court to the eighth prayer was proper.

We find no error in the granting of the defendant's prayers. Without going over these prayers in detail, we may say that they put the case fairly before the jury. By the first, the jury were told that the plaintiff could not recover on the special count, which set up a contract by letter, if they found the contract was "not in writing," thus leaving open the question of their right of recovery upon the common counts.

The second, fourth and fifth (marked sixth in the record) as granted, were in accordance with the views already here expressed.

The third prayer is in accordance with instructions approved in *Peters v. Hilles*, 48 Md. 507, and other cases in this court.

Finding no error the judgment will be affirmed.

Parol Evidence affecting a written instrument is not ordinarily admissible, except to complete the entire contract of which the writing is only a part, or to show that a writing which purports to be a contract is in fact no contract: *Jamestown Business College v. Allen*, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740, and cases cited in the cross-reference note thereto; *Brantingham v. Huff*, 174 N. Y. 53, 95 Am. St. Rep. 545, 66 N. E. 620. Subsequent parol agreements to vary a writing are discussed in the monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659-672.

If a Buyer Makes False Statements to a Commercial Agency, he may become liable to an action of deceit, or a sale of goods made in reliance thereon may be rescinded: *Tindle v. Birkett*, 171 N. Y. 520, 89 Am. St. Rep. 822, 64 N. E. 210; monographic note to *Henry v. Dennis*, 85 Am. St. Rep. 383.

The General Rules of *Res Judicata* are stated in the recent cases of *La Follett v. Mitchell*, 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916; *White v. Ladd*, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739; *Garden City v. Merchants' etc. Nat. Bank*, 65 Kan. 345, 93 Am. St. Rep. 281, 69 Pac. 325; *Hunter v. Hunter*, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33. As to who are parties within the doctrine of *res judicata*, see the monographic note to *Hill v. Bain*, 2 Am. St. Rep. 876-878. It has been held that one not a party to a prior action is not estopped by the judgment therein, although he had notice of the pendency of the action: *Lower Latham Ditch Co. v. Loudon etc. Co.*, 27 Colo. 267, 83 Am. St. Rep. 80, 60 Pac. 629.

AMERICAN BONDING COMPANY OF BALTIMORE v. NATIONAL MECHANICS' BANK OF BALTIMORE.

[97 Md. 598, 55 Atl. 395.]

PUBLIC OFFICER.—Interest on Funds Deposited with Bank.—

If an officer deposits public funds with a bank, and the bank, with knowledge of the ownership of the money, pays interest thereon to the officer individually, the state may recover from the bank the interest so diverted. (p. 471.)

SUBROGATION.—If a Surety Pays the Debt of his principal, his right to subrogate is not restricted to the rights and remedies to which the creditor was entitled against the principal, but extends to his rights and remedies against other persons who were liable for the debt paid. (p. 472.)

SUBROGATION.—If an Officer Deposits Public Funds with a bank, and the bank, with knowledge of the ownership of the money, pays interest thereon to the officer individually, and the state holds the surety of the officer liable for the diverted interest, the surety is entitled to be subrogated to the rights of the state against the bank, and the custom of banks to make such payments is no defense. (p. 473.)

SUBROGATION—Exemption of Statute of Limitations.—A surety of a public officer who has paid the state its claim against his principal, is entitled to the benefit of every right, lien and security which existed in favor of the state in reference to the claim, including the state's exemption from the statute of limitations. (pp. 473, 474.)

W. I. Cross, Edward Duffy and Cowen, Cross & Bond, for the appellant.

Randolph Barton, Randolph Barton, Jr., and Ambler & Stewart, for the appellee.

*** SCHMUCKER, J. On October 18, 1902, the state of Maryland recovered a judgment of \$4,951.80 against the American Bonding Company of Baltimore as the surety on the official bond of James M. Vansant as clerk of the court of common pleas of Baltimore City. The breach for which the suit was brought was the failure by Vansant to account for and pay over to the state certain money which had been paid to him by various banks as interest on funds received by him in his official capacity and kept on deposit with such banks. Of the money which he so received as interest on funds belonging to the state the sum of \$3,774.70 was paid to him by the present appellee, the National Mechanics' Bank of Baltimore.

*** The American Bonding Company as surety paid the judgment to the state and then filed the present bill to recover \$3,774.70 of it from the National Mechanics' Bank.

The bill alleges the appointment of Vansant as clerk on the 15th of November, 1895, the filing by him of an official bond with the bonding company as sole surety in the penalty of \$50,000 and the retention of the office by him until December 1, 1897. It also avers that he on or about November 18, 1895, at the solicitation of the appellee bank and in pursuance of his official duties opened an account with it in the name of "James M. Vansant, clerk," in which he from time to time deposited money belonging to the state of Maryland, collected by him in the performance of his official duties, and that in addition he, in each year, opened an account with the same bank entitled "James M. Vansant, clerk special," in which he deposited the license fees received by him as clerk and that this money was

afterward transferred by him to the first-mentioned account standing in his name as James M. Vansant, clerk. That Vansant during his occupancy of the position of clerk also kept an individual and personal account in said bank in his own name.

The bill then alleges that the bank, well knowing that the moneys deposited in the two official accounts of Vansant as clerk belonged to the state of Maryland and had been collected by him in the performance of his official duties, allowed and paid to him individually interest at about the rate of two per cent per annum on the daily balances of the said state funds, and the bill states in detail the amounts of interest so allowed, amounting in all to \$3,774.70, with the respective dates of the several allowances. It is alleged that the said payment was accomplished by the bank's crediting the interest on the public funds to the individual account of Vansant and permitting him to draw it out on his individual check and misappropriate it, and that it was the intention of the bank in so doing to pay such interest on the public funds to him for his own personal use. It is also alleged that the interest was so allowed by the bank in pursuance of its habit of dealing with ⁶⁰¹ various previous clerks of the same court who had deposited with it the public funds under their charge.

It is then alleged that Vansant failed to account for and pay over to the state the interest so allowed to him on the public moneys by the bank in consequence of which the suit was brought by the state against the bonding company as his surety and the judgment already mentioned was recovered against it and that it satisfied and paid the same to the state. That the judgment was thereupon according to law entered to the use of the bonding company, and it caused execution to issue thereon which was returned nulla bona and that Vansant is insolvent.

The bill then charges that the bank, by knowingly paying to Vansant individually interest on the public funds deposited with it by him, participated in the misapplication thus accomplished of such interest and thereby became and was responsible to the state of Maryland for the amount of the interest, and that the bonding company by the payment of the judgment recovered against it for the entire interest so misappropriated was subrogated to the right of the state against the bank and is now entitled to recover from the latter the \$3,774.70 interest paid by it which forms part of the amount of the judgment. The prayer of the bill is for a decree against the defendant for the \$3,774.70 and for further relief.

The answer admits the deposit in the bank of the public money by Vansant to his credit as clerk as in the bill alleged and the payment to him individually of the several sums of money in the bill charged and at the times therein set forth, and also the recovery of the judgment by the state against the appellant and the satisfaction thereof by it. It denies, however, that the money was paid in pursuance of any agreement, but asserts that it was "spontaneously and gratuitously" credited to Vansant's personal account. The answer then, by the way of explanation of the transaction, asserts that for more than thirty years prior to the institution of the suit it had been the custom of the banks, including the appellee, in which the clerk of the court of common pleas deposited the ⁶⁰² public money collected by him, to allow to the clerk making such deposits "a sum of money which was equivalent to what would have been interest at the rate of about two per cent per annum" thereon. That such an allowance had been made to Gray, the clerk who preceded Vansant, and that when the latter came into office the same custom had been followed by the appellee with him, and that in that way the money referred to in the bill had from time to time been placed to his individual account, and he had been allowed to check it out for his own use. The answer asserts that such custom of dealing with the said clerks by the banks was well known to and acquiesced in by the state and its officers, and also by the appellant at the time it became surety upon Vansant's bond, and that by reason thereof the state would have been estopped from making any claim against the appellee for the money so paid by it to Vansant, and that the appellant is for the same reason estopped from asserting the claim set up by it in the present suit.

Charles Hahn, the paying teller of the appellee, testified in the court below that, not wishing the bank to lose the clerk's account, he called to see Vansant about the time of his appointment to the clerkship, but did not find him in his office. He, however, saw several other bank men in the office for the same purpose as his own, whereupon he, in order "to clinch the matter," wrote to Vansant as follows: "My dear Vansant: I am happy to congratulate you on your appointment which I heard this morning with satisfaction. I called to talk with you as to the 'clerk's account' with the Mechanics' Bank where you now have it. We desire the cordial relation to continue, and you may ever command us as of old. If convenient we would be pleased to have you call at bank and see our Mr. Ramsay, president of the bank. Yours, Charles Hahn, paying teller."

John B. Ramsay, the president of the bank testified that he had no recollection of Vansant's having seen him in reference to the allowance of the two per cent on the amount of public money to be kept on deposit with the bank or of having ⁶⁰³ made any agreement on the subject, but he frankly admitted that two per cent on those deposits had been paid by the bank to Vansant individually in return for the use of the state money, and said that it had been done "along the line of the custom."

James Bond, the president of the appellant, testified that he did not know when his company became surety on Vansant's bond that interest was allowed to the clerk on deposits of state money, but he said that a general impression or understanding prevailed that such was the case, as he expressed it, "it was in the air."

It has already been decided by us in *Vansant v. State*, 96 Md. 110, 53 Atl. 711, that under the circumstances appearing from the record in this case the sums of money thus from time to time paid by the bank to Vansant individually were the property of the state, and that it was his duty to account to the state for them. We also held in that case that his failure to account for them constituted a breach of his official duty for which the surety on his bond was liable, and affirmed the judgment which the state had obtained against the surety for the damages sustained by the breach.

The question now to be determined is whether the surety on the clerk's bond, having satisfied the state's judgment, is entitled to be put by way of subrogation in the place of the state and granted a decree against the Mechanics' Bank, the present appellee, for the \$3,774.70 of the state's money which it paid to Vansant individually and which was included in the amount of the judgment.

The theory of the appellant's case is that the bank so aided and participated in Vansant's diversion to his own use of the interest on the deposits as to have been equally guilty with him of the breach of duty thereby made, which, in view of his relation to the deposits, amounted to a breach of trust. That under those circumstances the state could have recovered from the bank the amount of the diverted interest and that the appellant, having as surety satisfied to the state the amount of its loss, is entitled to be subrogated to its rights against the bank in the premises.

⁶⁰⁴ As we said in *Duckett v. Mechanics' Bank*, 86 Md. 403, 63 Am. St. Rep. 513, 38 Atl. 984: "There can be no dispute

that as a general principle all persons who knowingly participate or aid in committing a breach of trust are responsible for the money and may be compelled to replace the fund which they have been instrumental in diverting. . . . There is in such instances no primary or secondary liability as respects the parties guilty of or participating in the breach of trust, because all are equally amenable." The participation by the bank in the breach of trust in that case consisted in permitting the trustee to deposit to his own credit a check drawn to the order of its cashier, containing on its face the words "to deposit to the credit of Henry W. Claggett, trustee," and then to draw out of bank the amount of the credit by his individual checks. The trustee converted the money to his own use. The words which we have quoted as appearing on the check were held to have been an explicit notice to the bank that Claggett was not the owner of the money and that it should not be placed to his individual credit, and to have thus imparted to the bank the requisite knowledge to affect it with responsibility. We cited in that connection the cases of *Bundy v. Monticello Co.*, 84 Ind. 119, and *American Ex. Bank v. Mining Co.*, 165 Ill. 109, 56 Am. St. Rep. 236, 46 N. E. 202.

In *Vansant v. State*, 96 Md. 110, 53 Atl. 711, when considering the very transactions now before us, we determined that Vansant as clerk "held a fiduciary relation to the state, although not a technical trustee" and that although he did not occupy the precise relation that a trustee or administrator does to his cestui que trust, his position was one of that nature in respect to this public money held by him and that he was to be deemed as holding it in trust for the state. We think it necessarily follows that he and the bank, which had undoubtedly knowledge of the state's ownership of the funds deposited by him as clerk, should be held liable, in dealing with those funds and with the sums allowed as interest thereon or as a return for their use, to the same measure of responsibility that was applied to the dealings of the bank with the trust fund in *Duckett's* case. In that case the successor in trust of the trustee who ⁶⁰⁵ had converted the trust fund to his own use, was allowed to recover the amount of the converted fund from the bank. Upon the same principles the state would have been able to recover from the present appellee the interest on public money which Vansant with its aid converted to his use.

It remains to be determined whether the appellant, having as surety paid to the state the amount of its money thus converted

by Vansant to his own use, is entitled to be subrogated to the rights of the state and recover from the appellee the \$3,774.70 of that money which consisted of interest paid by it to him on the state's deposits.

The general equitable doctrine of subrogation, by which a surety who has paid the debt of his principal becomes entitled to all of the rights of the creditor against the principal debtor and to the benefit of all securities for the debt held by the former against the latter, is universally recognized. We are, however, in this case asked to go a step further and hold that under such circumstances the right of subrogation is not restricted to the rights and remedies to which the creditor was entitled against the principal, but extends to his rights and remedies against other persons who were liable for the debt which has been satisfied by the surety. We are not aware that this court has ever been called upon to pass on that precise proposition, but the expressions which it has used in defining the right of subrogation are broad enough to include the principle upon which the proposition rests. In *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286, the court say of the doctrine of subrogation: "It is not founded on contract, but has its origin in a sense of natural justice. So soon as a surety pays the debt of the principal debtor, equity subrogates him to the place of the creditor and gives him every right, lien and security to which the creditor could have resorted for the payment of his debt." In *Ghiselin v. Ferguson*, 4 Har. & J. 521, it is said that if a surety paying the debt of his principal shall be considered to stand in the place of the creditor "for any one purpose to answer the ends of justice the court cannot understand why he may not be so considered for every purpose where the same ends are in view."

*** That the doctrine of subrogation does go to the extent of giving to the surety, who has paid the debt of the principal, the benefit of the rights and remedies of the creditor against all persons who were liable for the debt is both asserted by text-writers and sustained by the authority of many decided cases: *Baylies on Sureties and Guarantors*, 358; *Rooker v. Benson*, 83 Ind. 250; *McCormick v. Irwin*, 35 Pa. St. 111; *Blake v. Traders' Bank*, 145 Mass. 13, 12 N. E. 414. This is especially held to be true of the sureties of a fiduciary who are compelled to answer for his breach of trust, and they have repeatedly been subrogated to the rights and remedies of both the trustee and the cestui que trust against the fiduciary and those participating in

the wrongful act: Sheldon on Subrogation, sec. 89; 24 Am. & Eng. Ency. of Law, 216 et seq., and cases there cited; Wilson v. Doster, 42 N. C. 231; Edmunds v. Venable, 1 Pat. & H. 121; Boone Co. Bank v. Byrum, 68 Ark. 71, 56 S. W. 532; Blake v. Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414.

The facts of the present case in our opinion bring it within the class of cases last referred to, and we think, both upon principle and authority, the appellant should be subrogated to the right of the state to recover from the appellee as a participant in Vansant's breach of trust in receiving to his personal credit and converting to his own use the \$3,774.70 allowed to him by the appellee in return for the use of the state's money deposited to his credit as clerk of the court of common pleas. Without the aid of the appellee the \$3,774.70 never would have been deposited to his individual credit, and could not have been drawn out by his individual check. Not only was the first step in the diversion of this money, which of right belonged to the state, taken by the appellee in entering it to Vansant's credit, but in view of the facts surrounding the deposit of the public funds with the appellee, the letter written to him by its teller amounted to a virtual invitation to him to deposit those funds with it for a consideration to be enjoyed by him as an individual.

The practice and custom of the appellee and other banks in allowing clerks of court interest for their individual use on deposits of public funds set up in the answer can afford no defense to the appellee. It was distinctly held in *Vansant v. State*, 96 Md. 110, 53 Atl. 711, that such custom interposed no obstacle to a recovery by the state of the very money now in question from Vansant, and the same principle must be applied to the present suit to enforce by way of subrogation the state's right to recover it from the appellee as a participant in Vansant's breach of trust.

The appellant, being subrogated to the right of the state in respect to its claim against the appellee, is entitled to the benefit of every right, lien and security which existed in favor of the state in reference to the claim. Among these may properly be classed the state's exemption from the running of limitations against it. In *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286, it was held that a surety who had paid the debt of the principal to the state was entitled to enjoy by subrogation the right of priority over other creditors in the distribution of the assets of the principal debtor which would have existed in favor of the state as a creditor had the claim been asserted by it. The rea-

soning which led our predecessors to the conclusion there arrived at requires us to hold that the present appellant is entitled to stand in the state's position in reference to its claim against the appellee and enjoy its exemption from the operation of the statute of limitations.

For the reasons stated by us the decree appealed from must be reversed, and as it is apparent that the appellant is entitled to recover we will not remand the case but will enter judgment in its favor for the principal amount of its claim.

Decree reversed and decree entered in this court in favor of the appellant against the appellee for \$3,774.70 with interest from this date and costs above and below.

THE RIGHT TO SUBROGATION.

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I. Introductory.

a. Definition.—“Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the right of the other in relation to the debt or claim, and its rights, remedies or securities”: *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 52 Am. Rep. 728, 2 N. E. 103. To the same effect, see *Johnson v. Barrett*, 117 Ind. 551, 10 Am. St. Rep. 83, 19 N. E. 199; *Heuser v. Sharman*, 89 Iowa, 355, 48 Am. St. Rep. 390, 56 N. W. 525; *Boston Safe Deposit etc. Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472; *New Orleans Nat. Bank v. Eagle Cotton etc. Co.*, 43 La. Ann. 814, 9 South. 442; *Hutchinson v. Crutcher*, 98 Tenn. 421, 39 S. W. 725; *Evison v. Hallock*, 108 Wis. 249, 83 N. W. 1102; *Swartz v. Siegel*, 117 Fed. 13. It has been styled a legal fiction whereby an obligation which has been discharged by a third person, is treated as still subsisting for his benefit, so that by means thereof one creditor is substituted to the rights, remedies and securities of another: *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. Rep. 625; *Lawrence v. United States*, 71 Fed. 228. When one person has been required to pay the debt of another, equity, as far as it can be done without just ground of complaint by others, substitutes him to all the rights and remedies of the creditor against the debtor: *Schilb v. Moon*, 50 W. Va. 47, 40 S. E. 329. Subrogation is “used to prevent one person who, while acting with clean hands to protect himself, incidentally but necessarily lifts a burden from another, giving him aid which he cannot in justice continue to enjoy without indemnifying such person against loss in the transaction”: *Larson v. Oisefoe*, 118 Wis. 368, 95 N. W. 399.

The doctrine of subrogation is not a fixed and inflexible rule of law or equity. It does not owe its origin to statute or custom. It is a creature of courts of equity, invented and applied by them to do justice, in a particular case, and under a particular state of facts, where the law is powerless in the premises: *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303. See, too, *Acer v. Hotchkiss*, 97 N. Y. 395; *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102. It does not

depend upon privity or contract; nor is it limited in its application to sureties and quasi sureties. But it is the mode whereby equity compels the ultimate discharge of an obligation by him who ought to pay it; and it is broad enough to include every instance in which one person, who, not being a mere volunteer, pays a debt which in justice, equity and good conscience ought to be paid by another: *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373; *Boston Safe Deposit etc. Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472; *Flannary v. Utley*, 9 Ky. Law Rep. 581, 3 S. W. 412, 5 S. W. 878; *Stewart v. Parcher* (Minn.), 98 N. W. 650; *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Durante v. Eaunaco*, 72 N. Y. Supp. 1048, 65 App. Div. 435; *Bender v. George*, 92 Pa. St. 36; *Miller's Appeal*, 119 Pa. St. 620, 13 Atl. 504; *Nalle v. Farriah*, 98 Va. 130, 34 S. E. 985.

b. Kinds of Subrogation.

1. **Legal Subrogation.**—There are known to the law two kinds of subrogation—legal and conventional. Ordinarily, when the term is used without qualification, legal subrogation is meant—that is, the right to substitution which springs as a matter of course from the mere fact of the payment of a debt without any agreement to that effect between the parties. It is in this sense that we have attempted to define subrogation in the two preceding paragraphs: See *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161.

2. **Conventional Subrogation** arises, not by force of law, but by reason of an agreement by the parties that a third person or one having no previous interest in the matter involved shall, upon discharging an obligation or paying a debt, be substituted in the place of the creditor in respect to such rights, remedies, and securities as he may have against the debtor: *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; *Barker v. Boyd*, 24 Ky. Law Rep. 1389, 71 S. W. 528. It has been said that conventional subrogation can result only from an express agreement, either with the debtor or creditor, and that it is not enough that a person paying the debt of another shall do so merely upon the understanding on his part that he should be subrogated to the rights of the creditor: *New Jersey etc. Ry. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Seeley v. Bacon* (N. J. Eq.), 34 Atl. 139. It is not to be understood from this, however, that an agreement for subrogation will never be implied: *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374; *Heuser v. Sharman*, 89 Iowa, 355, 48 Am. St. Rep. 390, 56 N. W. 525. The agreement may be made between the debtor, creditor, and the third person, or between the creditor and the third person, or even between the debtor and the third person so long as the creditor is not thereby prejudiced: *Patterson v. Clark*,

96 Ga. 494, 23 S. E. 496; *Citizens' Nat. Bank v. Wert*, 26 Fed. 294; *Fivel v. Zuber*, 67 Tex. 275, 3 S. W. 273, citing *Fuller v. Hollis*, 57 Ala. 435; *Mitchell v. Butt*, 45 Ga. 162; *Caudle v. Murphy*, 89 Ill. 352; *New Jersey etc. Ry. Co. v. Wortendyke*, 27 N. J. 658; *Owen v. Cook*, 3 Tenn. Ch. 78; *Morgan v. Hammett*, 23 Wis. 34. Compare *Harrison v. Bisland*, 5 Rob. (La.) 204; *Hoyle v. Cazabat*, 25 La. Ann. 438; *Brice v. Watkins*, 30 La. Ann. 21. But substitution cannot be brought about, probably, by a contract between the debtor and a stranger to which the creditor is not a party, as to a part only of the debt: *Smith v. Morrison* (Tex. Civ. App.), 29 S. W. 1116.

c. Equitable Basis and Nature of Subrogation.—Legal subrogation is not founded upon contract or privity or strict suretyship. It is born of equity, and results from the natural justice of placing the burden where it ought to rest. It does not flow from any fixed rule of law, but rather from principles of justice, equity, and benevolence. It is a purely equitable result, depending like other equitable doctrines upon the facts and circumstances of each particular case to call it forth. It is a device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it: *Opp v. Ward*, 125 Ind. 241, 21 Am. St. Rep. 220, 24 N. E. 974; *Spaulding v. Harvey*, 129 Ind. 106, 28 Am. St. Rep. 176, 28 N. E. 323; *Clark v. Marlow*, 149 Ind. 41, 48 N. E. 359; *Crippen v. Chappel*, 35 Kan. 499, 57 Am. Rep. 187, 11 Pac. 453; *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; *Ocobock v. Baker*, 52 Neb. 447, 66 Am. St. Rep. 519, 72 N. W. 582; *Boicee v. Conover*, 63 N. J. Eq. 273, 53 Atl. 910; *Kinhead v. Ryan*, 64 N. J. Eq. 454, 53 Atl. 1053; *Kolb v. National Surety Co.*, 176 N. Y. 233, 68 N. E. 247; *Grainger v. Lindsay*, 123 N. C. 216, 31 S. E. 473; *Cottrell's Estate*, 23 Pa. St. 294; *Mosier's Appeal*, 56 Pa. St. 76, 93 Am. Dec. 783; *Forest Oil Company's Appeal*, 118 Pa. St. 138, 4 Am. St. Rep. 584, 12 Atl. 442; *Tarver v. Land Mtg. Bank*, 7 Tex. Civ. App. 425, 27 S. W. 40; *Hullings v. Hullings Lumber Co.*, 38 W. Va. 315, 18 S. E. 620; *Memphis etc. R. R. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482; *The Jersey City*, 43 Fed. 166; *Matthews v. Fidelity Title etc. Co.*, 52 Fed. 687; *Goodyear Shoe Machinery Co. v. Dancel*, 119 Fed. 692. The law, however, is as fond of the principle as is equity, wherever it can be made available in legal procedure: *Stevens v. King*, 84 Me. 291, 24 Atl. 850. See, too, *Hull v. Myers*, 90 Ga. 674, 682, 16 S. E. 653. And, while the right to subrogation is not based upon contract, it may be qualified and controlled by the express agreement of the parties; and their rights, in that respect, may be made whatever they choose to make them: *Henderson-Achert Lithographic Co. v. John Shillito Co.*, 64 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295. See "Conventional Subrogation," ante.

d. Origin, Growth, and Expansion of the Doctrine.

1. **In General.**—Chancellor Kent says that the doctrine of subrogation is familiar to the civil law and the law of those countries in which that system essentially prevails but that it is equally well known in the English chancery: *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 7 Am. Dec. 494. It is not improbable that the prevalence of the doctrine in the civil law suggested its adoption from that system of jurisprudence by the early English chancellors. Many authorities regard the Roman law as its source. But however this may be, it has long been an established branch of equity jurisprudence, and its importance has gradually increased until the frequency of its application is surprising: See *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374; *Shinn v. Budd*, 14 N. J. Eq. 234; *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794; *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. Rep. 142.

2. **Present Status and Liberality.**—Since the doctrine of subrogation was ingrafted on English equity jurisprudence, it "has been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons": *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; *Heuser v. Sharman*, 89 Iowa, 355, 48 Am. St. Rep. 390, 56 N. W. 525; *George v. Butler*, 16 Utah, 111, 50 Pac. 1032; *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; *Dorrah v. Hill*, 73 Miss. 787, 19 South. 961; *Rachal v. Smith*, 101 Fed. 159. "The doctrine of subrogation or substitution, at first applied in behalf of those who were bound by the original security with the principal debtor, has been greatly extended, and the principle, modified to meet the circumstances of cases as they have arisen, has been applied in favor of volunteers intervening subsequently to the original obligation, and as between different classes of sureties, and in the marshaling of assets, and prescribing the order in which property and funds shall be subjected to the discharge of different classes of obligations, and as between classes of creditors, so as to do substantial justice in each case": *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625. The remedy, then, is no longer confined to sureties and quasi sureties, but includes so wide a range of persons and subjects that it has been denominated the mode whereby equity compels the ultimate payment of an obligation by him who in justice, equity, and good conscience ought to pay it: *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; "Definition," ante.

No doctrine of equity jurisprudence is more beneficent in its operation than is subrogation, and perhaps none stands in higher favor: *Chaplin v. Sullivan*, 128 Ind. 50, 27 N. E. 425; *Sands v. Durham*, 99 Va. 263, 86 Am. St. Rep. 884, 38 S. E. 145. No general rule can be laid down which will afford a test in all cases for its application; whether or not the doctrine is applicable in any par-

ticular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration: *Boston Safe-Deposit etc. Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472; *Aultman-Miller & Co. v. Bishop*, 53 Neb. 545, 74 N. W. 55; *Gordan v. Stewart* (Neb.), 96 N. W. 624; *In re Mosier*, 56 Pa. St. 76, 93 Am. Dec. 783. Subrogation has been allowed, it is said, upon the broad principle that to deny it, under the facts and circumstances involved, would violate the plainest principles of justice: *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303. Of course, it is not a universal remedy for all who have lost their money in paying obligations for which others are primarily bound: *Berry v. Bullock*, 81 Miss. 463, 33 South. 410. The sphere of its application has many limitations, as will hereafter appear.

The remedy of subrogation is well calculated to effect justice as between those bound to perform the same duty or discharge the same obligation, whether or not they are bound in the same degree, and it has nothing of form nor of technicality about it. "He who, in administering it, would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object": *Enders v. Brune*, 4 Rand. (Va.) 447; *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848; *Schieb v. Moon*, 50 W. Va. 47, 40 S. E. 329.

II. Circumstances Affecting and Controlling Subrogation.

a. Principles of Equity Generally.—The doctrine and practice of subrogation, being of equitable origin and nature, its operation is controlled and governed by the principles of equity: *Springer v. Foster*, 27 Ind. App. 15, 60 N. E. 720; *Sheppard v. Messenger* (Iowa), 77 N. W. 515. While subrogation exists solely for the purpose of accomplishing substantial justice, it is possible that in all cases where it is invoked there must, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence, as recognized and enforced by courts of chancery. This is the view taken by the Nebraska courts and apparently by the Wisconsin: *Seiroe v. Homan*, 50 Neb. 601, 70 N. W. 244; *Meeker v. Larson* (Neb.), 90 N. W. 958; *Gordon v. Stewart* (Neb.), 96 N. W. 624; *Blodgett v. Hitt*, 29 Wis. 169, 183.

b. Intervening Rights and Equities.—Since subrogation is a creature of equity, it must be enforced with a due regard to the rights, legal or equitable, of others. It cannot be invoked so as work injustice, or defeat a legal right, or overthrow a superior or perhaps even an equal equity, or displace an intervening right or title: *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524; *Bartholomew v. First Nat. Bank*, 57 Kan. 594, 47 Pac. 519; *Gray v. Zellmer*, 66 Kan. 514, 72 Pac. 228; *Gaskell v. Huffaker*, 20 Ky. Law Rep. 1555, 49 S. W. 770; *Rand v. Cutler*, 155 Mass. 451,

29 N. E. 1085; *Dwight v. Scranton Lumber Co.*, 32 Mich. 624, 47 N. W. 102; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Rice v. Winters*, 45 Neb. 517, 63 N. W. 830; *Hayden v. Huff*, 60 Neb. 625, 83 N. W. 920; *Union Trust Co. v. Monticello etc. Ry. Co.*, 63 N. Y. 311, 20 Am. Rep. 541; *Vaughan v. Jeffreys*, 119 N. C. 135, 26 S. E. 94; *Cutchin v. Johnston*, 120 N. C. 51, 26 S. E. 698; *Budd v. Oliver*, 148 Pa. St. 194, 23 Atl. 1105; *Musgrave v. Dickson*, 172 Pa. St. 629, 51 Am. St. Rep. 765, 33 Atl. 705; *Shimp's Assigned Estate*, 197 Pa. St. 128, 46 Atl. 1037. If there should be any who, by any rule of strict law, or in equity and good conscience, stands on higher ground or for any reason has a better right, he will not be displaced or his right disturbed; for that is the essence of the doctrine": *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848. Thus, the right of subrogation does not exist in favor of a second mortgagee to the prejudice of the paramount lien: *Skinkle v. Huffman*, 52 Neb. 20, 71 N. W. 1004. Nor can the right prevail against bona fide purchasers or those in a like position: *Richards v. Griffith*, 92 Cal. 493, 27 Am. St. Rep. 156, 28 Pac. 484; *Ahern v. Freeman*, 46 Minn. 156, 24 Am. St. Rep. 206, 48 N. W. 677; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437. A surety on a note secured by a trust deed, who has paid the debt secured, cannot enforce the lien for reimbursement in such a manner as to affect the right to redeem of one who purchases the land at execution sale: *James v. Jaques*, 26 Tex. 320, 82 Am. Dec. 613. And if money is loaned to a railway company in the ordinary course of business, without any agreement as to the use to be made of it, and is paid out to laborers and supplymen, after which the company goes into the hands of a receiver, the persons making the loans are not entitled to be subrogated to the claims paid with the money loaned, as against mortgagees of the railway: *Fidelity Ins. etc. Co. v. Shenandoah Valley E. E. Co.*, 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759.

c. *Solvency of Debtor.*—The right to be subrogated to the securities of one who has been paid does not depend upon the solvency or insolvency of the debtor, but upon the circumstances attending the payment of the debt to which the security was incident: *Spaulding v. Harvey*, 129 Ind. 106, 28 Am. St. Rep. 176, 28 N. E. 323.

d. *Usury.*—Ordinarily, there is no basis for the application of equitable doctrine of subrogation, where the claim thereto grows out of an agreement which is void by reason of usury: *Trible v. Nichols*, 53 Ark. 271, 22 Am. St. Rep. 190, 13 S. W. 796; *Roe v. Kiser*, 62 Ark. 92, 54 Am. St. Rep. 288, 34 S. W. 534; *Perkins v. Hall*, 105 N. Y. 539, 12 N. E. 48. Still, the fact that one who has loaned money to discharge a prior encumbrance has charged usury will not deprive him of the right to subrogation to the rights of the prior encumbrancer, if he has an agreement to that effect, and is not seeking

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to collect more than the principal and legal interest of his debt. At least such is the conclusion reached in *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374.

e. Laches and Negligence.—The right to subrogation, being one of equity merely, must ordinarily be exercised with due diligence. It may be lost through laches: *Atkins v. Nordyke*, 8 Kan. App. 855, 54 Pac. 328; *Ocobock v. Baker*, 52 Neb. 447, 66 Am. St. Rep. 519, 72 N. W. 582; *Gring's Appeal*, 89 Pa. St. 336; *Coonrod v. Kelly*, 119 Fed. 841. For example, it has been held that a vendee of land, satisfying a mortgage thereon and canceling it, will not be substituted in the place of the mortgagee where, through his gross neglect, he has failed to discover the existence of a prior encumbrance on the land under which it is sold: *Garwood v. Eldridge*, 2 N. J. Eq. 145, 34 Am. Dec. 195. And a person loaning money to pay off a mortgage with an agreement for a new one cannot be subrogated to the rights of the first mortgagee, as against a judgment rendered against the mortgagor before the execution of the mortgage, which an examination of the records would have disclosed: *Mather v. Jenswold*, 72 Iowa, 550, 13 N. W. 512, 34 N. W. 327; *Fort Dodge Bldg. etc. Assn. v. Scott*, 86 Iowa, 431, 53 N. W. 283. So, it has been decided that if a party otherwise entitled to be subrogated to the rights of a judgment creditor, delays until two hours before a sale under the judgment is to take place, and then makes application for subrogation, he must excuse his laches and make out a clear case, to warrant the court in arresting the proceedings and granting him relief: *Forest Oil Company's Appeals*, 118 Pa. St. 138, 4 Am. St. Rep. 584, 12 Atl. 442. However, subrogation is often allowed notwithstanding there is more or less negligence, and it may be said that negligence which does not increase the burdens of any lienholder does not prevent subrogation or bar the right thereto: *Miller v. Stark*, 61 Ohio St. 413, 56 N. E. 11. See, too, *Caldwell v. Palmer*, 74 Tenn. (6 Lea) 652.

III. Payment and Discharge of Obligation.

a. Necessity of Payment.—Payment of the debt is a prerequisite to the right of subrogation. Not liability to pay, but actual payment, renders the doctrine of substitution applicable. And ordinarily the whole debt must be paid, or at least tendered, before the right can be enforced. Until the creditor is wholly satisfied, there should and can be, as a rule, no interference with his rights or securities which might prejudice or embarrass him in any way in the collection of the residue: *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136; *Fulton v. Harrington*, 7 Houst. (Del.) 182, 30 Atl. 856; *Bartholomew v. First Nat. Bank*, 57 Kan. 594, 47 Pac. 519; *Insurance Co. v. Fidelity Title etc. Co.*, 123 Pa. St. 523, 10 Am. St. Rep. 546, 16 Atl. 791; *Nettleton v. Ramsey County Land etc. Co.*, 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128; *London etc. Mtg.*

Co. v. Fitzgerald, 55 Minn. 71, 56 N. W. 464; New Jersey etc. Ry. Co. v. Wortendyke, 27 N. J. Eq. 658; Cason v. Connor, 83 Tex. 26, 18 S. W. 668; Featherstone v. Emerson, 14 Utah, 12, 45 Pac. 713; Columbia Finance etc. Co. v. Kentucky Union Ry. Co., 60 Fed. 794. Thus, one seeking to be subrogated to mortgage security must first pay the secured debt: Lumbermen's Ins. Co. v. Sprague, 59 Minn. 208, 60 N. W. 1101. It has been held that tender of payment accompanied with a demand for the assignment of the debt is not sufficient: Forest Oil Company's Appeal, 118 Pa. St. 138, 4 Am. St. Rep. 584, 12 Atl. 442. We think, however, that it would be unsafe to say that a tender of payment would not in any case give rise to the right to subrogation. In Keokuk v. Love, 31 Iowa, 119, it is held that when sureties are claiming the right of subrogation in a court of equity, but have not paid the claim of the creditor, the court may order that they shall be subrogated to the rights of the latter when they do pay the debt of their principal.

b. **Sufficiency—Part Payment.**—A part payment of a debt is not ordinarily sufficient to call forth the doctrine of subrogation. It can generally be invoked only upon the discharge of the entire debt or obligation: Good v. Golden, 73 Miss. 91, 55 Am. St. Rep. 486, 19 South. 100; Appeal of Allegheny Nat. Bank (Pa.), 7 Atl. 788; Musgrave v. Dickson, 172 Pa. St. 629, 51 Am. St. Rep. 765, 33 Atl. 705; Cases cited in the preceding paragraph. Accordingly, a second mortgagee, who pays only a part of the first mortgage, cannot, in the absence of an agreement, enforce subrogation to the rights of the latter: Stuckman v. Roose, 147 Ind. 402, 46 N. E. 680. And a vendee of encumbered property, paying only a part of the mortgage debt as a consideration for the sale of the property, will not be substituted in the place of the mortgagee: Hubbard v. Le Barron, 110 Iowa, 443, 81 N. W. 681. So, one is not entitled to subrogation for purposes of contribution, on the payment of an encumbrance in part secured on his land and in part on the property of another, unless he pays the whole debt secured: Springer v. Foster, 27 Ind. App. 15, 60 N. E. 720. If a debtor pledges life insurance policies to secure several debts, a surety paying one of the debts is held not entitled to any of the collateral security until all the debts are discharged: Willingham v. Ohio etc. Trust Co., 22 Ky. Law Rep. 158, 56 S. W. 706, 57 S. W. 467.

But the doctrine of the insufficiency of part payment to create the right of subrogation, says Chief Justice Post in Skinkle v. Huffman, 52 Neb. 20, 71 N. W. 1004, "has, in every instance, been invoked for the protection of the creditor, and never, so far as we are advised, to defeat contract obligations in the interest of the debtor alone. Thus understood, the exception requiring payment in full of the debt as a condition precedent to the right of subrogation is as firmly established as the rule itself. Cases are, how-

ever, not wanting, directly in point, and in which subrogation has been allowed between the parties occupying toward each other the relation of cosureties and the like, upon the payment of a part only of the debt," citing *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580; *Comins v. Pattle*, 35 N. J. Eq. 94; *Gedye v. Matson*, 25 Beav. 310. The Nebraska court holds, in the foregoing case, that a second mortgagee who, in order to protect his security, pays an installment due on the first mortgage, will, to the extent of such advancement, as against the mortgagor, be subrogated to the rights of the holder of the first mortgage; and may, upon payment by the mortgagor of the balance due on the prior mortgage, enforce his lien for the amount so advanced. When there is an agreement to pay an entire debt evidenced by several notes maturing at different times, a surety who pays one of the notes is entitled to maintain an action against the principal debtor for the installment so paid, without waiting until the whole indebtedness is paid: *Nettleton v. Ramsey County Land etc. Co.*, 54 Minn. 395, 40 Am. St. Rep. 342. 56 N. W. 128. In *Barnes v. Barnes*, 24 Ky. Law Rep. 1732, 72 S. W. 282, it is held that when two persons purchase real estate in common, and give a note for part of the price with a third person as surety, who pays half of the note, he may, by subrogation, be entitled to a lien on the property for his debt and interest.

"A surety cannot have subrogation until he has actually paid the debt in full," says Justice Brannon in *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172; "but, on part payment, even without that, he may, when the debt is due, sue in equity both the creditor and the principal debtor, to compel each debtor to pay the debt out of his own property, and may have enforced for his relief any liens which the creditor has on the estate of his principal. If the surety has paid part, he may in such suit have subrogation to the creditor's liens after satisfaction out of the debtor's property of the balance due the creditor."

Equity will not subrogate a person to the rights of a mortgagee under a first mortgage, when the latter also holds a second mortgage for the payment of which the party seeking subrogation is liable, unless he pays both mortgages: *Knoblauch v. Foglesong*, 38 Minn. 459, 38 N. W. 366.

A stay surety is not entitled to subrogation to the rights of the holder of a stayed judgment merely because such stay surety has signed a note as surety with the judgment debtor, upon which note the money has been loaned with which payment was made: *Lichty v. Moore*, 38 Neb. 269, 56 N. W. 965.

c. Money Payment not Essential.—Payment of the debt need not be in money, but whatever discharges the liability and is accepted as payment is sufficient. If the creditor receives either property, negotiable paper, or other securities in full satisfaction of the debt,

this generally suffices: *Knighton v. Curry*, 62 Ala. 404; *Combs v. Caudle*, 95 Va. 7, 27 S. E. 815.

IV. Rights, Securities, and Property Involved.

a. Rights and Securities in General to Which Payor Entitled.—

One entitled to subrogation is put in all respects in the place of the person or creditor to whose rights he is subrogated. He is entitled to all the rights, remedies, and securities which the creditor had in respect to the debt, and to avail himself of them as fully in every particular as the creditor could have done: *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757; *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267; *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Fidelity and Deposit Co. v. Jordan* (N. C.), 46 S. E. 496; *Pott v. Nathans*, 1 Watts & S. 155, 37 Am. Dec. 456; *Smith v. Tunno*, 1 McCord Ch. 443, 16 Am. Dec. 617; *Lowndes v. Chisolm*, 2 McCord Ch. 455, 16 Am. Dec. 667; *Bodes v. Crockett*, 2 Yerg. 346, 24 Am. Dec. 489; *Mitchell v. De Witt*, 25 Tex. 180, 78 Am. Dec. 561; *Bank of Montpelier v. Dixon*, 4 Vt. 587, 24 Am. Dec. 640. Says Chancellor Walworth: "It is an established principle of equity that sureties, or those who stand in the situation of sureties, for those who pay a debt for them, are entitled to stand in the place of the creditor, or to be subrogated to all his rights as to any fund, lien, or equity which he may have against any other person or property on account of the debt": *Eddy v. Traver*, 6 Paige Ch. 521, 31 Am. Dec. 261. And, says Chancellor Kent: "A surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and have his securities transferred to him, and to avail himself of those securities against the debtor": *Hayes v. Ward*, 4 Johns. Ch. 123, 8 Am. Dec. 554. Even Lord Eldon admitted that "a surety is entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without his knowledge, having a right to have those securities transferred to him, though there was no stipulation for it; and to avail himself of all those securities against the debtor": *Craythorne v. Swinburne*, 14 Ves. 162, quoted in *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444.

A surety paying a note secured by mortgage is subrogated to the rights of the payee under the mortgage: *Jones v. Tincher*, 15 Ind. 308, 77 Am. Dec. 92; *James v. Jaques*, 26 Tex. 320, 82 Am. Dec. 613. If a creditor takes a mortgage from the principal debtor, the surety is entitled to it as indemnity; and the creditor must do nothing by

which it may be impaired as a security: *Hayes v. Ward*, 4 Johns. Ch. 123, 8 Am. Dec. 554. The sureties on a note secured by mortgage are subrogated to the mortgagee's right to the proceeds of insurance on the property: *Aetna Ins. Co. v. Thompson*, 68 N. H. 20, 73 Am. St. Rep. 552, 40 Atl. 396. When a purchaser of mortgage premises has expressly assumed the payment of the mortgage debt as part of the consideration, an indorser who has become liable on the mortgage notes is entitled, upon payment thereof, to subrogation to the rights and remedies of the payee of the notes, and may recover of the purchaser the amount thereof. Such right to subrogation extends not merely to the mortgage security, but also to the debt and remedies to enforce it: *Nettleton v. Ramsey County Land etc. Co.*, 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128. If a judgment is recovered against a constable and his sureties for his wrongfully attaching and selling property, which judgment is paid by the sureties, he having died insolvent in the meantime, they may be subrogated to his right to sue on the note given for the purchase price of the property sold: *Meyer Bros. Drug Co. v. Davis*, 68 Ark. 112, 56 S. W. 788. And a surety on a note for the purchase price of a chattel, the title to which is to remain in the vendor until full satisfaction of the debt, is subrogated, on payment, to the rights and remedies of the creditor, and he has the same rights as an equitable assignee to take possession of the property for his security: *Torp v. Gulseth*, 37 Minn. 135, 33 N. W. 550. The lien of an attachment is preserved for the benefit of a surety who pays the debt and takes an assignment of the creditor's securities, in the same manner and to like extent whether the payment be before or after judgment: *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207. A surety who, without suit, pays a note containing a stipulation for attorney's fees in the event of suit, is held subrogated to such stipulation, and may recover such fees in an action against the maker: *Beville v. Boyd*, 16 Tex. Civ. App. 491, 41 S. W. 670, 42 S. W. 318.

It is hardly necessary to state that one for whose benefit the doctrine of subrogation is invoked and enforced can acquire no higher or greater rights than those of the person for whom he is substituted. The rights of the person subrogated are measured by those of the original creditor, and cannot be extended further. He succeeds to no rights not held by the creditor; and those rights, claims, and securities to which he succeeds are taken subject to the limitations, burdens, and disqualifications incident to them in the hands of his predecessor: *Leavitt v. Canadian Pac. Ry. Co.*, 90 Me. 153, 37 Atl. 886; *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253, 23 Am. St. Rep. 39, 20 Atl. 300; *First Nat. Bank v. Wood*, 71 N. Y. 405, 27 Am. Rep. 66; *Liles v. Rogers*, 113 N. C. 197, 37 Am. St. Rep. 627, 18 S. E. 104; *Evison v. Hallock*, 108 Wis. 249, 83 N. W. 1102; *Swarts v. Siegal*, 117 Fed. 13. Good faith on the part of a creditor who is seeking satisfaction of his claim through subrogation to the rights of his debtor

against a third person, does not enable him to prevail when his debtor has been guilty of fraud so as to defeat his rights against the third person: *Green v. Turner*, 80 Fed. 41.

b. **The Primary and Original Security.**—When it is said that a surety paying his principal's debt is subrogated to all the rights, remedies, and securities held by the creditor for the payment of the debt, the words "all securities" include the primary and original security, that is, the identical security, the judgment, note, bill, bond, or other contractual instrument upon which the surety is bound with his principal. He is substituted to the very debt itself, which equity, notwithstanding its payment and discharge, keeps alive for his benefit and protection: *Lumpkin v. Mills*, 4 Ga. 343; *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653; *Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. 20; *Neilson v. Fry*, 16 Ohio St. 552, 91 Am. Dec. 110; *Sublett v. McKinney*, 19 Tex. 439; *Beville v. Boyd*, 16 Tex. Civ. App. 491, 41 S. W. 670, 42 S. W. 318; *German American Sav. Bank v. Fritz*, 68 Wis. 390, 32 N. W. 123. Thus, a surety who pays a judgment, and is thereby subrogated to the rights of the creditor against the principal debtor, may issue execution on the judgment in the name of the creditor for the amount which he has paid as surety: *Connelly v. Bourg*, 16 La. Ann. 108, 79 Am. Dec. 568. And a surety who has paid the promissory note of his principal, is subrogated to all the rights of the holder of the instrument, one of which is the possession thereof, and the right of action upon it against the principal; and he may pursue his remedy upon the note as against the principal, who is primarily liable, to the extent of reimbursing what he has expended: *McClure v. Johnson*, 10 Okla. 663, 668, 65 Pac. 103.

The doctrine of the above decisions is eminently just and reasonable, and has the support of practically all of the American courts. It appears to have been thought at one time in England, however, that the right of subrogation extends only to securities other than the obligation or instrument which is the evidence of the debt, and that the surety does not succeed to precisely the same rights possessed by the creditor. But this idea seems to be at variance with the earlier decisions of that country and and to have been corrected in later years by parliament: See *Mason v. Pierron*, 63 Wis. 244, 23 N. W. 119; *United States v. Ryder*, 110 U. S. 728, 734, 4 Sup. Ct. Rep. 196. This misconception of the law has gained some foothold in America. In *Uzzell v. Mack*, 4 Humph. 319, 40 Am. Dec. 648, there is a holding that a surety discharging a bond or judgment, which is the only security the creditor has taken, has nothing to which he can be subrogated. And the North Carolina court also holds that the securities to which subrogation can be had do not embrace the one evidencing the debt itself, unless it is assigned to a third person for the benefit of the surety: *Briley v. Sugg*, 21 N.

C. (1 Dev. & B. Eq.) 366, 30 Am. Dec. 172; *Tiddy v. Harris*, 101 N. C. 589, 8 S. E. 227; *Liles v. Rogers*, 113 N. C. 197, 37 Am. St. Rep. 627, 18 S. E. 104; *Peebles v. Gay*, 115 N. C. 38, 44 Am. St. Rep. 429, 20 S. E. 173. This doctrine of only partial substitution proceeds on the theory that the payment by the surety is an extinguishment of the obligation, and that equity cannot keep it alive even for the purpose of protecting the surety. Such a narrow, technical view has no place in the law of subrogation, and, as we have already stated, has generally been repudiated.

c. **Priority Over Other Claims.**—If a surety, or person standing in like situation, is entitled, on paying his principal's debt, to stand, as respects the debt, in the place of the creditor, and succeed to all his rights, it follows that such surety is subrogated not only to the securities of the creditor, but to all his rights of priority. This was recognized as the law by Chief Justice Marshall in the case of *Lidderdale v. Robinson*, 2 Brock. 159, Fed. Cas. No. 8337, approved in 12 Wheat. 594, and in *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286. In this last case it is held that the surety of a deceased debtor of the state, having paid the debt to the commonwealth, is entitled to the state's prior claim in the distribution of the debtor's assets. Similarly, it has been held that a surety on a bond given to the United States may be subrogated to the preferences and priorities of the national government in the estate of the principal (*United States v. Hunter*, 5 Mason, 62, Fed. Cas. No. 15,426; *United States v. Preston*, 4 Wash. C. C. 446, Fed. Cas. No. 16,087), or in the estate of a cosurety: *Jackson v. Davis*, 4 Mackey, 194; *Bank of South Carolina v. Adger*, 2 Hill Eq. 262. See, also, *Fleming v. Beaver*, 2 Rawle, 128, 19 Am. Dec. 629; *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 266; *Robertson v. Trigg*, 32 Gratt. 76. Sureties on an administrator's bond have been given the same priority which their principal could have enjoyed: *Schoofield v. Rudd*, 48 Ky. (9 B. Mon.) 291. See, also, *Muldoon v. Crawford*, 77 Ky. (14 Bush) 125; *Drake v. Coltrane*, 44 N. C. 300.

d. **Protection of Property—Estate Involved.**—The right of subrogation exists in favor of one who, in order to protect his own interest or estate in property, is required to pay a debt for which another is primarily liable: *Hackensack Sav. Bank v. Terhume Mfg. Co.*, 45 N. J. Eq. 610, 18 Atl. 155; *Galbraith v. Howard*, 11 Tex. Civ. App. 230, 32 S. W. 803; *McNeill v. Miller*, 29 W. Va. 480, 3 S. E. 335. And the extent or quantity of the interest which is in jeopardy is not material. If he has any palpable interest which will be protected by the extinguishment of the debt, he may pay the debt and be entitled to hold and enforce it just as the creditor could: *Suydam v. Voorhees*, 58 N. J. Eq. 157, 43 Atl. 4. One having a contingent or future interest in the property is within this rule: *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102; *Sulton v. Sulton*, 26

S. C. 33, 1 S. E. 19. Compare *Kelly v. Kelly*, 54 Mich. 30, 19 S. W. 580. So are persons equitably entitled to land: *Warner v. Hall*, 53 Mich. 371, 19 N. W. 40. A life tenant paying off claims or mortgages on the premises is subrogated to the rights of the creditor or mortgagee: *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663; *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755; *Kocher v. Kocher*, 56 N. J. Eq. 545, 39 Atl. 535. So is a tenant for years: *Hamilton v. Dobbs*, 19 N. J. Eq. 227.

a. **Homesteads.**—One may, under proper circumstances, be subrogated to rights which can be enforced against a homestead: *Gilbert v. Neely*, 35 Ark. 24; *Luck v. Atkins*, 53 Ark. 303, 13 S. W. 1097; *Ayres v. Probasco*, 14 Kan. 198; *Markillie v. Allen*, 120 Mich. 360, 79 N. W. 568; *Boy v. Clark*, 75 Tex. 28, 12 S. W. 845; *Denecamp v. Townsend* (Tex. Civ. App.), 33 S. W. 254. But see *First Nat. Bank v. Browne*, 128 Ala. 557, 86 Am. St. Rep. 156, 29 South. 552. Money advanced to pay a mortgage for the purchase price of a homestead is held equivalent to so much purchase money, and the second mortgagee is entitled to be subrogated to the rights of the first: *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740. And where one pays off a mortgage and his title afterward fails, he may be subrogated to the mortgagee's rights, although the property is a homestead: *Murphy v. Smith* (Tex. Civ. App.), 50 S. W. 1040. If a third person loans a vendee money with which to pay the purchase price of land, taking from the vendor a conveyance of the title as security, he is subrogated to the rights of the vendor, and the vendee's rights, homestead or otherwise, are subject to his lien for the money loaned: *Heyderstadt v. Whalen*, 54 Minn. 199, 55 N. W. 958. And it is said that one who discharges a vendor's lien upon land—even the homestead—either by paying as surety, or at the request of the debtor, or at a judicial sale which fails to convey the title, is entitled to be subrogated to the lien of the creditor to the extent of the payment so made: *Faires v. Cockrill*, 88 Tex. 428, 31 S. W. 190, 626. Citing *McDonough v. Cross*, 40 Tex. 251; *Burns v. Ledbetter*, 54 Tex. 374; *Texas etc. Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12. See, also, *Hicks v. Morris*, 57 Tex. 658; *Pioneer etc. Loan Co. v. Paschall*, 12 Tex. Civ. App. 613, 34 S. W. 1001; *Dixon v. National Loan etc. Co.* (Tex. Civ. App.), 40 S. W. 541; *Ivory v. Kennedy*, 57 Fed. 340; *Western Mtg. Co. v. Ganzer*, 63 Fed. 647. If money is advanced to pay a purchase money note, and the amount advanced is secured by a trust deed, it has been held that the person making the loan may be subrogated to the vendor's lien as against the homestead right of the borrower: *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559.

f. **Dower.**—A widow who, in order to protect her interest in the estate left by her husband, pays off a lien or mortgage, may become subrogated to the rights of the lienholder, as against the heirs and other persons: *Jefferson v. Edrington*, 53 Ark. 545, 14 S. W. 99, 903;

Smith v. Stephens, 164 Mo. 415, 64 S. W. 260; Becker v. Cary (N. J. Eq.), 36 Atl. 770; Woods v. Wallace, 30 N. H. 384. See, too, Coudert v. Coudert, 43 N. J. Eq. 407, 5 Atl. 722. If a widow elects to take a legacy in lieu of dower and a portion of the amount necessary to satisfy the legacy is used to pay the debts of the testator, she may be subrogated to the rights of the creditors against the real estate of the testator, to recover the amount so taken: Overton v. Lea, 108 Tenn. 505, 68 S. W. 250.

On the other hand, a widow's dower is not exempt from the operation of the doctrine of subrogation, as the following cases will show. Where the owner of land which is encumbered by trust, judgment, and purchase money liens, which are paramount to his wife's dower right in the event of his death, sells the land to one who pays off and discharges these liens as a part of the purchase money, he is subrogated to the rights of the lienors; and if the liens absorb the entire purchase money, the widow is not entitled to dower out of the purchase money: Blair v. Mounts, 41 W. Va. 706, 24 S. E. 620. And a purchaser at an administrator's sale whose money is applied to a satisfaction of a mortgage on the land may be subrogated to the mortgagee's rights as against a claim for dower: House v. Fowle, 22 Or. 303, 29 Pac. 890. If one becomes a surety on a note given by the vendee of land to secure the purchase price, and the vendor mortgages the land to the surety to secure him against loss, the surety, having been compelled to pay the purchase price, may foreclose the mortgage after the mortgagor's death, and his rights will be superior to the claims of the widow, he being subrogated to the lien of the vendor: Ballew v. Roler, 124 Ind. 557, 24 N. E. 976. It is held that where a husband conveys land owned jointly with his wife, representing that he had authority to do so, and the purchaser pays off an outstanding lien for purchase money due from the husband and wife, he is subrogated to the benefits of the lien as against her claims: Dillon v. Warfel, 71 Iowa, 106, 32 N. W. 194.

Where a widow makes an insufficient renunciation of her dower in a mortgage, the mere fact that the proceeds of the mortgage go to discharge a prior mortgage does not subrogate the second mortgagee to the rights of the prior mortgagee: Jeffries v. Allen, 29 S. C. 501, 7 S. E. 828. But where a mortgage is executed by a husband and wife to raise funds to pay a prior mortgage upon the same property, given by him before his marriage, and it subsequently appears that she was an infant at the time of executing the last mortgage, such fact not being disclosed, the person taking the last mortgage, in an action to foreclose it, may be subrogated to the rights of the mortgagor under the first mortgage, which may be revived and enforced, to the extent of the amount advanced to pay it, to the exclusion of the wife's dower rights: Snelling v. McIntyre, 6 Abb. N. C. 469.

If the purchaser of an equity of redemption pays a mortgage to which the wife of the mortgagor was a party, or gives a new mortgage in place of such mortgage, he becomes, in an equitable sense, the purchaser of the interest in the original mortgage, and is entitled to be subrogated to the position of the mortgagee, and to stand in equity as the purchaser of and holder of his security: *Everson v. McMullen*, 113 N. Y. 293, 10 Am. St. Rep. 445, 21 N. E. 52.

g. Estates of Decedents.

1. **In General—Widow.**—A creditor of one having an established claim against the estate of a decedent may be substituted to the rights of the latter, and may to that extent file his own claim against the estate directly: *Campau v. Miller*, 46 Mich. 148, 9 N. W. 140. General creditors of an estate whose fund has been taken to pay an unprobated mortgage debt, are subrogated to the lien of the debt which the fund discharged: *Jefferson v. Edrington*, 53 Ark. 545, 14 S. W. 99, 903. Where an administrator uses the personal assets of the estate in paying probated claims without assigning dower to the widow, she is subrogated to the rights of the creditors whose debts are discharged; and she may resort to the realty, as the creditors might have done, for the payment of her dower interest; which should have been assigned out of the personalty in kind: *Crouch v. Edwards*, 52 Ark. 499, 12 S. W. 1070; *Jefferson v. Edrington*, 53 Ark. 545, 559, 14 S. W. 99, 903.

One advancing money to an executor or administrator which is applied to the payment of debts for which the estate is bound, may be subrogated to the place of the executor or administrator. "Persons dealing with the representatives of a deceased person are presumed, in law, to be fully apprised of the extent of their authority to act in behalf of the estate which they represent. Hence, in the case of an ordinary administrator, they are presumed to know that he has no authority, as such, to make new contracts which will bind the estate in his charge; such, for example, as contracts for the loan of money even upon the pretense that it is needed to pay the debts. A person, therefore, who, under such circumstances, advances money to an administrator acquires no right, either at law or in equity, as against the estate. His only equity arises in case the money advanced has, in fact, been applied to the payment of debts for which the estate was justly and legally bound. In such cases the creditor of the administrator will be permitted to take his place, and will be subrogated to his rights. But precedent as well as sound policy requires that it should be shown by the clearest evidence that the estate has been benefited, or, in other words, that the money has been applied beneficially and in the payment of the debts": *Woods v. Ridley*, 27 Miss. 120, 151; *De Concillio v. Brownrigg*, 51 N. J. Eq. 532, 25 Atl. 383. See, too, *Tyler's Estate v. Tyler* (Ind. App.), 41 N. E. 965.

If a widow pays claims against her husband's estate, and the administrator pays other claims with money advanced by her for that purpose, she may be subrogated to the rights of the creditors whose claims are thus paid: *Brown v. Forst*, 95 Ind. 248. And a widow who, before the appointment of an administrator, incurs the expense of erecting a monument for her husband, is entitled to be subrogated to the rights of the dealer who put up the monument, and she may recover therefor from the administrator: *Pease v. Christman*, 158 Ind. 642, 64 N. E. 90.

2. Devisees and Legatees.—A legatee whose legacy has been absorbed in the payment of debts of the testator, may have it out of undivided realty by subrogation to the rights of creditors: *Hope v. Wilkinson*, 14 Lea, 21, 52 Am. Rep. 149. But if the amount of a mortgage, given by a legatee and her husband to an executor for the purpose of securing notes which equitably are her debt, is deducted from the legacy, her legatees will not be substituted to the mortgagee's rights: *Dean v. Rounds*, 18 R. I. 436, 27 Atl. 515, 23 Atl. 802. The discharge of a judgment against the executor of an estate by some of the legatees substitutes them to the rights of the judgment creditor: *Mitchell v. Mitchell*, 8 Humph. 359.

A devisee who pays a debt to protect his interest may be subrogated to the claim of the creditor against the personal estate of the testator: *Redmond v. Burroughs*, 63 N. C. 242. And when a wife pays the balance due on a mortgage of property in which she has a life interest, the mortgage being executed by herself and husband for his debt, her devisees may be subrogated, as against his heirs, to the extent of the sum paid to the mortgagee's rights: *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663. A devisee of a life interest who pays with his own funds a debt of the testator, which is either charged upon the land by the will, or payable out of the land by statute, is entitled to be subrogated to the rights of the creditor: *Suydam v. Voorhees*, 58 N. J. Eq. 157, 43 Atl. 4.

3. Executors and Administrators.—The law seems to be well settled that an executor or administrator who advances money to pay the debts of the decedent stands substituted to the rights of the creditors who are thus benefited: *McNeill v. McNeill*, 36 Ala. 109, 76 Am. Dec. 320; *Hullett v. Hood*, 109 Ala. 345, 19 South. 419; *Turner v. Shuffler*, 108 N. C. 642, 13 S. E. 243; *Suydam v. Voorhees*, 58 N. J. Eq. 157, 43 Atl. 4; *Stayner v. Bower*, 42 Ohio St. 314; *Appeal of Breckenridge*, 127 Pa. St. 81, 17 Atl. 874. Compare *Seaton v. Alcorn*, 51 Miss. 72; *Evans v. Halleck*, 83 Mo. 376. An administrator paying a debt guaranteed by the intestate may be substituted to the rights of the creditor in collateral security: *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52. And an administrator who has paid the debts of the estate and the costs of litigation to an amount exceeding the personal estate of the

decedent, may be subrogated to the rights of the creditors against the land, and may subject it in the hands of heirs and devisees for his reimbursement: *Wooley v. Pemberton*, 41 N. J. Eq. 394, 5 Atl. 139. To the same effect, see *Taylor v. Taylor*, 8 B. Mon. 419, 48 Am. Dec. 400; *Kinney v. Harvey*, 2 Leigh, 70, 21 Am. Dec. 597; *Gaw v. Huffman*, 12 Gratt. 628. If an administrator pays off debts of the estate from his own funds, when there are no assets of the estate, he is entitled to be subrogated to the rights of the creditors to have the land sold and be reimbursed from the proceeds thereof: *Denton v. Tyson*, 118 N. C. 542, 24 S. E. 116. So, an executrix who has no funds of the estate wherewith to pay a note and mortgage against the estate, buys them with her own money, is entitled to subrogation to the rights of the holders thereof: *Penneo v. Goodspeed*, 22 Ill. App. 50, affirmed in 120 Ill. 524, 12 N. E. 196. An administrator, paying in full a debt that is not within the preferred class is held substituted to the rights of the creditor: *Pryor v. Davis*, 109 Ala. 117, 19 South. 440.

As to the right to subrogation of one advancing money to an executor or administrator to pay debts of the decedent, see ante, p. 491.

V. Voluntary Payments and Volunteers.

a. Standing of Volunteers.—Volunteers do not stand high in the favor of equity. And the rule is as old as the law of subrogation that one who pays the debt of another of his own motion, without any request to do so, without having any interest in the matter, without any right to protect or property to save, and without any compulsion, is regarded as a mere volunteer or intermeddler; and he thereby acquires no right to subrogation, in the absence of any contract, assignment, or expectation that he will be substituted in the place of the creditor: *Tradesman's Nat. Bank v. Sheffield City Co.*, 137 Ala. 547, 34 South. 625; *Hough v. Aetna Life Ins. Co.*, 57 Ill. 318, 11 Am. Rep. 18; *Pearce v. Bryant Coal Co.*, 121 Ill. 590, 13 N. E. 561; *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219, 45 N. E. 1007; *Beifeld v. International Cement Co.*, 79 Ill. App. 318; *Muir v. Berkshire*, 52 Ind. 149; *Binford v. Adams*, 104 Ind. 41, 3 N. E. 753; *Wormer v. Waterloo Agricultural Works*, 62 Iowa, 699, 14 N. W. 331; *Matteson v. Dent*, 112 Iowa, 551, 84 N. W. 710; *Brice v. Watkins*, 30 La. Ann. 21; *Weil v. Enterprise Ginnery Co.*, 42 La. Am. 492, 7 South. 622; *Demourelle v. Piazza*, 77 Miss. 433, 27 South. 623; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 48, 7 S. W. 473; *Roberts v. Best*, 172 Mo. 67, 72 S. W. 657; *Crane v. Noel* (Mo. App.), 78 S. W. 826; *Washburn v. Osgood*, 38 Neb. 804, 57 N. W. 529; *Fay v. Fay*, 43 N. J. Eq. 438, 11 Atl. 122; *Sanford v. McLean*, 3 Paige, 117, 23 Am. Dec. 773; *M. T. Jones Lumber Co. v. Villegas*, 8 Tex. Civ. App. 669, 28 S. W. 558.

Said Chancellor Johnson in an early South Carolina case: "The doctrine of subrogation is a pure, unmixed equity, having its

foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound; and as far as I have been enabled to learn its history, it never has been so applied. If one with perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty": *Gadsden v. Brown*, 1 Spear Eq. 37, 41. This seems a clear statement of the law, and, if not given a strict and literal interpretation (for the law is becoming more liberal on the question of who is a volunteer: *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31), may be regarded as accurate. It is quoted with approval in *Contoocook Fire Precinct v. Hopkinton*, 71 N. H. 574, 578, 53 Atl. 797; *Shinn v. Budd*, 14 N. J. Eq. 234, 237; *Durante v. Eannaco*, 72 N. Y. Supp. 1048, 65 App. Div. 435, 441; *Aetna Life Ins. Co. v. Meddleport*, 124 U. S. 543, 549, 8 Sup. Ct. Rep. 625; *Prairie State Bank v. United States*, 164 U. S. 227, 231, 17 Sup. Ct. Rep. 142.

"One may think," observes Justice Goode in the recent case of *Crane v. Noel* (Mo. App.), 78 S. W. 826, 828, "of a stranger paying the debt of some one else in circumstances that would constitute an officious intermeddling with the debtor's business, and afford the payor no good claim in equity to the securities held by the creditor. If the test of the right to be substituted was the purpose for which payment is made, as being a purpose laudable in itself, and including an intention to preserve the debt, and obligations collateral thereto, for the benefit of the payor, instead of extinguishing the debt, Crane's standing would be better. But the test is not the motive of the party who pays, but whether or not he acted as a volunteer."

A stranger who voluntarily pays the debt of another may take an assignment of it from the creditor and enforce the debt against the debtor; and if, at the time the payment is made, the creditor agrees to assign him the debt, though no assignment in writing is made, the stranger will be regarded in equity as the equitable assignee thereof, and the transaction as a purchase of the debt: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 18 S. E. 456. It has already been seen that a volunteer in discharging the debt of a third person may, by contract, keep alive and on foot the securities which the creditor holds, and enforce them against the debtor just as the original creditor could have done. See "Conventional Subrogation," ante, p. 477.

b. Who are not Volunteers Generally.—A person paying a debt, or advancing money for the purpose, at the instance, solicitation, or request of the debtor cannot be regarded as a volunteer, stranger, or intermeddler, within the meaning of the foregoing rules: *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468; *Fort Jefferson Imp. Co. v. Dupoyster*, 112 Ky. 792, 66 S. W. 1048; *Gans v. Thieme*, 93 N. Y. 225; *Hart v. Davidson*, 84 Tex. 112, 19 S. W. 454; *Rachal v. Smith*, 101 Fed. 159, 165. For example, if one who has no previous interest, and is under no obligation, pays off a mortgage or advances money for its payment, at the instance of the mortgagor, he is not a volunteer, and he is entitled to subrogation to the lien of the mortgage: *Motes v. Roberson*, 133 Ala. 630, 32 South. 225. Nor is one a volunteer who pays the debt of another in order to protect his own rights or save his own interests in property: *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373; *Grady v. O'Reilly*, 116 Mo. 346, 22 S. W. 798; *Cole v. Malcom*, 66 N. Y. 363.

c. Persons Making Advances and Loans.

1. In General.—A person advancing money to pay another's debt is not ordinarily entitled to subrogation, unless there is some obligation, interest, or right on his part in respect to the debt, or unless he has been requested, or has an expectation, understanding, or agreement to be substituted in the place of the creditor whose claim he discharges: *Riggin v. Hilliard*, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402; *Sackett v. Stone*, 115 Ga. 466, 41 S. E. 564; *Bouton v. Cameron*, 205 Ill. 50, 68 N. E. 800; *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. 222. A person advancing money to a tenant to pay the rent, and charging it to him, is not subrogated to the landlord's lien: *Bostick v. Ammons*, 63 S. C. 302, 41 S. E. 310. And the mere fact that money loaned is used to pay off purchase money notes does not subrogate the lender to the rights of the holders of the notes: *Cage v. Shapard* (Tex. Civ. App.), 46 S. W. 839. The question of the right to subrogation of one who loans or advances money for the payment of the debt of another arises frequently where the money is used to discharge a mortgage or encumbrance. In that connection the subject will hereafter be given a more extended consideration. It is believed that there is a tendency toward the relaxation of the law in favor of those who advance funds with which a third person's obligation is discharged. See "Persons Interested in Encumbered Property," post. It is said that the "law does not take note of the origin of the moneys with which a payment is made which carries legal subrogation with it as its effect; legal subrogation takes place though the payment be made by money borrowed by the party making the payment or furnished to him by another person for that purpose": *Walmsley & Co. in Liquidation*, 107 La. 417, 31 South. 869.

2. **To Married Women for Necessaries.**—Equity allows one who has loaned or advanced money to a distressed wife with which to procure necessities, to stand in the stead of the person supplying them, and to recover of the husband the amount actually paid by her out of the money advanced. The supreme court of Massachusetts, however, has fallen into error on this question, by taking the view that the lender is a mere volunteer and not entitled to subrogation. The narrowness and injustice of such a view are apparent, and the decision of that court is opposed to every other decided case that has come under our observation: See the monographic note to *Wanamaker v. Weaver*, 98 Am. St. Rep. 645, 646.

VI. Persons Interested or Affected in General.

a. **By Whom Subrogation may be Invoked.**—The doctrine of subrogation seems to have first been invoked in favor of sureties. And it is now most commonly applied in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is only secondarily liable for the debt; but it is also applicable to persons compelled to pay the debt of a third party to protect their own rights, or save their own property: *Cole v. Malcom*, 66 N. Y. 363; *Dunlop v. James*, 174 N. Y. 411, 67 N. E. 60. Indeed, the doctrine has become broad enough to include every person who, not being a mere volunteer or intermeddler, pays a debt or discharges an obligation which in justice, equity and good conscience ought to be paid or discharged by another: See "Definition," ante, p. 476. While it would be unsafe to say, in the face of this liberal statement of the law of subrogation, who may and who may not lay claim to its beneficent doctrines, still it may be well to enumerate some cases of persons whom substitution has been allowed. Subrogation may take place for the benefit of a surety, a cosurety, an insurer, a purchaser or owner who extinguishes an encumbrance on the property, a junior creditor or encumbrancer who satisfies a prior lien, an heir who pays a debt of the succession, and a person who pays his own debt which another has assumed but not paid: See *Townsend v. Cleveland Fire Proofing Co.*, 18 Ind. App. 568, 47 N. E. 707, and cases cited in succeeding subdivisions of this note. This enumeration is not made with the thought that the doctrine of subrogation is limited in its application to the persons enumerated, but it is made merely for the purpose of calling attention to some of the leading and well-established relations in respect to which subrogation has been invoked.

b. To Whom Subrogation may be Had.

1. **In General.**—Generally speaking, we know of no limitation upon the doctrine of subrogation so far as concerns the persons to whose rights subrogation may be had, except, perhaps, in the case of the public (to which attention will presently be given), provided

the rights of innocent third persons are not interfered with. When the sureties of a trustee are required to answer for his breach of trust, they are subrogated to the rights of both the trustee and the cestui que trust against those who participated in the wrong: *Blake v. Traders' Nat. Bank*, 145 Mass. 13, 12 N. E. 414.

2. The Nation, State and Municipality.

A. In the Case of Official Bonds.—Instances are frequent where sureties on the bond of a public officer, upon being held to make good the default of their principal, are held to be, by the fact of payment, equitable assignees and entitled to be subrogated to the position of the commonwealth, nation, city or county in respect to its liens, securities and priorities, for the purpose of enforcing reimbursement from their principal or contribution from their cosureties: *Cummings v. May*, 110 Ala. 479, 20 South. 307; *Boone County Bank v. Byrum*, 68 Ark. 71, 56 S. W. 532; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *Bunting v. Ricks*, 22 N. C. (2 Dev. & B. Eq.) 130, 32 Am. Dec. 699; *Myers v. Miller*, 45 W. Va. 595, 31 S. E. 976; *United States v. Hunter*, 5 Mason, 62, Fed. Cas. No. 15,426; *United States v. Preston*, 4 Wash. C. C. 446, Fed. Cas. No. 16,087. It seems, however, that the surety does not succeed to every advantage in the form and mode of proceeding which the law confers on the public. For instance, he cannot sue in the name of the United States, and have other privileges of procedure peculiar to the nation: *United States v. Preston*, 4 Wash. C. C. 446, Fed. Cas. No. 16,087; *United States v. Ryder*, 110 U. S. 729, 740, 14 Sup. Ct. Rep. 196. In the principal case, ante, p. 466, it is held that the sureties are subrogated to the rights of the commonwealth, even to its exemption from the statute of limitations. When the sureties of a sheriff pay for him money collected as revenue, they are substituted to the rights of the state to its lien upon the real estate of the sheriff: *Dawson v. Lee*, 83 Ky. 51; and if they pay a defalcation by him for county taxes collected, they are subrogated to the lien of the county on his real estate therefor: *Baker v. Fidelity & Deposit Co.*, 24 Ky. Law Rep. 2196, 73 S. W. 1025. Where a surety on the bond of a tax collector makes good the default of his principal, even before judgment rendered for such default, he is entitled to be subrogated to the rights of the state or county, and to have the statutory lien of the bond enforced for his indemnity, against the principal, cosureties and purchasers from them with notice of the lien: *Schuessler v. Dudley*, 80 Ala. 547, 60 Am. Rep. 124, 2 South. 526. But see *Knoll v. Marshall County*, 114 Iowa, 647, 87 N. W. 657.

B. In the Case of Bail Bonds.—The supreme court of the United States has decided that a surety on a recognizance for the appearance of person charged with a crime against the United States, without an express contract of indemnity, cannot recover from the principal any sums he may have been required to pay on account of the

principal's forfeiture, and is not entitled to subrogation to the rights of the United States, nor to the benefit of government priority and peculiar remedies: *United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. Rep. 196. But see *Simpson v. Roberts*, 35 Ga. 180; *Reynolds v. Harral*, 2 Strob. 87.

C. In the Case of Tax Payments.—One voluntarily paying a tax to a city for which he and his property are not liable will not be subrogated to the rights of the city against the property or its owner. He comes within the rule applicable to volunteers: *Montgomery v. Charleston*, 99 Fed. 825. There are instances, however, in which subrogation to the rights of the public has been allowed in favor of one paying taxes for which another was primarily liable. In *Taylor v. Wilcox*, 167 Mass. 572, 46 N. E. 115, it is held that a purchaser at foreclosure who buys upon the representation of the assignee in insolvency of the mortgagor, that a tax on the property had been or would be discharged from the insolvent estate, and who, upon the assignee's refusal to pay the tax, pays it himself, is subrogated to the right of the town to prove the tax as a privileged claim in insolvency. And in *Barron v. Whiteside*, a mortgagee paying taxes to protect the property is held subrogated to the rights of the state and city against the trustee to whom the property has been assigned for the benefit of creditors. In a recent Washington case it is decided that if a mortgagee in good faith pays delinquent taxes to protect his lien, he may be subrogated to the lien of the county therefor, and may recover the sum paid as against a subsequent mortgagee whose lien has been given priority: *Dunsmuir v. Port Angeles Gas Co.*, 30 Wash. 586, 71 Pac. 9. See, also, *United States v. Ryder*, 110 U. S. 729, 733, 4 Sup. Ct. Rep. 196.

The right of an individual to be subrogated to the rights of the public in respect to the machinery for the collection of taxes has, however, been doubted and denied in several cases. It is clear, we think, that a county treasurer voluntarily paying the taxes of a property owner, cannot be subrogated to the lien of the state and county for the taxes so paid. He is, under such circumstances, a mere volunteer: *Mercantile Trust Co. v. Hart*, 76 Fed. 676. In rendering the decision in this case, Mr. Justice Thayer says: "The case of *In re Wallace's Estate*, 59 Pa. St. 401, is very much in point. In that case taxes due from a property owner had been advanced and paid by the collector of taxes, and subsequently the owner had confessed a judgment in favor of the tax collector for the taxes so advanced. The collector claimed the right to be subrogated to the lien of the state, but the right was denied. The court said, in substance, that it might well be doubted whether a person could ever claim subrogation to the rights of the state as respects a lien for taxes, but that such right could not be claimed where the payment of taxes was voluntary, nor where subrogation, if allowed, would prejudice the rights of a third party, such as a subsequent judgment creditor. In

the case of *Wilkinson v. Babbitt*, 4 Dill. 207, Fed. Cas. No. 17,668, a collector of internal revenue who had paid to the government certain public moneys which one of his deputies had unlawfully deposited in a bank that had subsequently failed, was held not subrogated to the right of the United States to claim a preference against the assigned effects of the insolvent bank. Also in the case of *Griffing v. Pintard*, 25 Miss. 173, and *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863, it was held that a tax collector and a sheriff respectively who had advanced and paid certain taxes for taxpayers, were not in a position to be subrogated to the rights of the state in whose behalf a lien for the taxes had been created. Inasmuch as a public tax is a debt of such a character that it cannot be assigned or farmed out of the state or municipality to whom it is due (*McInerney v. Reed*, 23 Iowa, 410, 415), a case must be very exceptional and peculiar when the right arises to be subrogated to the lien of the state or a municipality. It would certainly be contrary to sound public policy to concede that a collector may accept payment of taxes in a mode not authorized by law [the officer in this case had accepted a check in payment of the taxes involved, and then advanced money from his funds to pay the taxes, but the check was never paid], and thereafter, when confronted with a possible loss, be allowed the right of subrogation." It would seem that in the above case the right to subrogation could justly have been denied on the ground that the officer was a volunteer.

Further light on this question is thrown by the language of the supreme court of Georgia in *Irby v. Livingston*, 81 Ga. 281, 6 S. E. 591: "We think the case of *Livingston v. Anderson*, 80 Ga. 175, 5 S. E. 48, decided at the last term of this court, is in point in this case. It is in effect what we now decide. In that case this court held that, inasmuch as no writ of execution had been issued against the taxpayer, who was in default, the sureties of the tax collector (who had been compelled to make good the default of the collector in not collecting and paying over these taxes), could not compel the state or its officers to issue execution for the use of the sureties entitled to reimbursement; but that the sureties could obtain relief in equity against the defaulting taxpayer. The right of subrogation does not apply as to the remedies which the state has against the citizen; but as to the security which the state has; that security passes to the citizen or to the surety who pays off a debt under such circumstances as these; and for the purpose of reimbursing himself he has a right to enforce the execution issued by the state."

"When the case is one of subrogation of the individual to public rights and remedies," to quote from a recent Connecticut decision, "the situation assumes an aspect not presented where the substitution relates to private rights. Questions of public policy, questions as to the propriety of turning over the governmental machinery to

individuals and conferring upon them the powers of the organized public, at once arise. The inquiry becomes not one of legislative power to provide for a complete or partial substitution, but one of judicial discretion in the administration of equitable principles under equitable considerations. So it is that courts ought to hesitate, and have hesitated, to apply the doctrine of subrogation to cases where the substitution would result in conferring upon individuals rights and powers peculiarly designed for and adapted to public purposes, and as a part of the governmental machinery, without statutory sanction, express or implied. The power of taxation is one of the drastic powers exercised by governmental bodies. Its machinery is skillfully designed to accomplish the desired results most certainly and effectually. It is adapted to its uses, but not to private, unrestrained exercise. Therefore it is that, in the absence of legislation expressly or by reasonable implication authorizing the substitution of the individual for the community, the powers specially created as incidental to the exercise of the public right of taxation ought not to become delegated to private persons by judicial intervention, unless, indeed, it is in rare and extreme cases."

Compare, in this connection, "Official Bonds and Priority Over Other Claims," ante.

c. **Against Whom Subrogation may be Enforced.**—The right of subrogation is not restricted to the remedies which the creditor had against the principal debtor, but extends to all the remedies which he had against the principal and others liable for the debt. The equity of sureties, or those standing in like situation, extends, not only to the rights of the creditor as against the principal, but to all rights of the creditor respecting the debt which the sureties pay or the obligation which they discharge: *Rooker v. Benson*, 83 Ind. 250; *Keokuk v. Love*, 31 Iowa, 119. In the principal case, ante, p. 466, the court uses this language: "That the doctrine of subrogation does go to the extent of giving to the surety who has paid the debt of his principal, the benefit of the rights and remedies of the creditor against all persons who were liable for the debt, is both asserted by text-writers and sustained by the authority of many decided cases. This is especially held to be true of the sureties of a fiduciary who are compelled to answer for his breach of trust, and they have repeatedly been subrogated to the rights and remedies of both the trustee and the cestui que trust against the fiduciary and those participating in the wrongful act."

In accordance with this doctrine, it is decided in the principal case that if an officer deposits public funds with a bank, and the bank, with knowledge of the ownership of the money, pays interest thereon to the officer individually, and the state holds the surety of the officer liable for the diverted interest, the surety is entitled

to be subrogated to the rights of the state against the bank. So, in *Carroll County v. Rhodes*, 69 Ark. 43, 63 S. W. 68, it is held that if the sureties of a county collector pay to the state the amount of money misapplied by that officer to the payment of a debt due from him to a bank, they will be subrogated to the right of the state to proceed against the bank. And if a county treasurer deposits public funds with a bank, which, with knowledge of the character of the money, appropriates it to the payment of a debt against the treasurer, who in that sum defaults, his sureties, when sued by the county, may bring in the bank as defendant, and may be subrogated in the one judgment against the bank for the amount of the judgment rendered against them: *Skipwith v. Hurt*, 94 Tex. 322, 60 S. W. 423. A surety of a trustee, who accounts for the defalcation of his principal, may be subrogated to the rights of the cestui que trust against a person wrongfully appropriating part of the trust estate: *Farmers' etc. Bank v. Fidelity Deposit Co.*, 108 Ky. 384, 56 S. W. 671.

A surety in an original obligation, having paid the debt, may be subrogated to the rights of the creditor against a subsequent surety of the principal: *McCormick v. Irwin*, 85 Pa. St. 111. So it has been held that when a replevin bail has been compelled to pay the judgment, he may have execution thereon against all the judgment defendants, and may enforce the collection thereof against one who is a surety of the other defendants in the judgment, though he may have known of such suretyship at the time he became replevin bail, unless it appears that the surety objected, at the time the judgment was rendered, to any stay of execution thereon: *Dessar v. King*, 110 Ind. 69, 10 N. E. 621.

When a surety has paid a judgment against his principal, he may by action follow and recover any of the fund which has been wrongfully converted or misapplied by the principal, and which has been received from him by a third person, with notice of its fiduciary character, in payment of a debt due from him to the principal, even though the judgment which was obtained against the surety and the principal on account of the breach of trust has been paid and discharged: *Fox v. Alexander*, 36 N. C. 340; *Fidelity & Deposit Co. v. Jordan* (N. C.), 46 S. E. 496. And one furnishing money to pay off a prior mortgage under an agreement that he shall have a first lien on the property, and taking an invalid mortgage, is subrogated to the lien of the prior mortgage, not only as against the mortgagor, but against other lienholders having notice of the facts: *Cumberland Bldg. etc. Assn. v. Sparks*, 111 Fed. 647. To the same effect, see *Wilton v. Mayberry*, 75 Wis. 191, 17 Am. St. Rep. 193, 43 N. W. 901.

d. *Innocent Third Persons.*—But while subrogation may be had against those with notice, as is shown in the preceding paragraph,

it cannot prevail against bona fide purchasers or those in like situation: *Richards v. Griffith*, 92 Cal. 493, 27 Am. St. Rep. 156, 28 Pac. 484; *Ahern v. Freeman*, 46 Minn. 156, 24 Am. St. Rep. 206, 48 N. W. 677. And, generally, subrogation will not be enforced against those holding intervening rights, liens, and equities, nor when it will prejudicially affect the rights of innocent persons: *Hargis v. Robinson*, 63 Kan. 686, 66 Pac. 988; "Intervening Rights and Equities," ante, where a more extended consideration of this question will be found.

e. Persons Having Lien on Two Funds.

1. **Junior Creditor with Lien on Only One.**—If a prior creditor, having security on two funds, satisfies his demand out of the security or fund which alone is pledged to a junior creditor, and thereby exhausts that fund or security, equity will subrogate the latter creditor to the former's lien upon that fund or security which is not exhausted: *Wyman v. Fort Dearborn Nat. Bank*, 181 Ill. 279, 72 Am. St. Rep. 259, 54 N. E. 946; *Van Pelt v. Strickland*, 60 Kan. 584, 57 Pac. 498; *Eddy v. Traver*, 6 Paige, 521, 31 Am. Dec. 261; *Union Bank v. Conroy*, 59 N. Y. Supp. 631, 42 App. Div. 576; *Jones v. Zollicoffer*, 2 Hawks, 623, 11 Am. Dec. 795; *Ramsey's Appeal*, 2 Watts, 228, 27 Am. Dec. 301; *Ohio Cultivator Co. v. People's Nat. Bank*, 22 Tex. Civ. App. 643, 55 S. W. 765; *Hudkins v. Ward*, 30 W. Va. 204, 8 Am. St. Rep. 22, 3 S. E. 600. Accordingly, it is held in *Anthes v. Schroeder* (Neb.), 94 N. W. 611, that the plaintiff therein is entitled to subrogation to the lien of a prior creditor on other security for any balance remaining due after the application of the proceeds of the security on which both have liens to the payment in full of the prior encumbrance.

This doctrine, however, will not be allowed to work injustice: *Shimp's Assigned Estate*, 197 Pa. St. 128, 46 Atl. 1037. And where a creditor having a lien on two pieces of land releases one of them, without any notice of the claim of another creditor whose lien extends only to the other, the former is not to be prejudiced by his inability to subrogate the latter to his lien on the property which has been released: *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 7 Am. Dec. 494. A separate judgment creditor of a partner is not entitled to be substituted to the rights of a judgment creditor of the partnership who has obtained satisfaction out of such partner's estate, to enable such separate creditor to proceed against the other partner, where there is nothing to show the latter partner indebted to his copartner whose property was taken to pay the firm debt: *Sterling v. Brightbill*, 5 Watts, 229, 30 Am. Dec. 304.

f. **Wrongdoers—Necessity of Clean Hands.**—It is hardly necessary to say that one invoking the equitable doctrine of subrogation must come into court with clean hands: *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *In re Hays' Estate*, 159 Pa. St. 381, 28 Atl. 158; *German Bank v. United States*, 148 U. S. 573, 13 Sup. Ct. Rep. 702. "The

doctrine of subrogation cannot be extended so as to authorize the application of the principle for the relief and benefit of a party who voluntarily surrenders a right or suffers an injury, the consequence of his own willful neglect or wrong, or who has connived and assisted in the wrong": *Starke v. Bernheim*, 102 Ala. 464, 14 South. 770. It is held that a second purchaser who, with notice of the right of a first purchaser, pays off a lien on the land, cannot ask to be subrogated to it: *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874. And in *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406, the right of a junior mortgagee is denied subrogation on account of his making an unlawful alteration of his mortgage, which injuriously affects the liability of the mortgagors. This rule that the doctrine of equitable subrogation will not be applied to relieve the defendant from a loss occasioned by his own unlawful act is recognized in *Guckenheimer v. Angevine*, 81 N. Y. 394, where a fraudulent vendee of chattels is denied the right to invoke the doctrine. Among wrongdoers, equity ordinarily will not enforce subrogation: *Gilbert v. Finch*, 173 N. Y. 455, 93 Am. St. Rep. 623, 66 N. E. 133. But see *Kolb v. National Surety Co.*, 176 N. Y. 233, 68 N. E. 247. The exaction of illegal interest as affecting the right to subrogation is considered under the head of "Usury," ante.

g. Grantees in Fraudulent Conveyance.—It is said that a deed tainted with actual fraud—that is, an intent to defraud creditors, in which intent the grantee participated—will not be permitted to stand for the purpose of reimbursing the grantee any advances he may have made in consequence of it; but a conveyance only constructively fraudulent may be upheld for the purpose of repaying the grantee any advances made by him in removing encumbrances from the property, as subservient to the equity of the case: *Ruse v. Bramberg*, 88 Ala. 619, 7 South. 384. In *Young v. Ward*, 115 Ill. 264, 3 N. E. 512, however, it seems to be held that a grantee in a conveyance, cognizant that it is made with intent to defraud creditors, who pays off and discharges encumbrances on the property, may, when the conveyance is set aside, be subrogated to the rights of the encumbrancers. But see *Mansur etc. Imp. Co. v. Jones*, 143 Mo. 253, 45 S. W. 41; *Greig v. Rice*, 66 S. C. 171, 44 S. E. 729. In *Cone v. Cross*, 72 Md. 102, 19 Atl. 391, a fraudulent conveyance is allowed to stand as security for the sum actually paid by the vendee, who it is not clear knew of the fraudulent intention of the grantor. This decision is cited approvingly in *Reimler v. Pfingsten* (Md.), 23 Atl. 24. According to *Arnold v. Hoshildt*, 69 Minn. 101, 71 N. W. 829, if the plaintiff holds a mortgage executed on property by a fraudulent grantor, payment of which he accepts from the grantee after the conveyance, the plaintiff is not estopped to attack the conveyance as fraudulent; but, if it is set aside, the grantee is entitled to be subrogated to the plaintiff's rights as mortgagee. And in *Duke v. Pigman*, 23 Ky. Law Rep. 209, 62 S. W. 867, it is held that if prop-

erty conveyed in fraud of creditors is subjected to the payment of a debt for which the grantor is bound as surety, the grantee may be subrogated to the rights of the grantor against his principal and cosureties. If a debtor makes a transfer of real and personal property which is fraudulent as to the latter, and the grantee uses the personalty to pay off a lien on the land, after a suit is brought to set aside the transfer of the personalty, the plaintiff may be subrogated to the lien: *Morrel v. Miller*, 28 Or. 354, 43 Pac. 490, 45 Pac. 346.

VII. Persons in Particular Relations.

a. **Insurer and Insured.**—One of the most frequent applications of the doctrine of subrogation is made in favor of insurance companies. And the general proposition is well established that an insurer, on paying a loss, is substituted to the place of the insured in respect to the rights and remedies of the insured against those directly responsible for the loss or destruction of the insured property. This rule is applicable in both fire and marine insurance cases: *Crissey etc. Lumber Co. v. Denver etc. R. R. Co.* (Colo. App.), 68 Pac. 670; *Egan v. British etc. Ins. Co.*, 193 Ill. 295, 86 Am. St. Rep. 342, 61 N. E. 1081; *Packman v. German Fire Ins. Co.*, 91 Md. 515, 80 Am. St. Rep. 461, 46 Atl. 1066; *Cumberland etc. Tel. Co. v. Dooley* (Tenn.), 72 S. W. 451; *International Nav. Co. v. British etc. Ins. Co.*, 108 Fed. 987; *Nord-Deutscher Lloyd v. President etc. Ins. Co.*, 110 Fed. 420. But an accident insurance company has been denied subrogation to the right of action which the assured has against a third person for negligently causing his injury: *Aetna Life Ins. Co. v. Parker*, 96 Tex. 287, 72 S. W. 168, 580, 621. So has a life insurance company been denied the right to recover for the wrongful death of a person whom it has insured: *Connecticut etc. Ins. Co. v. New York etc. R. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *Insurance Co. v. Brame*, 95 U. S. 754.

The right of an insurer to subrogation has already engaged our attention in the monographic note to *Mobile Ins. Co. v. Columbia R. R. Co.*, 44 Am. St. Rep. 731-739. We shall, therefore, refrain from any further discussion of the question at this time.

b. **Corporation Officers, Stockholders, and Creditors.**—If the president of a corporation, in order to protect the property of those whom he represents, pays the interest on a mortgage of that property out of his own funds, he may invoke the doctrine of subrogation: *Bush v. Wadsworth*, 60 Mich. 255, 27 N. E. 532. But if he voluntarily pays labor claims from money borrowed by himself, he cannot be subrogated to the laborer's rights to be preferred, after the insolvency of the corporation: *Suddath v. Gallaher*, 126 Mo. 393, 28 S. W. 880. Directors of a corporation who are sureties to creditors, may, on its insolvency, be substituted to the creditor's rights: *Gray v. Taylor* (N. J. L.), 44 Atl. 668.

A stockholder, paying his own and another stockholder's share of the debts of the corporation to protect his interest in the property of the company, may be subrogated to the rights and remedies of the creditors so paid, as a means to enforce contribution from the other stockholder: *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40. But whatever a stockholder pays toward the satisfaction of the debts of the corporation, either directly to it in the way of assessments, or on account of his personal liability as a stockholder directly to the creditors, he cannot, by subrogation to the rights of the creditor, recover back: *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 71 Am. St. Rep. 36, 56 Pac. 787.

A creditor who is entitled to be subrogated to the rights of a corporation to claim amounts due on shares does not lose the right through being a stockholder: *Richardson v. Chicago Packing etc. Co.* (Cal.), 63 Pac. 74. But a creditor of a corporation cannot be subrogated to another creditor's right against stockholders, even by paying the latter's claim, where the former has no recourse against the stockholders: *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136.

c. **Principal and Agent.**—An agent who pays money out of his own pocket to protect the estate of his principal in his charge is not a volunteer, and he is entitled to all the equities that his principal would have been entitled to had he himself paid the demand: *Curry v. Curry*, 87 Ky. 667, 12 Am. St. Rep. 504, 9 S. W. 831. If, however, an agent acts purely as a volunteer, he cannot invoke the doctrine of subrogation: *Crane v. Noel* (Mo. App.), 78 S. W. 826. Thus, an agent of a mortgagee, who receives for collection undorsed interest coupons, but who, instead of making the collection, remits the amounts thereof from his own funds, without the knowledge of the mortgagee or mortgagor, and without any obligation to do so, cannot claim subrogation to the mortgagee's rights in the coupons: *Bennett v. Chandler*, 199 Ill. 97, 64 N. E. 1052.

If a person intrusts money to his agent to invest in real estate, and the agent fraudulently pays off a mortgage with it on property belonging to a corporation organized by him, such person may, it has been held, be subrogated to the rights of the mortgagee: *Cotton v. Dacey*, 61 Fed. 481.

d. **Officer Paying Judgment or Execution.**—There are a number of cases holding that a judgment or execution cannot ordinarily be kept alive in the hands of the sheriff for his benefit when he has paid the same without any agreement or assignment: *Boren v. McGehee*, 6 Port. 432, 31 Am. Dec. 695; *Roundtree v. Weaver*, 8 Ala. 314; *Whittier v. Heminway*, 22 Me. 238, 38 Am. Dec. 309; *Morris v. Lake*, 9 Smedes & M. 521, 48 Am. Dec. 724; *Reed v. Pruyn*, 7 Johns. 426, 5 Am. Dec. 287; *Harwell v. Worsham*, 2 Humph. 524, 37 Am. Dec. 572. According to *Lintz v. Thompson*, 1 Head, 456, 73 Am. Dec. 182, the voluntary payment of an execution by the officer holding it, without a transfer of the judgment to him, operates not only as a

satisfaction of the execution, but as an extinguishment of the judgment, notwithstanding the officer, by reason of his neglect, had rendered himself liable under the statute to a judgment on motion for the amount. But in *Finn v. Stratton*, 28 Ky. (5 J. J. Marsh.) 364, it is held that where an execution is paid by a sheriff who has rendered himself liable by his official defalcation in regard to it, he is entitled to the interest of the plaintiff in the demand, and may use the name of the plaintiff to enforce it against all the defendants in the execution: See, also, *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46; *Denson v. Ham* (Tex. App.), 16 S. W. 182; *Hall v. Taylor*, 18 W. Va. 544.

In *Heilig v. Lemly*, 74 N. C. 250, 21 Am. Rep. 489, a sheriff neglected to enforce an execution until after it was spent, and then paid the amount due thereon, and took an assignment for his own benefit to a third person. It was held that the judgment was not extinguished, and that an alias execution might issue. The court, referring to the case of *Reed v. Pruyn*, 7 Johns. 426, 5 Am. Dec. 287, which has been widely cited to a contrary doctrine, says: "We think that in the subsequent cases in New York, and others elsewhere that have followed this case, the opinion of the eminent judge [Kent] has been misconceived, and an extension given to it which was not intended, and which cannot be supported by reason. An opinion applicable to a special case has been converted into a general and arbitrary rule."

When a sheriff, under a void execution, collects the amount of a valid judgment, and pays it to the judgment plaintiff, and afterward the judgment defendant recovers a judgment against the officer for the money so collected, the officer is subrogated to the rights of the first judgment creditor, and he may, at his option, have execution on the judgment or offset it against the one obtained against him: *Gillette v. Hill*, 102 Ind. 531, 1 N. E. 551. And when personalty is sold under execution after the judgment has been satisfied, the purchaser being chargeable with such satisfaction, the officer or his sureties may be entitled to the money bid or taken in at the sale, on being compelled by the debtor to repay the value of the property sold: *Morgan v. Oberly*, 85 Ill. 74.

A sheriff, after satisfying a judgment recovered against him because of his deputy failing to pay money collected on execution, may be subrogated to the rights of the deputy in a judgment obtained by him against a bank for the sum collected on the execution and deposited in the bank, where the deputy and his sureties are insolvent: *Downer v. South Royalton Bank*, 39 Vt. 25.

VIII. Sureties, Guarantors and Parties to Bills and Notes.

a. Surety's Right to Subrogation.

1. *The General Rule.*—When a surety pays the debt or meets the obligation of his principal, equity puts him in the place of the creditor whose debt he has discharged, and gives him the benefits of all

the securities held by the creditor in respect to the discharged obligation. He is subrogated to all the rights of the creditor, and may enforce all liens, priorities, and means of compelling payment, which the creditor might have enforced. The surety stands in the shoes of the creditor, and has the same rights that he would have had, but none other: *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757; *March v. Barnet*, 121 Cal. 419, 53 Pac. 933; *New London Bank v. Lee*, 11 Conn. 112, 27 Am. Dec. 713; *Davis v. Smith*, 5 Ga. 274, 47 Am. Dec. 279; *Begein v. Brehm*, 123 Ind. 160, 23 N. E. 496; *Opp v. Ward*, 125 Ind. 241, 21 Am. St. Rep. 220, 24 N. E. 274; *Searing v. Berry*, 58 Iowa, 20, 11 N. W. 708; *Rice v. Downing*, 12 B. Mon. 45; *Talbott v. Lancaster*, 10 Ky. Law Rep. 475, 9 S. W. 694; *Creager v. Brengle*, 5 Har. & J. 234, 9 Am. Dec. 516; *Kimmel v. Lowe*, 28 Minn. 265, 9 N. W. 764; *Conner v. Howe*, 35 Minn. 518, 29 N. W. 314; *Fleming v. Beaver*, 2 Rawle, 128, 19 Am. Dec. 629; *Pott v. Nathans*, 1 Watts & S. 155, 37 Am. Dec. 456; *Yeager's Appeal* (Pa.), 8 Atl. 225; *Lenoir v. Winn*, 4 Desaus. 65, 6 Am. Dec. 597; *Bowen v. Barksdale*, 33 S. C. 142, 11 S. E. 640; *Utah Nat. Bank v. Forbes*, 18 Utah, 225, 55 Pac. 61; *Hall v. Hyer* (W. Va.), 37 S. E. 594; *Riemer v. Schlitz*, 49 Wis. 278, 5 N. W. 493; *The Evangel*, 94 Fed. 680; *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. Rep. 142. And a surety of a surety is entitled to all the rights of the latter, and to be substituted in his place, as to his remedies against the principal: *Elwood v. Deifendorf*, 5 Barb. 398. But see *New York State v. Fletcher*, 5 Wend. 85. If the debt has been reduced to judgment, the surety, upon payment, is entitled to an assignment thereof, and equity will regard the lien as still subsisting, and will aid the surety in its enforcement: *Searing v. Berry*, 58 Iowa, 20, 11 N. W. 708; *Connelly v. Bourg*, 16 La. Ann. 108, 79 Am. Dec. 568; *Benne v. Schnecks*, 100 Mo. 250, 13 S. W. 82; *Hill v. King*, 48 Ohio St. 75, 26 N. E. 988; *Rickards v. Bemis* (Tex. Civ. App.), 78 S. W. 239; *Flood v. Hulter* (Va.), 32 S. E. 64. And sureties of a judgment debtor compelled to pay a portion of the debt after the attaching of a lien in favor of the judgment creditor, will be subrogated, in respect to the lien and to the extent of their payment, to the rights of the creditor: *In re Lawrence*, 5 Fed. 349.

And when, from his own hands, a surety furnishes his principal money to be applied to pay the latter's debt, for which the surety is liable, and the money is thus applied by the principal, the latter, in making the payment, will be regarded as the agent of the surety, and the payment will vest in the surety as complete a right to subrogation to securities held by the creditor as would have vested in him had he paid the debt in person: *Zuellig v. Hemerlie*, 60 Ohio St. 27, 71 Am. St. Rep. 707, 53 N. E. 447.

2. Illustrations of the Rule.

A. Surety on Injunction Bond.—If a surety on an injunction bond is sued, and judgment obtained against him (the injunction being of a

judgment and being afterward discharged), he is entitled to the benefit of the creditor's judgment lien upon the property of the judgment debtor: *Rodgers v. McCluer*, 4 Gratt. 81, 47 Am. Dec. 715. Where a second indorser has given an injunction bond in a suit upon the note, his surety in that bond, who has been compelled to pay the amount of the note, may recover from the first indorser: *Chrisman v. Harmon*, 29 Gratt. 494, 26 Am. Rep. 387.

B. On a Forthcoming Bond.—Sureties of one of the two joint debtors in a forthcoming bond became, upon the discharge thereof, sureties for the debt; and when they have discharged the same, are entitled to be substituted to all the rights of the creditors against the original debtors, subsisting at the time they became so bound: *Robinson v. Sherman*, 2 Gratt. 178, 44 Am. Dec. 381; *Hill v. Manser*, 11 Gratt. 525; *Borer v. Ferguson*, 96 Va. 411, 31 S. E. 817. See, too, *Conaway v. Odbert*, 2 W. Va. 25.

C. On a Replevin Bond.—If a replevin bail pays a judgment against the defendant, he is subrogated to all the rights of the judgment plaintiff, and may obtain an order of court for execution to his use on the judgment against the judgment defendant: *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373. The surety on a replevin bond does not lose his right to subrogation by voluntarily paying a judgment against his principal: *Armstrong v. Farmers' Nat. Bank*, 130 Ind. 508, 30 N. E. 695.

D. On an Appeal Bond.—A surety on an appeal bond who is compelled to pay the judgment is entitled to be subrogated to all the rights of the judgment creditor: *McClung v. Beirne*, 10 Leigh, 394, 34 Am. Dec. 739. See, also, *Foster v. Whitaker*, 12 Ga. 57; *Allen v. Powell*, 108 Ill. 584; *Howe v. Frazer*, 2 Rob. (La.) 424; *Culliford v. Walser*, 38 N. Y. Supp. 199, 3 App. Div. 266; *Black v. Epperson*, 40 Tex. 162; *Harnsberger v. Yancey*, 83 Gratt. 527. In *Taul v. Epperson*, 38 Tex. 492, the surety on an error bond, sued out by one joint defendant, who paid the debt upon the judgment being affirmed, was held subrogated to the rights of the plaintiffs as against all the defendants. And according to *Peirce v. Higgins*, 101 Ind. 178, sureties on an appeal bond may be subrogated to the lien of the judgment appealed from, and paid by them; and their equities are superior to those of a purchaser in good faith who buys the land on which the judgment is a lien after the execution of the bond.

E. On a Guardian's Bond.—The sureties of a guardian, when compelled to pay the debts or meet the obligations of his principal, will be subrogated to the ward's rights and remedies against the guardian: *Gilbert v. Neeley*, 35 Ark. 24; *Rice v. Rice*, 108 Ill. 199; *Harris v. Harrison*, 78 N. C. 202; *Commonwealth v. Cox*, 36 Pa. St. 442; *Commonwealth v. Cooper*, 149 Pa. St. 239, 24 Atl. 339. Even before payment, if the guardian is insolvent, they may be subrogated; but they take the remedies with all the defenses that existed against

the ward: *Adams v. Gleaves*, 78 Tenn. (10 Lea) 367. They may be subrogated to the right of the ward to subject the homestead of the guardian: *Luck v. Atkins*, 53 Ark. 303, 13 S. W. 1097.

F. On an Administrator's Bond.—Sureties on an administrator's bond, when required to pay creditors after an order of distribution, are entitled to be subrogated to the rights of the creditors, and may recover trust funds in the hands of the administrator which have been diverted and misapplied: *Pierce v. Holzer*, 65 Mich. 263, 32 N. W. 431. For other cases illustrating the right of sureties on the bond of an executor or administrator to be subrogated to rights of those whose demands he has met, see *Gowing v. Bland*, 3 Miss. (2 How.) 813; *Wernecke v. Kenyon*, 66 Mo. 275; *Cowgill v. Linnville*, 20 Mo. App. 138. In *Kennedy v. Pickens*, 38 N. C. 147, they are substituted to the rights of the next of kin; and in *Pinckard v. Woods*, 8 Gratt. 140, they are substituted to the rights of legatees. See, too, *Taylor v. Taylor*, 8 B. Mon. 419, 48 Am. Dec. 400. Sureties of an executor entitled to compensation who are held liable for his default may be subrogated to his claim in order to reduce their liability; and of this right they cannot be deprived by his electing, after insolvency, not to assert the claim: *Abro v. Robinson*, 93 Ky. 195, 19 S. W. 587. See, also, *Clark v. Williams*, 70 N. C. 679.

G. On a Trustee's Bond.—The sureties of a trustee may be subrogated to his right to reimbursement from the trust fund for money properly paid out by him in its behalf: *Boyd v. Myers*, 80 Tenn. (12 Lea) 175.

H. Public Officer's Bond.—Sureties on the bond of a public officer, upon being held to make good the default of their principal, are entitled to be subrogated to the position of the nation, commonwealth, or municipality in respect to its rights, liens, securities and priorities, for the purpose of enforcing reimbursement from their principal or contribution from their cosureties: *Knighton v. Curry*, 62 Ala. 404; *Bunting v. Ricks*, 22 N. C. (2 Dev. & B. Eq.) 130, 32 Am. Dec. 699; *Robertson v. Trigg*, 32 Gratt. 76; *Myers v. Miller*, 45 W. Va. 595, 31 S. E. 976; *United States v. Hunter*, 5 Mason, 62, Fed. Cas. No. 15,426; *Jackson v. Davis*, 4 Mackey, 194. The sureties of a de facto officer are within this rule: *Boone County Bank v. Byrum*, 68 Ark. 71, 56 S. W. 532.

I. The Sureties of a Purchaser at a Judicial Sale, when required to pay his bonds, are entitled to a lien on the land for the amount so paid: *Highland v. Anderson* (Ky.), 17 S. W. 866.

b. Creditor's Right to Subrogation.—A creditor, in case of the default of his debtor, may avail himself of securities given by the debtor to his surety, or person standing in the situation of surety, to indemnify the surety against liability for the debt. This is the corollary of the doctrine that a surety is entitled to the benefit of any security which the creditor may have taken from the principal.

"The creditor and surety are each entitled to the securities held by the other for the payment of the debt": *Whitehead v. Henderson*, 67 Ark. 200, 56 S. W. 1065; *Whitehead v. Hamilton Lumber Co.*, 52 N. J. Eq. 78, 27 Atl. 897; *State v. Campbell* (N. J. L.), 35 Atl. 788; *Keene Five Cent Sav. Bank v. Herrick*, 62 N. H. 174; *First Nat. Bank v. Hunton*, 70 N. H. 224, 46 Atl. 1049; *Brown v. Ligon*, 92 Fed. 851. But the rights of the creditor through subrogation to the remedies of the surety can in no case exceed those of the latter. Until the indemnitor's covenant has been broken, or there has been some failure to perform it, no action can be maintained thereon by either: *Henderson-Achert Lith. Co. v. John Shillito Co.*, 64 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295. If a creditor accepts a guarantor, who takes indemnity from the principal debtor, the creditor is substituted to the rights of the guarantor to only so much of the security as is subsisting at the time he asserts his right by action: *Poole v. Lowe*, 24 Colo. 475, 52 Pac. 741.

c. **Guarantor's Right to Subrogation.**—The guarantor of a mortgage, who is required to pay a deficiency thereon, may be subrogated to the securities held as collateral to the debt secured by the mortgage: *Havens v. Willis*, 100 N. Y. 482, 3 N. E. 313. And the guarantor of a note may be substituted in the place of the holder, to whom he makes payment: *Babcock v. Blanchard*, 86 Ill. 165. If one guarantees, for a present consideration, the payment of a debt, and the debtor executes a mortgage to him conditioned for the payment of the indebtedness to the creditor and the indemnification of the guarantor, the creditor is entitled, by substitution, to the benefit of the security: *Butterworth v. Kritzer Milling Co.*, 115 Mich. 1, 72 N. W. 990.

d. Parties to Bills and Notes.

1. **Indorser's Right to Subrogation.**—An indorser of a negotiable instrument is, by payment, entitled to subrogation to the rights of the holder: *Dooley v. Lackey*, 55 Ill. App. 30; *Seixas v. Gonsoulin*, 40 La. Ann. 351, 4 South. 453; *George v. Somerville*, 153 Mo. 7, 54 S. W. 491. Thus, is the indorser of a note secured by a trust deed is required to pay it, he is subrogated to the payee's rights under the deed: *Kingman v. Cornell etc. Buggy Co.*, 150 Mo. 282, 51 S. W. 727. See, too, *Telford v. Garrels*, 132 Ill. 550, 24 N. E. 573. And the indorser on a note secured by a pledge is subrogated to the pledgee's rights on paying the note: *Woodward v. American etc. Ry. Co.*, 39 La. Ann. 566, 2 South. 413. A surety paying a judgment against the maker or against himself and the maker, is subrogated to the rights of the judgment creditor: *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444; *Schleissman v. Kallenberg*, 72 Iowa, 338, 2 Am. St. Rep. 247, 33 N. W. 459; *Yates v. Mead*, 68 Miss. 787, 10 South. 75. A subsequent indorser of a note, paying a judgment on it against the maker, a prior indorser, and himself, which is a lien on land of the prior indorser, may sue in equity to enforce substitution to the lien of the

judgment against the land of the prior indorser, without first getting a judgment at law against the prior indorser for the money paid by him: *Schieb v. Moon*, 50 W. Va. 47, 40 S. E. 329. The receiver of an insolvent indorser has a right of action against the original obligors upon the paper, on the payment of a dividend to the creditor holder; and, upon full payment, the estate of the insolvent is subrogated to all of the creditors' rights as against prior parties: *Mercantile Nat. Bank v. McFarlane*, 71 Minn. 497, 70 Am. St. Rep. 352, 7 N. W. 287. But one who, not being a surety or indorser on a note, pays it, has no claim against the maker so as to entitle him to any rights in personal property mortgaged to secure the note, together with others: *Bank of Ackley v. Porter*, 116 Iowa, 377, 89 N. W. 1094. And if a stranger pays a note at the request of an indorser, but without the request of the maker, and subsequently the indorser fraudulently obtains possession of the note and collects the sum due from the maker, the stranger will not be subrogated to the rights of the original payee: *Matterson v. Dent*, 112 Iowa, 551, 64 N. W. 710. The general rule is, that a person who pays a note, without having any interest to protect, is not entitled to subrogation: *Binford v. Adams*, 104 Ind. 41, 3 N. E. 753.

2. **Accommodation Indorsers.**—An accommodation indorser of a bill or note is, in the event of his being held to pay, entitled to be subrogated to all the rights and remedies of the holder or creditor: *Boyd v. Finnegan*, 3 Daly, 222. If one becomes an accommodation indorser for two joint makers of a note at the request of only one of them, he is, upon being compelled to pay, subrogated to the rights of the original creditor: *Hoffman v. Butler*, 105 Ind. 371, 4 N. E. 681.

3. **Sureties and Guarantors.**—The sureties on a note, upon payment, are entitled to be subrogated to the rights of the payee: *Frank v. Taylor*, 130 Ind. 145, 29 N. E. 486; *Gilbert v. Adams*, 99 Iowa, 519, 68 N. W. 883; *Myres v. Yapple*, 60 Mich. 339, 27 N. W. 536; *Carpenter v. Minter*, 72 Tex. 370, 12 S. W. 180. The rule is the same where they furnish their principal the money to pay off the debt: *Zuellig v. Hemerlie*, 60 Ohio St. 27, 71 Am. St. Rep. 707, 53 N. E. 447. If securities have been given by the principal debtor, he is entitled to them: *Fitch v. Hammer*, 17 Colo. 591, 31 Pac. 336; and when they consist of a mortgage, he is subrogated to the payee's rights thereunder, and may foreclose it: *Waldrip v. Black*, 74 Cal. 409, 16 Pac. 226; *Jones v. Tineher*, 15 Ind. 308, 77 Am. Dec. 92.

When a guarantor of a note pays it at the request of one of the makers, whereupon the note is indorsed and delivered to him, he is subrogated to the rights of the holder, including the security of a mortgage of chattels: *Rand v. Barrett*, 66 Iowa, 731, 24 N. W. 530.

4. **Holder's Right to Subrogation.**—When the maker and the indorsers of commercial paper are insolvent, the holder is entitled to avail himself, on the principle of subrogation, to the rights of the

indorsers in securities given them by the maker to secure them against loss. The holder, however, can have no higher rights than the indorsers had: *Appeal of Harmony Nat. Bank*, 101 Pa. St. 428; *National Shoe etc. Bank v. Small*, 7 Fed. 837.

IX. Persons Concerned with Encumbered Property.

a. Party Paying, or Advancing Money to Pay, Encumbrance.

1. **General Prerequisites to His Right to Subrogation.**—The applications of the doctrine of subrogation to persons paying off, or advancing money to pay off, mortgages, encumbrances, and liens, are of great frequency and importance. The general principles governing the doctrine in cases of this class are not different, perhaps, from those which already have been considered in other connections. Thus we find that one required to pay, and who accordingly pays, a mortgage executed by another, is entitled to be subrogated to the rights of the mortgagee, and be treated as the assignee of the mortgage, notwithstanding the mortgage itself may have been canceled, and the mortgage debt discharged: *Johnson v. Barrett*, 117 Ind. 551, 10 Am. St. Rep. 83, 19 N. E. 199; *Hubbard v. Knight*, 52 Neb. 400, 72 N. W. 473. If land is held in trust for the payment of a debt, one compelled to pay the amount thereof is subrogated to the rights of the cestui que trust: *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684.

And when a person having an interest in real property pays money to satisfy a lien thereon in order to protect that interest, he is entitled to be subrogated to the rights of the encumbrancer, and considered as an assignee of the lien, for the purpose of effecting substantial justice, although the lien is discharged of record: *Shaffer v. McCloskey*, 101 Cal. 576, 36 Pac. 196; *Kinnah v. Kinnah*, 184 Ill. 284, 56 N. E. 376; *Fort Jefferson Imp. Co. v. Dupoyster*, 112 Ky. 792, 66 S. W. 1048; *Elliott v. Tainter* (Minn.), 93 N. W. 124; *Land Mortgage Bank v. Quannah Hotel* (Tex. Civ. App.), 32 S. W. 573; *Davis v. Farwell Co.* (Tex. Civ. App.), 49 S. W. 656. A trustee under a mortgage from a railroad corporation with covenants of warranty may protect the trust property against a forced sale under a prior encumbrance, and, upon paying the encumbrance, may have the benefit of its lien against the corporation: *Memphis etc. R. R. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482. And when one entitled to redeem pays a mortgage, who is under no obligation to pay it, he thereby becomes subrogated to the rights of the mortgagee: *Long v. Long*, 111 Mo. 12, 19 S. W. 537; *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900.

Again, one who advances or loans money at the debtor's request for the purpose of discharging a mortgage, and who takes a new security which proves invalid, may be subrogated to the lien of the mortgage discharged: *Levy v. Martin*, 43 Wis. 198, 4 N. W. 35; *Equitable Mortgage Co. v. Lowdry*, 55 Fed. 165.

But before a third person paying a debt secured by mortgage, or advancing money therefor, can be subrogated to the rights of the holder of the mortgage thus paid, he must show that he acted at the request of the debtor or creditor, or to discharge a liability of his own, or to protect an interest of his, or in pursuance of an agreement or understanding for subrogation. In other words, if a volunteer pays off or loans money to pay off an encumbrance, without taking an assignment thereof, and without an agreement for substitution, he cannot invoke the doctrine of subrogation, in the absence of fraud, mistake, or some other consideration whereon equity can ground its jurisdiction: *Guy v. Du Uprey*, 16 Cal. 195, 76 Am. Dec. 518; *McCowan v. Brooks*, 113 Ga. 532, 39 S. E. 115; *Hutchinson v. Rice*, 105 La. Ann. 474, 29 South. 898; *Desot v. Ross*, 95 Mich. 81, 54 N. W. 694; *Howell v. Bush*, 54 Miss. 437; *Mansur etc. Implement Co. v. Jones*, 143 Mo. 253, 45 S. W. 41; *Mavity v. Stover* (Neb.), 94 N. W. 834; *Kocher v. Kocher* (N. J. Eq.), 39 Atl. 536; *Campbell v. Foster Home Assn.*, 163 Pa. St. 609, 43 Am. St. Rep. 818, 30 Atl. 222. One who loans money which is used in paying off a mortgage or encumbrance is not ordinarily entitled, from that circumstance alone, to be subrogated to the rights of the holder of the encumbrance: *Kline v. Bagland*, 47 Ark. 111, 14 S. W. 474; *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453; *Seeley v. Bacon* (N. J. Eq.), 34 Atl. 139; *Carolina etc. Loan Assn. v. Black*, 119 N. C. 323, 25 S. E. 975; *Watson v. Wilcox*, 39 Wis. 643, 20 Am. Rep. 63; *Cumberland etc. Loan Assn. v. Sparks*, 106 Fed. 101. The mere fact that the proceeds of a later mortgage are applied to the discharge of a prior one does not, as a rule, entitle the mortgagee therein to be subrogated to the rights of the prior mortgagee (*Ayers v. Staley* (N. J. Eq.), 18 Atl. 1046; *Bradshaw v. Van Valkensburg*, 97 Tenn. 316, 37 S. W. 88), as when it is discovered that a lien has arisen intermediate between the two mortgages: *Hoagland v. Green*, 54 Neb. 164, 74 N. W. 424. It is held in *Aetna Life Ins. Co. v. Buck*, 108 Ind. 174, 9 N. E. 153, that a mortgagee in a void mortgage cannot be subrogated to a valid mortgage which was paid off and discharged long before his mortgage was executed, with the proceeds of an invalid intervening mortgage.

"There is clearly no scope for the operation of the principle of equitable subrogation in a case of ordinary borrowing, where there is no fraud or misrepresentation, and the borrower creates in favor of the lender a new and valid security, although the funds are used in order to discharge a prior encumbrance. In such case, the lender is treated as a mere volunteer in the transaction. But the rule is settled that, where money is expressly advanced in order to extinguish a prior encumbrance, and is used for this purpose, with the just expectation on the part of the lender of obtaining a valid security, or where its payment is secured by a mortgage which for any reason is adjudged to be defective, the lender or mortgagee may

be subrogated to the rights of the prior encumbrancer whose claim he has satisfied, there being no intervening equity to prevent. It is of the essence of this doctrine that equity does not allow the encumbrance to become satisfied as to the advancer of the money for such purposes, but as to him keeps it alive, and as though it had been assigned him as security for the money": *Bolman v. Lohman*, 74 Ala. 507; *Scott v. Land Mtg. etc. Co.*, 127 Ala. 161, 28 South. 709; *Bigelow v. Scott*, 135 Ala. 236, 33 South. 546.

For other authorities in support of the proposition that one advancing or loaning money which is used to discharge an encumbrance, and taking an invalid security therefor, is entitled to subrogation to the rights of the original encumbrancer, where there are no intervening rights, see *Gilbert v. Gilbert*, 39 Iowa, 657; *Zinkerson v. Lewis*, 63 Kan. 590, 66 Pac. 644; *Dillon v. Dillon*, 24 Ky. Law Rep. 781, 69 S. W. 1099; *State Nat. Bank v. Viceroy*, 24 Ky. Law Rep. 892, 70 S. W. 183; *Milholland v. Tiffany*, 64 Md. 455, 2 Atl. 831; *Kitchell v. Mudgett*, 37 Mich. 82; *Polmer v. Sharp*, 112 Mich. 420, 70 N. W. 903; *Haverford Loan etc. Co. v. Fire Assn.*, 180 Pa. St. 522, 57 Am. St. Rep. 657, 37 Atl. 179; *Miller v. Rutland etc. R. R. Co.*, 40 Vt. 399, 94 Am. Dec. 413; *Bachal v. Smith*, 101 Fed. 159. This doctrine was recognized in *Everston v. Central Bank*, 33 Kan. 352, 6 Pac. 605, where money was loaned on a forged mortgage, supposed to be valid, to pay off a valid mortgage. And in *Gordon v. Stewart* (Neb.), 96 N. W. 624, where it appears that one Stewart, having adult children and an insane wife residents of England, owned a dwelling-house, wherein he lived with a woman under a void contract of marriage. The property was encumbered by a valid mortgage, and one Gordon loaned Stewart money with which to pay it off, in good faith taking a mortgage on the property executed by Stewart and the woman with whom he was living. After the death of Stewart, his children and true widow claimed the property; and the contention was made that Gordon, in respect to the discharge of the prior mortgage, was a mere volunteer. The court denied this contention, saying: "The following recent decisions all sustain the right of subrogation under circumstances which render them, on principle, authority in the present case, and several of them are directly in point: *Faulk v. Calloway*, 123 Ala. 325, 26 South. 504; *Merchants' etc. Bank v. Tillman*, 106 Ga. 55, 31 S. E. 794; *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231, 30 N. E. 21; *Fowler v. Maus*, 141 Ind. 47, 40 N. E. 56; *Stevens v. King*, 84 Me. 291, 24 Atl. 850; *Frisbee v. Frisbee*, 86 Me. 444, 29 Atl. 1115; *Draper v. Ashley*, 104 Mich. 527, 62 N. W. 707; *Markillie v. Allen*, 120 Mich. 360, 79 N. W. 568; *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; *Union Mortgage etc. Co. v. Peters*, 72 Miss. 1058, 18 South. 497; *Dorrah v. Hill*, 73 Miss. 787, 19 South. 961; *Straman v. Rechtine*, 58 Ohio St. 433, 54 N. E. 44; *Texas Loan etc. Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12; *Johnson v. Tootle*, 14 Utah, 482, 47 Pac. 1033; *Southern*

Bldg. etc. Assn. v. Page, 46 W. Va. 302, 3 S. E. 336. There are many cases where subrogation has been denied, among them *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267; *Rice v. Winters*, 45 Neb. 517, 63 N. W. 830; *Carolina etc. Loan Assn. v. Black*, 119 N. C. 323, 25 S. E. 975; *Bible v. Wisecarver* (Tenn.), 50 S. W. 670; but most of them are where the unfortunate condition of the party seeking subrogation is due to negligence or mistake of law, and we have not discovered any case where the equities are so strong as in the one before us, where the right has been denied."

"Perhaps it should be remarked," says the Nebraska court in *Boevink v. Christiaan* (Neb.), 95 N. W. 652, "that where money has been loaned to discharge a prior mortgage, and for any reason the money cannot be made on the new mortgage, three reasons for refusing subrogation are found in the cases denying it. These are: Negligence of the lender, as in *Bohn Sash Co. v. Case*, 42 Neb. 281, 60 N. W. 576, and *Rice v. Winters*, 45 Neb. 517, 63 N. W. 830; mistake of law, which gives no ground of relief, as in *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267; *Meeker v. Larson* (Neb.), 90 N. W. 958; and intervening rights of innocent third persons. None of these appear in this case." And, accordingly, it is held in the Nebraska case quoted from that one who loans money to pay a mortgage on the estate of a decedent at the request of the executor, and on the assurance of the judge that the executor has authority to execute a mortgage for that purpose, and who takes the executor's note and mortgage upon the property, is subrogated to the rights of the original mortgagee, when it afterward appears that the executor had no such authority, and the mortgage given by him is invalid.

These cases certainly announce a liberal and commendable doctrine; and, while authority no doubt exists for a narrower doctrine, we believe they are sound. In the case of *George v. Butler* (Utah), 50 Pac. 1032, where this question was before the court, it was said: "Tested alone by the earlier cases, Sutherland might be regarded as a volunteer, but latterly the doctrine of subrogation has been developed and expanded, and given a wider application to business matters. By analogy, it has been applied to transactions similar to the one under consideration—to one having no previous interest to protect, who pays off a mortgage, or advances money for its payment, at the instance of the mortgagor and for his benefit, when no innocent person can be injured, believing he is getting security equal to that of the person whose debt he pays": See, too, the leading case of *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31.

2. Effect of Intention of Parties.—When one pays a mortgage debt, it is not essential to his right to be substituted in the place of the mortgagee that he have an avowed intention at the time of the payment to keep the mortgage alive for his protection; an intention to that effect, being to his advantage, will be presumed:

Joyce v. Dauntz, 55 Ohio St. 538, 45 N. E. 900. The fact that the mortgage was paid, and was intended to be paid, is immaterial; equity will keep it alive so long as the rights of the parties require: *Union Mortgage etc. Co. v. Peters*, 72 Miss. 1058, 18 South. 497. The actual intention of the parties, however, may have some bearing on the question of subrogation. A person who has lent money to a debtor may be subrogated by the debtor to the creditor's rights; and if the party who has agreed to advance the money for the purpose, employs it himself in paying the debt and discharging the encumbrance on land given for its security, he is not to be regarded as a volunteer. The real question in all such cases is, whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of the creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is": *Building etc. Assn. v. Thompson*, 32 N. J. Eq. 133; *Bohn Sash etc. Co. v. Case*, 42 Neb. 281, 60 N. W. 576; *Rachal v. Smith*, 101 Fed. 159. The true principle, it has been said, "is, that when money due on a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, substituting him who pays in the place of the mortgagee, as may best serve the purpose of justice and the just intent of the parties. Many cases state the rule in equity to be, that the encumbrance shall be kept on foot, or considered extinguished or merged, according to the intent or the interest of the party paying the money; but the decisions, it is believed; will generally be found in accordance with the principle above stated. And it makes no difference in either of these cases whether the party, on the payment of the money took an assignment of the mortgage or a release, or whether a discharge was made and the evidence of the debt canceled. The debt itself may be held still to subsist in the nature of a lien on the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it as if it had actually been assigned": *Robinson v. Leavitt*, 7 N. H. 73; *First Nat. Bank v. Ackerman*, 70 Tex. 315, 8 S. W. 45.

3. Of Knowledge of Intervening Lien.—The fact that one who loans money to satisfy a prior mortgage knows of the existence of an intervening mortgage will not defeat his right to subrogation, if he had an agreement to that effect. The second mortgagee, being placed in no worse position by the transaction, cannot complain of the substitution of the lender in the place of the first mortgagee: *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 222, 38 S. E. 374. And where mortgaged land is sold for its full value by the mortgagor, and the proceeds applied to the satisfaction of the mortgage debt, equity will keep the mortgage alive and enforce it for the protection of the purchaser as against subsequent encumbrances; and his

right to subrogation will not be affected by notice of the encumbrances when he bought and paid for the property: *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900.

4. **Of Mistake of Law or Fact.**—The doctrine of subrogation has been invoked in a number of instances in favor of persons discharging and canceling mortgages through a mistake of fact. Thus, if one not an intermeddler or volunteer causes a mortgage to be satisfied and discharged in ignorance of a judgment lien, under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake, and give the party who made it the benefit of the equitable right of subrogation where no superior intervening equities are interfered with: *Heisler v. Aultman*, 56 Minn. 454, 45 Am. St. Rep. 486, 57 N. W. 1053. And if the owner of property pays off a trust deed, without notice of a junior lien, the payment will be presumed to be made for his own benefit, and the protection of his own interest, and equity will regard him as the assignee of the senior lienholder, and will revive the lien and enforce it in his favor: *Darrrough v. Herbert Kraft Co. Bank*, 125 Cal. 272, 57 Pac. 983, citing *Young v. Morgan*, 89 Ill. 199. So, if the holder of a mortgage takes a new mortgage as a substitute for a former one, and cancels and releases latter in ignorance of an intervening lien upon the mortgaged premises, equity will, in the absence of some special disqualifying fact, restore the lien of the first mortgage, and give it its original priority: *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923, citing *Bruse v. Nelson*, 85 Iowa, 157; *Cobb v. Dyer*, 69 Me. 494; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205.

The case of *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31, is a leading authority in this connection. There the party paying a first mortgage and taking a mortgage for the money advanced, did so without knowing of the existence of a second mortgage. We quote from the opinion: "There are a very respectable number of cases in which relief has been refused under circumstances precisely like those now before us, where one has loaned and used his money in good faith, and for the express purpose of relieving a debtor from a pressing obligation, and his real property from a specific lien for the amount of the same, under a genuine but excusable misapprehension as to the rank and position of security taken by him on the same property, has been treated and characterized as a volunteer, a stranger, and an officious intermeddler, and denied the rights of an equitable assignee. But of late years, with the development of the principles on which the doctrine is founded, the courts have been taking a broader and more commendable view of the situation of such a party, and at this time very little is left of the views expressed in the earlier cases. The better opinion now is, that one who loans his money upon real estate security for the express purpose of taking up and discharging liens or encumbrances on the same property, has thus paid the debt

at the instance, request, and solicitation of the debtor, expecting and believing in good faith that his security will of record be substituted in fact in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler; nor is the debt, lien, or encumbrance regarded as extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor."

In the above case the mistake of the person loaning the money to discharge a mortgage, and taking a mortgage on the land as security for the money advanced consisted in supposing that there were no other liens on the property. But the case is not different where the mistake consists in supposing a second lien to have been discharged, or in justifiably believing that it would be discharged. A prime consideration in such cases, however, is that the restoration of the discharged lien may be made without putting the holder of the second encumbrance in any worse position than if the prior lien had not been discharged. If it has been discharged under a mistake of fact by the party paying the money, to refuse to restore it for his protection would be permitting the second lienholder to profit at the expense of such person and from his mistake: *London etc. Mortgage Co. v. Tracy*, 58 Minn. 201, 59 N. W. 1001.

In *Bank of Ipswich v. Brock*, 13 S. Dak. 409, 83 N. W. 436, the plaintiff, to whom the defendant applied for a loan agreed to pay one mortgage on the land of the defendant if he would procure the release of another (there were two mortgages on the property); and, on paying the mortgage, he instructed the register of deeds not to discharge it of record until such release was secured; but, through mistake, the register of deeds discharged this mortgage paid. The court held that the plaintiff was entitled to have the discharge set aside and the record of cancellation canceled. The Minnesota case of *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31, to which we have referred in the preceding paragraphs, is approved by the South Dakota court in this case.

In case of a mistake of law, however, the rules are otherwise. For example, if a mortgagor and mortgagee of a homestead mortgaged for money with which to pay off a prior mortgage, labor under a mutual mistake in supposing that the homestead belongs to the mortgagor in fee, under her husband's will, to the exclusion of her minor children, equity will not grant relief by subrogating such mortgagee to the rights of the prior mortgagee: *Kleinmann v. Gieselman*, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. 796. See, also, *Deavitt v. Ring* (Vt.), 56 Atl. 978. And where a stranger to a prior mortgage on the property of a married woman, who voluntarily advances money upon a second mortgage thereon executed by the husband assuming to act under a power of attorney from her, which does not authorize the loan or the mortgage, and who causes part of the money advanced to be paid in the release and discharge of the prior mortgage, for his supposed security, acting with a

knowledge of all the facts, but under a mistake of law, will not be subrogated to the rights of the prior mortgagee, when the second mortgage is declared invalid: *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267. See, also, *Guy v. Du Uprey*, 16 Cal. 196, 76 Am. Dec. 518; *Campbell v. Foster Home Assn.*, 163 Pa. St. 609, 43 Am. St. Rep. 318, 30 Atl. 222.

5. **Of Misrepresentations and Fraud.**—When there is misrepresentation and fraud whereby one is induced to advance money to discharge a lien on property, and the money is so applied, it is not uncommon for a court of equity to protect the lender by subrogating him to the lien of the encumbrance which his money has been used to discharge: *Bolman v. Lohman*, 74 Ala. 507. If one is induced to advance money to pay off a trust deed or lien on property, on the assurance that the title thereto is otherwise clear, and takes a new security for the money advanced, and subsequently it appears that the property is encumbered, equity will keep the original trust alive as security for the money loaned: *Whitesella v. Texas Loan Agency* (Tex. Civ. App.), 39 S. W. 194; *Southern Bldg. etc. Assn. v. Page*, 46 W. Va. 302, 33 S. E. 336. So, where a mortgagee, induced by fraudulent representations of the mortgagor that his mortgage would become the senior lien, pays money to remove prior liens on the property, he is entitled to be subrogated to the rights of the holders of such prior liens, as against a person whose lien is prior to the lien of the mortgage, but junior to the liens satisfied: *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231, 30 N. E. 21; *Union Mortgage etc. Co. v. Peters*, 72 Miss. 1058, 18 South. 497.

6. Of an Agreement or Understanding for Security.

A. **In General.**—"Where money is advanced to a debtor in pursuance of an express agreement that it is to be used to retire existing liens or encumbrances on his property, and that the creditor who loans the money is to have a first lien upon the property to secure its repayment, such creditor may be subrogated to the rights of the encumbrancer or lienor whose debt has been paid, not only as against the borrower, but as against anyone else who subsequently acquires an interest in the property with knowledge of the circumstances under which the money to pay off the encumbrances or liens was advanced." Furthermore, "if money is advanced to a debtor to discharge an existing first mortgage upon his property, and in pursuance of an agreement that the lender is to have a first lien upon the property for the repayment of the sum loaned, the lender is entitled, as against a junior encumbrancer, to be treated as the assignee of the first mortgage which has been paid off and discharged with the money loaned, whenever it becomes necessary to do so to effectuate the agreement with the lender, and to prevent the junior encumbrance from being raised accidentally to the dig-

nity of a first lien, contrary to the intention of the parties. The species of subrogation mentioned in both these instances is what has been termed 'conventional subrogation,' and does not depend upon the establishment of any privity of contract": *Cumberland Bldg. etc. Assn. v. Sparks*, 111 Fed. 647, 652, per Justice Thayer. See, in support of this doctrine, *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; *Thompson v. Connecticut etc. Ins. Co.*, 139 Ind. 325, 38 N. E. 796; *Farm Land Mortg. etc. Co. v. Elsbree*, 55 Kan. 562, 40 Pac. 906; *Dillon v. Kauffman*, 58 Tex. 696; *Brown v. Dennis* (Tex. Civ. App.), 30 S. W. 272; *Park v. Kribs* (Tex. Civ. App.), 60 S. W. 905; *Powers v. McKnight* (Tex. Civ. App.), 73 S. W. 549; *Bankers' Loan etc. Co. v. Hornish*, 94 Va. 608, 27 S. E. 459.

Or, to quote from *Straman v. Rechtime*, 58 Ohio St. 443, 51 N. E. 44: "Where money is loaned under an agreement to be used in the payment of a lien on real estate, and it is so used, and the agreement is that the one who loans the money shall have a first mortgage lien on the lands to secure his money, and through some defect in the new mortgage, or oversight as to other liens, the money cannot be made on the last mortgage, the mortgage has a right to be subrogated to the lien which the money supplied by him has paid, when it can be done without placing greater burdens upon the intervening lienholders than they would have borne if the old mortgage had not been released."

B. When New Security Proves Invalid.—It has been seen in the preceding paragraphs that one who pays off, or advances money to pay off, a mortgage with an understanding that he shall have a new mortgage on the property of equal rank with the one which he discharges, is entitled to be substituted in the place of the mortgagee whose mortgage has been thus paid, in case the new mortgage proves invalid: *Merchants' etc. Bank v. Tillman*, 106 Ga. 55, 31 S. E. 794; *Johnson v. More*, 33 Kan. 90, 5 Pac. 406; *Warner etc. Co. v. Morgan* (Kan.), 75 Pac. 480. Thus, where a debt against a decedent is secured by a mortgage on his real estate, and the administrator borrows the money to pay it from a third person, with the agreement that he shall be reimbursed from the estate, and secured by a mortgage on the same property, and for that purpose a mortgage is executed by the administrator to him which is void because of a want of power in the administrator, the person advancing the money by which the original mortgage is paid is subrogated to its lien: *Crippen v. Chappell*, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453. So, where money is loaned with an agreement that it shall be used to pay off a mortgage on exempt personal property, and that a new mortgage on the property shall be given as security for the loan, the person advancing the loan will be substituted in the place of the original mortgagee when the new mortgage is found invalid because the signature of the wife of the mortgagor is not witnessed

as required by statute: *Lashua v. Myhre*, 117 Wis. 18, 93 N. W. 811.

C. When New Mortgage is Refused.—The law is also well settled that where one loans money to another upon an agreement that it is to be used to pay off an existing mortgage on property, and that a new mortgage is to be executed to the lender therefor, the lender is entitled to subrogation to the rights of the prior mortgagee in case the borrower fails or refuses to execute the new mortgage: *Warford v. Hawkins*, 150 Ind. 486, 50 N. E. 468; *Baker v. Baker*, 2 S. Dak. 261, 39 Am. St. Rep. 776, 49 N. W. 1064. Compare *Berry v. Bullock*, 81 Miss. 463, 33 South. 410. The lender is entitled to have the satisfaction of record set aside, and a decree foreclosing the old mortgage, as against the mortgagor and one who received a conveyance of the property with a knowledge of the facts: *Wilton v. Mayberry*, 75 Wis. 191, 17 Am. St. Rep. 193, 43 S. W. 901.

b. Junior Encumbrancer Paying Senior Lien.

1. Right to Subrogation in General.—A junior lienholder who pays or discharges a senior lien or encumbrance on the property, when such payment is necessary to the protection of his own lien or encumbrance, is entitled to be substituted in the place of the senior encumbrancer to the extent necessary for his own protection. He will be regarded as an equitable assignee of the prior lien, which will be kept on foot and alive for him in equity, notwithstanding its payment and discharge: *Bishop v. O'Connor*, 69 Ill. 431; *Tyrell v. Ward*, 102 Ill. 29; *Ebert v. Garding*, 116 Ill. 216, 5 N. E. 591; *Erwin v. Acker*, 126 Ind. 133, 25 N. E. 888; *Spaulding v. Harvey*, 129 Ind. 106, 28 Am. St. Rep. 176, 28 N. E. 323; *O'Brien v. Bradley*, 28 Ind. App. 487, 61 N. E. 942; *Shimer v. Hammond*, 51 Iowa, 401, 1 N. W. 656; *Frisbee v. Frisbee*, 86 Me. 444, 29 Atl. 1115; *Rappanier v. Bannon* (Md.), 8 Atl. 555; *Washburn v. Hammond*, 151 Mass. 132, 24 N. E. 33; *Reyburn v. Mitchell*, 106 Mo. 365, 27 Am. St. Rep. 350, 16 S. W. 592; *Lincoln v. Lincoln* (Neb.), 97 N. W. 255; *Haverford Loan etc. Assn. v. Fire Assn.*, 180 Pa. St. 522, 57 Am. St. Rep. 657, 37 Atl. 179; *Fears v. Albea*, 69 Tex. 437, 5 Am. St. Rep. 78, 6 S. W. 286; *Southern etc. Loan Assn. v. Skinner* (Tex. Civ. App.), 42 S. W. 320; *Bank of U. S. v. Peter*, 13 Pet. 123. He is not required to await foreclosure proceedings by the prior lienholder before exercising the right: *Bowen v. Gilbert* (Iowa), 98 N. W. 273. If the entire prior encumbrance is paid, the junior encumbrancer is entitled to subrogation to the extent of the amount he contributed, though the balance of the debt is paid by the debtor or a third person: *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374.

2. Limitations on the Right.—The entire debt must, as a general rule, be paid, in order to entitle the junior encumbrancer to substitution: *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S.

E. 374. But see *New Jersey Bldg. etc. Co. v. Cumberland Land etc. Co.*, 53 N. J. Eq. 644, 33 Atl. 964. If the junior lienholder, instead of paying or tendering payment, assumes the attitude of denying the validity and superiority of the prior lien, the right to make payment and of subrogation will be deemed waived: *Shattuck v. Belknap Sav. Bank*, 63 Kan. 443, 65 Pac. 643. And the payment must be made for the protection of the junior encumbrancer or for the preservation of this security: *Jenkins v. Continental Ins. Co.*, 12 How. Pr. 66. "The equitable rule under which the holder of a junior mortgage is entitled to tender to the holder of a senior mortgage the amount due thereon, and demand an assignment of the same, is not applicable unless the former shows that such assignment is necessary to his protection; nor can this rule be invoked by a mortgagee against a judgment creditor of his mortgagor having equities at least equal to those of the mortgagee, for the purpose of compelling the judgment creditor to assign to the mortgagee an older mortgage executed by their common debtor, and to which the judgment creditor had acquired title for the express purpose of protecting his junior judgment lien": *Tillman v. Stewart*, 104 Ga. 687, 69 Am. St. Rep. 192, 30 S. E. 949.

It is held that if a grantor at different times and to different persons executes two deeds of the same property, subject to a mortgage, one who, after the deeds are recorded, takes a mortgage from the second grantee and subsequently pays the first mortgage, is not subrogated to the rights of its holder, he being regarded as a volunteer: *Pollock v. Wright*, 15 S. Dak. 134, 87 N. W. 584. And if the maker of a note executes a chattel mortgage to a trustee, to indemnify an indorser thereon, a subsequent mortgagee will not be subrogated to the rights of the holder of the note as against the indorser, on a tender to the trustee of the amount due on the mortgage: *Schmitttdiel v. Moore*, 101 Mich. 590, 60 N. W. 279. A second mortgagee, voluntarily paying and consenting to the cancellation of interest coupons secured by the first mortgage, cannot be subrogated to the rights of the first mortgagee as to such coupons, in an action afterward brought to foreclose the first mortgage: *J. B. Watkins Land Mtg. Co. v. Williams*, 63 Kan. 30, 64 Pac. 976.

3. **Consent or Knowledge of Debtor.**—We do not regard it as essential to the right of a junior lienholder to subrogation that he should have the consent of the debtor to the payment. He may, without the debtor's consent, fortify his own security by paying the sum due on the prior encumbrance, and be subrogated to its lien: *Bowen v. Gilbert* (Iowa), 98 N. W. 273. However, it is decided in *Gray v. Zelmer*, 66 Kan. 514, 72 Pac. 228, that subrogation to the rights of a prior mortgagee cannot be claimed when his mortgage has been paid, without the knowledge or consent of the mortgagor, from the proceeds of a subsequent invalid mortgage executed by an agent without authority. And some support to this

decision is given by *Campbell v. Foster Home Assn.*, 163 Pa. St. 609, 43 Am. St. Rep. 818, 80 Atl. 222.

4. Mistake and Fraud.—A junior lienholder who, through inadvertence or mistake, causes a senior lien on the property to be canceled, may have it reinstated for his protection: *Bowen v. Gilbert* (Iowa), 98 N. W. 273; *Seirroe v. Homan*, 50 Neb. 601, 70 N. W. 244. When a subsequent mortgagee, who is ignorant of a prior deed and who, bona fide relying upon his mortgage, pays the senior mortgage for his own benefit, and allows it to be discharged and canceled, he will be subrogated to the rights of the senior mortgagee: *Cobb v. Dyer*, 69 Me. 494. And where a mortgagee forecloses his mortgage, and under a mistake as to the correctness of the proceedings pays prior encumbrances, he may be subrogated to the rights of the holder thereof: *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91.

Where a mortgagee, induced by the fraudulent representations of the mortgagor that his mortgage would thereby become the senior lien, pays money to remove prior liens on the property, he is entitled to be subrogated to the rights of the holders of such prior liens, as against a person whose lien is prior to the lien of the mortgage, but junior to the liens satisfied: *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231, 30 N. E. 21.

c. Supposed Owner Paying Encumbrance.—A person who in good faith believes that he owns property, and who therefore pays off a mortgage thereon, is entitled, when his title fails, to be subrogated to the mortgage and have it revived and enforced for his benefit: *Betts v. Sims*, 35 Neb. 840, 37 Am. St. Rep. 470, 53 N. W. 1005; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886. Compare *Wadsworth v. Blake*, 43 Minn. 509, 45 N. W. 1181; *Cornwell v. Orton*, 126 Mo. 355, 27 S. W. 536. Where a husband, supposing that under the will of his wife he is the sole owner of land, pays and causes to be discharged a prior encumbrance resting upon the entire estate, but it subsequently transpires that he owns only an undivided fifth of the property as tenant in common, he is entitled, having relieved the common estate of an encumbrance, to contribution from his cotenants, and may enforce his claim by subrogation to the mortgage discharged: *Haverford Loan etc. Assn. v. Fire Assn.*, 180 Pa. St. 522, 57 Am. St. Rep. 657, 37 Atl. 179, approved in *Wieder v. Wieder*, 75 Vt. 178, 53 Atl. 1072, where a husband paid an encumbrance on property which he supposed he owned when he was entitled to only a life estate. Where a testator had no children at the time of executing his will, but subsequently children were born, and the will was held void, and his widow, supposing she was the sole devisee, paid and discharged a mortgage on part of the estate, she was held entitled to have the mortgage lien reinstated to secure the money so paid, and have the land sold to satisfy the same: *Coudert v. Coudert*, 43 N. J. Eq. 407, 5 Atl.

722. One who acquires title by a decree of court, and who in good faith pays an encumbrance thereon, may be subrogated to the lien thereof, when the decree is subsequently reversed: *Gooch v. Botta*, 110 Mo. 419, 20 S. W. 192.

d. Purchaser of Encumbered Property.

1. **Effect of His Paying the Encumbrance.**—A familiar instance of the application of the doctrine of subrogation is where the purchaser of encumbered property, without having assumed the encumbrance, pays it off in order to protect his own rights or perfect his own title. It is uniformly held, in such cases, that he is entitled to be subrogated to the position of the encumbrancer or lienholder in respect to all the latter's securities, rights, remedies, and priorities: *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671; *Duke v. Pigman*, 23 Ky. Law Rep. 209, 62 S. W. 867; *Appeal of Sowers* (Pa.), 15 Atl. 898; *Hoke v. Jones*, 33 W. Va. 501, 10 S. E. 775; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886. The remedy of subrogation "is frequently applied in favor of a vendee of encumbered real estate who, although not personally liable, has paid the debt of another which is a charge upon the land, and which, if not paid, might cause him to lose his interest therein. Under such circumstances, the debt, although paid and satisfied in form, is regarded in equity as neither paid nor satisfied in fact, but by operation of law the former holder ceases to be the creditor, while the person paying takes his place as owner of the debt and security unimpaired. Where, within the limitations suggested, benefit may result to the person paying without injury to the person who should pay, equity casts the burden upon the latter, who ought in fairness to bear it, provided it will not work injustice or disturb the rights of other creditors of the common debtor": *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1.

When the purchasers under a trust deed, in order to protect their title, pay notes secured by liens on the land superior to theirs, they are subrogated to the rights of the payee: *Schneider v. Sellers* (Tex. Civ. App.), 61 S. W. 541. And if the purchaser of property subject to a mortgage pays it and causes it to be discharged of record, being ignorant of a judgment lien on the land subsequent to the mortgage, he may have the mortgage reinstated as a lien prior to the judgment lien: *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625.

Subrogation may be allowed to one holding under an invalid contract for a conveyance of property which he frees from an encumbrance: *Nixon v. Jullian*, 72 Miss. 570, 18 South. 366. And a purchaser by parol of a portion of a tract of land who, to prevent a sale, pays off a mortgage on the whole, is subrogated to the mortgage and a judgment recovered thereon: *Champlin v. Williams*, 9 Pa. St. 341. Again, when a vendee, pursuant to his contract, pays a lien on the land, and the contract is abandoned by the parties,

and the vendor becomes unable to execute it, the purchaser is entitled to be substituted to such lien, and equity keeps it alive for his indemnity: *James v. Burbridge*, 53 W. Va. 272, 10 S. E. 396, approved in *Faulk v. Calloway*, 123 Ala. 325, 26 South. 504.

One who purchases land from the heirs at law, and, in order to remove an encumbrance from the property, pays a debt incurred by the deceased in his lifetime, to secure which a deed to the land was given, is subrogated to all the rights of the creditor whose debt he has extinguished: *Simpson v. Ennis*, 114 Ga. 202, 39 S. E. 853. So, a purchaser of the estate of a decedent who pays off a general debt of the decedent at the request of an heir, to prevent the estate being sold to pay the debt, is subrogated to the lien which the creditor had on the estate by virtue of his claim against the heir; and such lien is prior to a mortgage given by an heir prior to such payment: *Chaplin v. Sullivan*, 128 Ind. 50, 27 N. E. 425.

A vendee of a chattel mortgagor, when called upon to pay off the mortgage indebtedness, is entitled to be subrogated to the rights of the mortgagee in any security he may have for the payment of the mortgage: *Illinois Trust etc. Bank v. Alexander Stewart Lumber Co.* (Wis.), 94 N. W. 777.

2. Of His Assuming the Encumbrance.—When, however, the purchaser of real estate assumes and agrees to pay as a part of the consideration an encumbrance on the land, he becomes primarily liable for the encumbrance, and ordinarily cannot, after payment, keep it alive by subrogation as against other liens on the land: *Poole v. Kelsey*, 95 Ill. App. 233; *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; *Stuckman v. Roose*, 147 Ind. 402, 46 N. E. 690; *Witt v. Rice*, 90 Iowa, 451, 57 N. E. 951; *Hubbard v. Le Barron*, 110 Iowa, 443, 81 N. W. 681; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; *Jacobsmeier v. Jacobsmeier*, 88 Mo. App. 102; *Gulling v. Washoe County Bank*, 24 Nev. 477, 56 Pac. 580; *Isensee v. Austin*, 15 Wash. 352, 46 Pac. 394; *Martin v. Aultman*, 80 Wis. 150, 49 N. W. 749.

A purchaser of land encumbered by a mortgage, who assumes and pays the mortgage as a part of the purchase price, will not be subrogated to the mortgage so that he can set it up as a prior lien against the holder of a junior judgment; but the mortgage is extinguished, and the judgment advanced to the place of first lien, notwithstanding he has no actual notice of the judgment: *Goodyear v. Goodyear*, 72 Iowa, 329, 33 N. W. 142; *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795. Nor will a vendee assuming a mortgage as part of the consideration be subrogated, on paying the mortgage, to the mortgage so as to have it declared a lien prior to a ditch assessment on the land (*Shirk v. Whitten*, 131 Ind. 455, 31 N. E. 87), or so as to enforce it against a purchaser at foreclosure under a second mortgage: *Kellogg v. Colby*, 83 Iowa, 513, 49 N. W. 1001.

Cases arise, however, where a vendee who assumes the payment of an encumbrance on the property may invoke the doctrine of subrogation. If a purchaser pays a debt of his grantor secured by a deed of trust on the property, as a part of the purchase price, and to protect his title from sale, he is subrogated to the lien of the trust deed, although formally released, so as to cast off an intervening judgment lien against the grantor: *Young v. Morgan*, 89 Ill. 199; *Smith v. Dinsmoor*, 119 Ill. 656, 4 N. E. 648. And where a husband, without his wife joining in a deed, transfers land subject to encumbrances, and the grantee assumes them, and pays them off without knowing of her inchoate one-third interest, he may, as against her claim, be subrogated to the rights of the encumbrancer: *Fowler v. Maus*, 141 Ind. 47, 40 N. E. 56. So, when the purchaser of a homestead assumes, as part of the consideration, a mortgage given by the vendor thereon, and after the purchaser has paid the mortgage, the vendor seeks to avoid the sale, the purchaser is substituted in the place of the mortgagee: *Faulk v. Calloway*, 123 Ala. 325, 26 South. 504. So, also, where a vendee of mortgaged premises agrees to pay the mortgage as a part consideration, on the representation of the grantor that there are no judgments or liens standing against him or the property, and pays the mortgage, relying on such representations, he is subrogated to the rights of the mortgagee as against one who recovered a judgment against the grantor subsequently to the execution of the mortgage: *Johnson v. Tootle*, 14 Utah, 482, 47 Pac. 1033.

On the other hand, where a mortgagor conveys the property, subject to the payment thereof by his grantee, he is entitled, upon paying the debt himself, to be subrogated to the mortgagee's rights. The grantor, in such a case, becomes the surety of the grantee: *Wood v. Smith*, 51 Iowa, 156, 50 N. W. 581; *Baker v. Terrell*, 8 Minn. 195; *Rogers v. Hedemark*, 70 Minn. 411, 73 N. W. 252; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960. The same rule applies when a conveyance is made, subject to the payment of a judgment lien by the grantee: *Barr v. Patrick*, 52 Iowa, 704, 3 N. W. 743.

3. Of Applying Purchase Money to the Encumbrance.—When land encumbered by a mortgage has been sold by the mortgagor for its full value, and the purchase money applied to the satisfaction of the encumbrance, equity will keep the mortgage security alive and enforce it for the protection of the vendee, as against subsequent encumbrancers; and when the purchase money so applied is only a partial payment on the mortgage debt, the vendee will be entitled to enforce the lien to the extent necessary for his reimbursement, when the mortgagee's security for the unpaid balance will not thereby be interfered with: *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900. See, too, *Hobgood v. Schultzer*, 44 La. Ann. 537, 10 South. 812; *Stevens v. King*, 84 Me. 291, 24 Atl. 850.

c. Person Paying Purchase Money.

1. **Subrogation to Vendor's Lien.**—A third party cannot, by voluntarily paying the amount of the purchase price of property secured by a vendor's lien, acquire such lien by subrogation: *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219, 45 N. E. 1007; *Demeter v. Wilcox*, 115 Mo. 634, 37 Am. St. Rep. 422, 22 S. W. 613. The mere fact that borrowed money is used to discharge a vendor's lien does entitle the lender to be subrogated to the lien: *Norris v. Wood*, 89 Va. 873, 17 S. E. 552. But where the lender, before paying the money over, has a part of it applied to the discharge of the lien, he may be subrogated to the vendor's rights: *Texas Land etc. Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12. And where one advances money to a purchaser for the sole purpose, as they both understand, of enabling the latter to purchase the land, he is entitled to be subrogated to the vendor's rights: *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47. "It must be understood," said the court in this case, "that the extension of this equity to a third person is strictly confined to those who furnish or advance the purchase money to the purchaser in such a manner that they can be said either to have paid it to the vendor, personally, or caused it to be paid, on behalf and for the benefit of the purchaser, and to this extent they become parties to the transaction. It must not be a general loan, to be used by the purchaser to pay the consideration of the purchase, or to be used for any other purpose at his pleasure. In such case, the simple fact that the money can be traced into the land as having been paid by the purchaser to the vendor as the whole or part of the purchase money, gives the person who loaned it no such right." See, also, *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Ford v. Ford*, 22 Tex. Civ. App. 453, 54 S. W. 773. In *Oury v. Saunders*, 77 Tex. 278, 13 S. W. 1030, where a vendee paid the purchase money notes from the proceeds of property of his minor children, they were held entitled to subrogation to the vendor's lien.

If one pays a note secured by a vendor's lien, under an agreement with the makers that he shall hold the note and lien as security, he is subrogated to the vendor's rights as against subsequent mortgagees with notice: *Warford v. Hawkins*, 150 Ind. 489, 50 N. E. 468. And one who pays off a vendor's lien at the request of the debtor, upon an agreement that he shall have the lien for his reimbursement, is subrogated to the rights of the vendor in respect to the lien, though the agreement rests in parol: *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31, 20 South. 512.

The sureties for the purchase price of land may be subrogated to the vendor's lien when they are compelled to pay the debt: *Riggs v. Chapman*, 20 Ky. Law Rep. 473, 46 S. W. 692. And if a surety who has the right of subrogation to a vendor's lien conveys his land to another upon condition that such grantee shall pay his debts, the grantee stands in the same position as his grantor with reference

to the debt secured, and has the same right of subrogation to the vendor's lien that his grantor had: *Darrow v. Summerhill*, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680.

A devisee of real property is substituted to all the rights of the deviser in connection therewith, including the right of subrogation to a vendor's lien, upon the payment of a debt to which the devised property was subject: *Darrow v. Summerhill*, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680.

X. Purchasers at Judicial Sales.

a. **Right to Subrogation in General.**—While perhaps there are a few scattering authorities to the contrary, the rule may be said to be now well established that a purchaser in good faith at a void judicial sale is entitled to be subrogated to the rights of the creditors whose claims have been discharged by the proceeds of such sale: *Meher v. Cole*, 50 Ark. 361, 7 Am. St. Rep. 101, 7 S. W. 451; *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119, 20 S. W. 525; *Harris v. Watson*, 56 Ark. 574, 20 S. W. 529; *Bunting v. Gilmore*, 124 Ind. 113, 24 N. E. 583; *Fowler v. Maus*, 141 Ind. 47, 40 N. E. 56; *Sands v. Lyham*, 27 Gratt. 291, 21 Am. Rep. 348; *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49; notes to *Perry v. Adams*, 2 Am. St. Rep. 328-330; *Scott v. Dunn*, 30 Am. Dec. 177-182. If the holder of a sheriff's deed redeems land from a prior lien, claiming the right to do so as owner, and such deed is afterward adjudged invalid on account of some defect in the proceedings taken by the sheriff, the person so redeeming is entitled to be subrogated to the lien which he has thus discharged: *Mieburn v. Phillips*, 143 Ind. 93, 52 Am. St. Rep. 403, 42 N. E. 461. If creditors who libel a boat have no notice of a pre-existing lien, a purchaser under their judgment becomes subrogated to their rights and acquires title free from such lien: *Case v. Woolley*, 6 Dana, 17, 32 Am. Dec. 54.

b. **Purchaser at Execution Sale.**—A purchaser at an execution sale whose money goes to pay the claims of creditors, is subrogated to their rights in the event of the sale proving void or ineffectual to pass title: See the notes to *Perry v. Adams*, 2 Am. St. Rep. 328-330; *Scott v. Dunn*, 30 Am. Dec. 177. Though the time in which redemption can be made has not expired, a purchaser at an execution sale is entitled to be subrogated to a trust deed existing at the time of the sale, upon paying to the holder thereof the amount due from the defendant in execution: *Swain v. Stockton Sav. etc. Soc.*, 78 Cal. 600, 12 Am. St. Rep. 118, 21 Pac. 365.

But when a homestead is sold under judgments not liens upon it, the purchaser is not entitled, upon the vacation of the sale, to have an assignment of the judgments, but he may have the money refunded, with interest, by the creditors who received it: *Jones v. Blumenstein*, 77 Iowa, 361, 42 N. W. 321. Where mortgaged land

is levied upon by a judgment creditor and bid in for a nominal sum by the plaintiff in execution, the latter, having purchased the equity of redemption only, cannot be subrogated to the rights of the mortgagee, if the amount of the mortgage should be collected from other property of the mortgagor: *Myers v. Jones*, 61 Kan. 191, 59 Pac. 275. In *Jewett v. Feldheiser*, 68 Ohio St. 523, 67 N. E. 1072, the purchaser at a sheriff's sale was held not subrogated to the supposed rights of the mortgagee, not being in privity with him. A purchaser at a sale under an execution issued upon a money judgment, in paying the purchase money, pays his own debt, and not that of the obligor against whom the judgment was rendered, and is, therefore, not entitled to subrogation. The rule as to payments at void judicial sales has no application: *Gray v. Denson*, 129 Ala. 406, 30 South. 595.

c. **At Foreclosure Sale.**—The purchaser at an invalid foreclosure sale, whose money goes to satisfy the mortgage, is entitled to be subrogated to the rights of the mortgagee: *Dutcher v. Hobby*, 86 Ga. 198, 22 Am. St. Rep. 444, 12 S. E. 356; *Bodkin v. Merit*, 102 Ind. 923, 1 N. E. 625; *Equitable Mtg. Co. v. Gray* (Kan.), 74 Pac. 614; *Brewer v. Nash*, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857; *Bailey v. Bailey*, 41 S. C. 337, 44 Am. St. Rep. 713, 19 S. E. 669, 728. He is regarded as the equitable assignee of the mortgage: *Jellison v. Halloran*, 44 Minn. 199, 46 N. W. 332. And this right of subrogation applied in behalf of the purchaser, exists also in favor of his grantee or assignee: *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813, citing *Jordan v. Sayre*, 29 Fla. 100, 10 South. 823; *Richards v. Morton*, 18 Mich. 255; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 35 N. W. 765; *Bonner v. Lessley*, 61 Miss. 392. The purchaser of a grantee in a deed executed under a defective power of sale in a mortgage is subrogated to the rights of the mortgagee: *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677. And a beneficiary in a second deed of trust, who buys the interest of the creditor in the first trust deed, and the purchaser's interest by an invalid sale thereunder, is substituted in the place of the creditor: *Long v. Long*, 141 Mo. 352, 44 S. W. 341. However, a purchaser is subrogated to the rights of the mortgagee only to the extent of his claim against the land for the amount of purchase money paid by him, and a subsequent purchaser under a partition sale of the land as the property of the purchaser at the mortgage sale is subrogated only to the rights of the latter, although he paid a larger sum: *Givens v. Carroll*, 40 S. C. 413, 42 Am. St. Rep. 889, 18 S. E. 1030. A purchaser at foreclosure who is denied a deed upon the sale, is not precluded from asserting his right to subrogation because of delay in paying the purchase price: *Bodkin v. Merit*, 102 Ind. 293, 1 N. E. 625.

Where property is sold under a decree of foreclosure, but on appeal the decree is vacated and the property decreed to be sold again,
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the original purchaser, the purchase money having been paid and applied to the debt, is subrogated to the rights of the mortgagee and entitled to an assignment of the mortgage: *Johnson v. Robertson*, 84 Md. 165. And a sale of mortgaged premises which is ineffectual because of defects in the execution of the power, will operate as an equitable assignment of the mortgage to the purchaser, if he paid the purchase money in good faith and it was applied to the satisfaction of the mortgage debt: *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676, 23 N. W. 787. But a purchaser at a trustee's sale is not substituted to the rights of a prior mortgagee, thereby cutting off the vendor's lien of his grantor under a contract for the sale of the premises, when the jury finds that such contract constitutes the consideration of such sale: *Scott v. Farmers' etc. Nat. Bank* (Tex. Civ. App.), 66 S. W. 485.

d. **At Probate Sale.**—A purchaser at an invalid sale of a decedent's property for the payment of debts is entitled to be subrogated to the extent that the money paid by him has been applied to the payment of such debts, to the rights of the creditors whose claims he has thus paid by his purchase; and he may retain possession of the property as security for the repayment of the sums to which he is entitled: *Duncan v. Gainey*, 108 Ind. 579, 9 N. E. 470; *Pool v. Ellis*, 64 Miss. 555, 1 South. 725; *Valle v. Fleming*, 29 Mo. 152, 77 Am. Dec. 657; *Scott v. Dunn*, 21 N. C. (1 Dev. & B. Eq.) 425, 30 Am. Dec. 174; *Perry v. Adams*, 98 N. C. 167, 2 Am. St. Rep. 326, 3 S. E. 729; *Hunter v. Hunter*, 58 S. C. 382, 79 Am. St. Rep. 845; *Hunter v. Hunter*, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33; *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124; *Blodgett v. Hitt*, 29 Wis. 169.

But a purchaser at a void executor's sale, with knowledge that the land is subject to a trust, and if the want of power of the executor to sell is not entitled to subrogation against the heirs, especially when he has made his payments to the executor and trustees, who have used the money indiscriminately with other moneys received from sales of personal property, and other land for various purposes: *Huse v. Den*, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790. And a purchase at an administrator's sale, whose title fails for want of a proper description, has been denied the right of subrogation to the rights of creditors whose debts have been paid with the purchase money: *Borders v. Hodges*, 154 Ill. 498, 39 N. E. 597. In *Salmond v. Price*, 13 Ohio, 368, 42 Am. Dec. 204, it is held that purchasers with a warranty from a purchaser at a void administrator's sale cannot, upon the death and insolvency of the latter, be substituted for him in his claim for advances to the estate of the decedent.

e. **At Tax Sale.**—A purchaser at a void tax sale is, as to the amounts paid by him upon his purchase and for subsequent taxes, subrogated to the lien of the state or municipality: *Gregory v.*

Bartlett, 55 Ark. 30, 17 S. W. 344; Merriam v. Hemple, 17 Neb. 345, 22 N. W. 775; Green v. Hellman, 61 Neb. 875, 86 N. W. 912. This doctrine is applied to the case of a drainage assessment in Reed v. Kalfsbeck, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466, and to a street grading assessment in John v. Connell, 61 Neb. 267, 85 N. W. 82. In Leavitt v. Bartholomew (Neb.), 93 N. W. 856, the general statement is made that "a tax purchaser not assailed for bad faith is entitled to subrogation to all the municipality's rights in any tax paid by him in making the purchase, or subsequently in protecting it."

XI. Co-obligors and Persons Equally Bound.

a. **In General.**—Authorities may not be wanting which refuse to extend the doctrine of subrogation to co-obligors and persons equally bound. We are unable to see, however, why a person bound as coprincipal should be denied the remedy of subrogation when to grant it would conduce to substantial justice. "If he is legally bound in the first instance to pay the whole debt, so is the surety. The only difference between them is that a payment by one entitles him to restitution of the whole, and a payment by the other entitles him to a reimbursement of only a part of what he paid": *Morris v. Evans*, 2 B. Mon. 84, 36 Am. Dec. 591. See, also, *Winston v. Ellis*, 65 Ala. 377; *O'Bryan Bros. v. Neel*, 84 Ga. 134, 10 S. E. 598; *Shropshire v. His Creditors*, 15 La. Ann. 705; *Sherwood v. Collier*, 14 N. C. 380, 24 Am. Dec. 264; *Brick v. Bual*, 73 Tex. 511, 11 S. W. 1044. Where one joint maker of a note secured by a mortgage pays it, the payment constitutes an equitable assignment of the mortgage to him, and he is subrogated to the rights of the creditor, as against his co-maker, for the latter's portion of the debt: *Truss v. Miller*, 116 Ala. 494, 23 South. 863. See, too, *Randolph v. Stark*, 51 La. Ann. 1121, 26 South. 59; *Look v. Horn*, 97 Me. 283, 54 Atl. 725; *Corner v. Mackey*, 147 N. Y. 574, 42 N. E. 29; *Pratt v. Law*, 13 U. S. (9 Cranch) 456.

b. **Joint Judgment Debtors.**—The authorities are divided on the question whether one of those against whom a joint judgment has been recovered may pay it and keep it on foot by any means or for any purpose: See *Campbell v. Pope*, 96 Mo. 468, 476, 10 S. W. 187; *Potvin v. Meyers*, 27 Neb. 749, 44 N. W. 25. "The rule as we understand it," says Justice Head in *Morris v. Davis* (Tex. Civ. App.), 31 S. W. 850, "is that a law the payment of a judgment by one of two joint obligors therein discharges the lien, but in equity the payment by one will subrogate him to the security held by the creditor for the amount due from the other by way of contribution: *German-American Sav. Bank v. Fritz*, 68 Wis. 390, 32 N. W. 123. The cases cited by our own supreme court in *Faires v. Cockrill*, 88 Tex. 428, 31 S. W. 190, 639, we think will sustain the view of equitable subrogation here announced. If, however, the payment be made before the lien is fixed by the record of the abstract, the doctrine of subrogation

could have no application. In such case the judgment would be discharged, and the one making payment would only have a personal action against his co-obligor for contribution." For other cases which consider the doctrine of subrogation applicable to joint judgment debtors, see *Harter v. Songer*, 13 Ind. 161, 37 N. E. 595; *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320; *Huggins v. White*, 7 Tex. Civ. App. 563, 27 S. W. 1066.

c. **Co-owners and Tenants in Common.**—When one tenant in common pays off the whole, or more than his proportion, of a charge or encumbrance upon the common property, equity will consider the lien as still existing, and subrogate him to the rights of the creditor, in order to enforce contribution from the cotenants, when justice demands it: *Oliver v. Lansing*, 57 Neb. 352, 77 N. W. 802; *Kinkead v. Ryan* (N. J. Eq.), 55 Atl. 730; *Haverford Loan etc. Assn. v. Fire Assn.*, 180 Pa. St. 522, 57 Am. St. Rep. 657, 37 Atl. 179; monographic note to *Flack v. Gosnell*, 35 Am. St. Rep. 419-421. Compare *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790. But such right, it is held, does not pass to a mortgagee under a mortgage purporting to convey the undivided interest of the tenant in the property: *Oliver v. Lansing*, 57 Neb. 352, 77 N. W. 802. When one of several owners redeems mortgaged premises, he becomes substituted in the place of the mortgagee, and is entitled to hold the land as if the mortgage existed, until the other owners pay him their shares of the encumbrance: *Hubbard v. Ascutney Mill Dam Co.*, 20 Vt. 402, 50 Am. Dec. 41. See, too, *Kinkead v. Ryan*, 64 N. J. Eq. 454, 53 Atl. 1053. And a tenant paying a mortgage on the estate in ignorance that his joint tenant has transferred his interest, is held substituted in the place of the mortgagee: *Shaffer v. McCloskey*, 101 Cal. 576, 36 Pac. 196. Where two persons purchase land jointly, giving their joint note for the unpaid purchase money, secured by a lien reserved in the deed, and one of them, to protect his own share, is compelled to pay the whole amount of the note, he will be subrogated to the vendor's security, and may enforce his right to reimbursement against his copurchaser or the latter's vendee, who, after partition, buys with notice of the encumbrance: *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88, 6 S. W. 897. See, also, *Miller's Appeal*, 119 Pa. St. 620, 13 Atl. 504; *Stokes v. Hodges*, 11 Rich. Eq. 135; *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654; *Dobyns v. Rawley*, 76 Va. 537.

d. **Copartners.**—A partner paying partnership debts may be subrogated to the rights of the creditors thus paid: *Rowlett v. Grieves*, 8 Mart. 483, 13 Am. Dec. 296; *Schuyler v. Booth*, 74 N. Y. Supp. 733, 37 Misc. Rep. 35; *Gilfillan v. Dewoody*, 157 Pa. St. 601, 27 Atl. 782. Compare *Hinton v. Odenheimer*, 57 N. C. 406; *Fessler v. Hickernell*, 82 Pa. St. 150. Thus a partner who has paid judgments for firm debts recovered against the members of the firm after its dissolution and the exhaustion of its social assets, is entitled to be subrogated to the rights of the judgment creditors against the

real estate of his copartner, in the hands of a subsequent purchaser, to the extent his payments exceed his proportion of the liability: *Sands v. Durham*, 99 Va. 263, 86 Am. St. Rep. 884, 38 S. E. 145. See, also, *Harter v. Songer*, 138 Ind. 161, 37 N. E. 595; *Hall v. Gaiennie*, 18 La. Ann. 442; *Scott's Appeal*, 88 Pa. St. 173.

c. Cosureties.—If a surety has been compelled to meet the entire obligation, he has a right to compel his cosurety to pay his equitably equal part; and to this end he is entitled to be subrogated to all the rights and remedies of the creditor. But this, however, cannot be carried to the extent of injuring one who stands on higher ground or for any reason has a better right: *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 948. See, too, *Peebles v. Gray*, 115 N. C. 38, 44 Am. St. Rep. 529, 20 S. E. 173. Thus a surety who pays a judgment against the principal and all the sureties, may, in order to enforce a repayment from the principal or contribution from the cosureties, be subrogated to all the rights of the judgment creditor: *German-American Sav. Bank v. Fritz*, 68 Wis. 390, 32 N. W. 123. When a principal gives a trust deed to two sureties on a note by him, a third surety paying the debt is subrogated to his cosureties' rights: *Blanton v. Bostick*, 126 N. C. 418, 35 S. E. 1035.

It is said that subrogation will not be enforced if there are several or successive obligations of suretyship which are in substance and nature for the same thing, and have no relation to or operation upon each other: *Liles v. Rogers*, 113 N. C. 197, 37 Am. St. Rep. 627, 18 S. E. 104; *Langford v. Perrin*, 5 Leigh, 552. However, it is held that a surety on an original obligation who pays the debt is entitled to subrogation to the rights of the creditor, not only as against the principal, but as against the subsequent surety of the principal; but that one who becomes a surety during legal proceedings against the principal, cannot enforce contribution against the original surety for the debt: *McCormick v. Irwin*, 35 Pa. St. 111; *Moore v. Lassiter*, 84 Tenn. (16 Lea) 630.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

RENLUND v. COMMODORE MINING COMPANY.

[89 Minn. 41, 93 N. W. 1057.]

MASTER AND SERVANT—Vice-principal or Fellow-servant. When a Question for the Jury.—Whether a skip-boss was, at the time of an accident due to his negligence, acting as a vice-principal or a fellow-servant is a question for the jury, if there is evidence tending to show that it was his custom to assume general charge of the men and direct their movements in a general way while in the shift, including the method and manner of going out of the mine. (p. 537.)

DEATH, Nonresident Alien may Recover Compensation for.—Under a statute authorizing the next of kin to recover compensation for the death of a human being due to the negligence of another, an action may be maintained for the benefit of a nonresident alien. (p. 540.)

Action by the administrator of the estate of John Erickson, deceased, to recover five thousand dollars for his death. Verdict and judgment for the plaintiff for one thousand dollars. The defendant appealed.

John G. Williams, for the appellant.

Adams & Miller, for the respondent.

⁴¹ **LEWIS, J.** This action was commenced under General Statutes of 1894, section 5913, for the benefit of the next of kin of the deceased, who lost his life while working in the defendant's mine. The accident occurred as follows: There was a shaft three hundred seventy-two feet deep, at an angle of about twenty-seven degrees, in which were operated two skip-tracks, separated by timbers about four feet apart. On these tracks two skip-cars

were arranged to balance each other, so that, when one was going up, the other would be going down. The skips were run by an engine, at the upper end of the shaft. On the right side of the shaft was a stairway running parallel with it, and extending from the surface to within a few feet of the bottom. The second and third levels were being operated, ⁴² the latter being at the bottom of the shaft. In going out of the mine the men on the third level were compelled to go up the skip-track a certain distance until they reached the stairway. On the evening of the accident the men gathered at the foot of the shaft, waiting for a signal to go up. The charge of negligence is based upon the claim that the skip-boss, who was in charge of the men on the third level, while acting in the capacity of vice-principal, assumed control of the skip, and directed the men to go upon the skip-track, in order to reach the stairway, and that, while the deceased was going up, the right-hand skip-car was rung down, and caught and killed him before he reached the ladder.

The assignments of error present two questions—whether there was evidence reasonably tending to establish negligence of defendant, and whether any recovery can be maintained in this action, for the reason that the beneficiary under the statute, the mother of the deceased, is a nonresident alien.

1. The question of negligence turns upon whether the skip-boss, Jacobson, at the time he directed the men to pass up the right-hand skip-track, and gave the signal for the movement of the skip-car, was a fellow-servant of the deceased, or whether he was acting in the capacity of a vice-principal.

The evidence is quite conclusive that the men were directed by Jacobson in the manner stated, and, according to his own statement, he gave the signal for the skip-car upon the right-hand side to go up, but for some reason it came down.

In respect to what capacity Jacobson was acting, the court instructed the jury that it was the duty of defendant to exercise reasonable care to provide a reasonably safe and suitable place in which its servants might perform the duties assigned them, including suitable means of egress from the mine, and to keep and maintain such place in a reasonably safe and suitable condition, and to see that the work was carried on in a manner reasonably safe to its employés; that the employer could not delegate to another the performance of such duties, and thereby escape liability; and that the person to whom such duties were delegated was the vice-principal of the master, and for his

negligence in their performance the master was liable. The court also instructed ⁴³ the jury that a foreman, mining captain, or superintendent might, in respect to some specific work, be a fellow-servant, and in other respects be a vice-principal; that if the method of carrying on the work required that the master exercise reasonable care in directing the movements of the men as they were leaving the mine, and if the master delegated such duty to the shift boss, and he was negligent in the performance thereof, then such negligence was the act of the master. The trial court here laid down very concisely and accurately the principles of law governing the case, and no exceptions were taken thereto.

But it is claimed that it conclusively appears from the evidence that the skip-boss, Jacobson, was acting in the capacity of a fellow-servant. In our judgment, the court was correct in submitting this question to the jury. It will be admitted that if the skip-boss had no authority as a general foreman or superintendent, and it was not a part of his duty to assume charge of and direct the movements of the men as they passed out of the mine, then, if he assumed to perform an act which was beyond the scope of his duty, and attempted to direct the men and control the skip, such act of negligence would not be attributable to the master. It will also be conceded that if it was the duty of the skip tender, Johnson, to control the movements of the car at the time the men made egress from the mine, and, being otherwise engaged at this particular moment, he permitted Jacobson, who had no authority to thus interfere, to perform that duty for him, and the accident occurred by reason of his negligence, in that case the master cannot be held liable. But if, in addition to his duties as skip-boss, there was conferred by the master upon Jacobson the additional duty of general supervision and control of the men in that shaft during the absence of the captain or superintendent, and it was a part of such duty to see that the men made a safe exit from the mine, and he was in the exercise thereof at the time in question, then his acts were not those of a fellow-servant, but were in pursuance of the duty imposed upon him as a vice-principal. There was some conflict in the testimony as to the nature of Jacobson's duties, but there was evidence tending to show that it was his custom to assume general charge of the men, and direct their ⁴⁴ movements in a general way while in the shaft, including the method and manner of going out of the mine. It does not conclusively appear that this duty was imposed upon the skip ten-

der, Johnson, and, under the evidence, it was a question for the jury to determine in what capacity Jacobson was acting, and whether he was negligent: *Hess v. Adamant Mfg. Co.*, 66 Minn. 79, 68 N. W. 774; *Perras v. A. Booth & Co.*, 82 Minn. 191, 84 N. W. 739, 85 N. W. 179.

2. A more important question is the effect to be given to section 5913 of the General Statutes. It is insisted that the statute has application only within the state of Minnesota. The argument is based upon the general principal of construction that statutory law has no extraterritorial force, for the reason that a legislative body is presumed to legislate only for the persons within the territorial limits of its own government. The act in question is copied after what is known as Lord Campbell's act, first adopted in England in 1846; and its scope and purpose were defined in *Schwarz v. Judd*, 28 Minn. 371, 10 N. W. 208, where it was stated that the theory of the statute is that the widow and next of kin have a pecuniary interest in the life of the deceased, and that its object was to compensate them for the loss caused by his death. We may, therefore, eliminate from this discussion the idea that the statute was intended to be in the nature of a penalty upon the party charged with negligence, and that the measure of damages should be in accordance with the degree of culpability.

The English court, in the case of *Adam v. British etc. Steamship Co.* (1898), L. R. 2 Q. B. Div. 430, held that the act did not apply for the benefit of aliens abroad, and stated the proposition thus: "Statutes must be understood, in general, to apply to those only who owe obedience to the laws, and whose interests it is the duty of the legislature to protect. Natural born subjects, and persons domiciled or resident within the kingdom, owe obedience to the laws of the kingdom, and are within the benefits conferred by the legislature; but no duty can be imposed upon aliens resident abroad, and with them the legislature of this country has no concern, either to protect their interests or to control their rights." It was further stated in the opinion that there was nothing in the act which ⁴⁵ either expressly or by implication warranted the conclusion that the legislature intended to give the act extraterritorial force.

Lord Campbell's act has been re-enacted, with certain changes, in many of the states of this country, but the main and essential feature—that of compensation—has generally been distinctly reserved. The first case to which our attention has been called where the statute was under consideration in this country

is *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558. In that case it was held that a nonresident alien mother could not maintain the action against a citizen of the state, and the opinion is based upon the decision of the English courts; and the argument was made in the opinion that the statute should not be held to have extraterritorial force, for the reason that it did not appear that the foreign country in which the mother resided had enacted similar statutes for the benefit of aliens resident in that state. The decision was apparently based upon the same doctrine applied in the case of *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200, where it was held that, while a foreign statute has no extraterritorial force, rights under it, not contrary to the policy of the state, would by comity be enforced by remedies according to the procedure of the state; and the court seemed to be impressed with the idea that unless the same privilege had been extended to the state of Pennsylvania by the foreign government, under the doctrine of comity, that state was under no obligation to extend favors to the citizens of such foreign government.

The next case having this subject under consideration is that of *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386. In that state the statute differed somewhat from Lord Campbell's act and from our own statute, in that it specifically provided that the damages should be assessed in proportion to the degree of culpability of the party charged with the negligence. It was held that the next of kin, although a nonresident alien, might maintain the action. It is insisted by appellant that the decision rests upon the peculiar provisions of the Massachusetts statute; and while it is true that the court discussed the different classes of actions, and held that the act is primarily one of penalty, yet we are not ready to admit that the decision was based upon such narrow ground. We ⁴⁸ think the court intended to adopt the broad principle that the act had extraterritorial application, from the fact that the English authorities and the Pennsylvania case above referred to were discussed, and not approved of, and particular attention called to the difference between duties and rights in the effect to be given legislative enactment.

The next case in order of time dealing with this question is that of *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 193, 63 N. E. 94, where it was also held that a nonresident alien might maintain an action under the mining stat-

utes of that state. The decision is based apparently, upon the case of *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386.

The latest case on the subject is that of *McMillan v. Spider Lake etc. Co.*, 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979, where it was held that a nonresident alien could not maintain the action. The opinion reviews many of the authorities, and follows the Pennsylvania court, and attempts to distinguish the Massachusetts statute and the decision of that court.

In all of these cases it was conceded that the legislature had the power to confer such right upon aliens, and the only question was whether it was so expressed. The question, therefore, comes to us as one of first impression and without any well-defined rules to guide us, so far as we are able to determine from the decisions of this country. In the first place, it must be admitted that there can be no valid distinction in the relation which exists between the several states of the United States and between a state and a foreign nation. There are no constitutional restrictions which limit the application of this statute in favor of the residents of other states and against nonresident aliens. But the argument is made that on account of the close relation of the states, and their connection with the general government, such discrimination was intended, and should be made.

Such a distinction does not seem to us to be founded upon any sound principle. There is no more reason for extending the application of the statute to a resident of another state than there is in extending it to the benefit of a foreign subject. In the following cases similar statutes were construed, and the rule adopted that words importing general application will not be restricted ⁴⁷ to the citizens or residents of the state: *Philpott v. Missouri Pac. R. R. Co.*, 85 Mo. 164; *Chesapeake etc. R. R. Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47; *Augusta Ry. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406. In these cases the party for whose benefit the action was brought was a resident of a sister state. But there is nothing in the reasoning of the court, or upon principle, which would justify a denial of the remedy to an alien nonresident. In *Luke v. Calhoun Co.*, 52 Ala. 115, under a statute which provided a penalty for murder, in favor of the widow or next of kin, the court held that the language of the statute was comprehensive, and was intended to extend to an alien nonresident; and in

that case the widow who brought the action was a resident of Great Britain.

Turning now to the language of our own statute, there is not a word or expression indicating an intention to limit its application to persons residing within the state, or to residents of sister states. The object of the statute was to remedy the harshness of the common law, and in some degree compensate those dependent upon the person killed. It would indicate an unnatural and selfish motive to draw a distinction between the dependent relatives who reside in another state or foreign government, and those residing in our own state; and, unless such intention is manifest, we are not at liberty to assume that the lawmakers were legislating upon any such basis. As stated by the learned chief justice in *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386, it is well known that a large percentage of the laborers who come within the borders of the state to seek employment leave their families and relatives behind. We think it is more in accordance with the spirit of the age that this statute be construed to have a universal application, and that it is intended to restore to the dependent, wherever the place of residence, in some degree, compensation for a loss resulting from an act of negligence committed within the state.

Judgment affirmed.

Nonresident Alien relatives are not entitled, in some of the states, to the benefit of statutes giving a right of action for wrongful death: *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558; *McMillan v. Spider Lake etc. Co.*, 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979. In other states, these statutes have been found susceptible of a more reasonable interpretation, in harmony with the decision of the Minnesota court in the principal case: *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386.

STILLWATER WATER COMPANY v. FARMER.

[89 Minn. 53, 93 N. W. 907.]

WATERS, Percolating, Limitations Upon Right to.—There is no reason why the maxim, "So use your property as not to injure another," should not be applied in a proper case to percolating waters. (p. 546.)

WATERS, Percolating, Right to Waste.—Except for the improvement of his own premises or for his own beneficial use, the owner of land has no right to draw, collect or divert percolating waters thereon, when such acts may destroy or materially injure the spring of another, the waters of which are used by the general public for domestic purposes. The land owner must not divert and waste percolating waters which may be appropriated by his neighbors for the general welfare of the public. (p. 548.)

J. N. Searles, for the appellant.

J. N. Castle and J. C. Nethaway, for the respondent.

☞ **COLLINS, J.** This was an action brought to restrain the defendant from interfering with subsurface waters, which, percolating through the ground, served in part to supply a spring situated upon plaintiff's property, which spring the latter uses to furnish its patrons, the people of Stillwater, with water for domestic use, the plaintiff's business under its charter being to provide the city and its inhabitants with water for both fire and domestic purposes. For other than domestic purposes water is taken from McKusick Lake by plaintiff company, but it must rely upon this spring, which is quite large, and others, much smaller, for a supply for domestic use.

The action was dismissed when plaintiff rested at the trial below, upon the ground that it had failed to establish a cause of action. The case comes here upon a bill of exceptions on appeal from an order refusing to grant plaintiff's motion for a new trial.

Whatever may have been the issue tried in the court below, it is very evident, and both parties now concede, that there is but a single question here. It is a new and important one; not without difficulty of determination, and upon which there seem to be very few cases to which we may look for assistance. The plaintiff corporation owns and uses for its mains a narrow strip of land running from McKusick Lake through a ravine which finally terminates in the vicinity of Lake St. Croix. At one time this ravine was the bed of a small brook, the outlet of McKusick Lake, but a running stream no longer exists. Part

way down this ravine is the spring around which the plaintiff has built a circular wall about six feet in diameter. On the south it is less than one foot ⁶⁰ from this wall to the line of land owned by defendant, and upon the east the line is only three feet distant.

Some time ago, on his own land, near the boundary line, and about ten feet from the center of the spring, the defendant excavated a trench, into which percolating waters were drained and gathered in quantities sufficient to affect materially the supply at the spring itself. In this trench he placed a three-inch pipe, which is used to supply water for his livery barn, some distance away. This supply comes from a small spring on one side of the excavation, which defendant has walled up so that its waters do not mingle with those gathered in the bottom of the trench. Of the pipe and its use plaintiff makes no complaint. In the bottom of the trench the defendant then placed a ten-inch tile pipe, and connected it with the city sewer. By means of the trench percolating waters were and are drawn away from plaintiff's spring, where they would naturally and otherwise go, are gathered in the bottom of the trench, and are then conducted to the city sewer through the ten-inch pipe. Therefore waters naturally supplying the big spring, and used by plaintiff for the public good, are drained and diverted, and, instead of serving the wants of the people, are dissipated and lost. By this draining and diversion the waters in the spring were lowered and reduced one or two inches.

Upon discovering the effect of the ten-inch pipe upon the spring, plaintiff made some changes in the outlet through which the water ran and in its mains for its own protection and benefit, whereupon defendant commenced to relay his ten-inch pipe on a lower level, beginning at its intersection with the city sewer, and working toward the trench.

When a portion of this pipe had been relaid, and while defendant was engaged in the work, plaintiff secured a temporary injunction restraining him from further relaying upon this lower level: The defendant, according to the testimony, threatened to continue such work, and to bring the pipe into the trench, so that when it connects with the water it will be at least eighteen inches below the outlet of the main used by plaintiff to secure its supply from this spring. The effect is evident, and the court below found ⁶¹ that, if the connection is made, as intended, there will be imminent danger that so large a portion of the waters, which now naturally flow into, and, in the absence of the trench, would

continue to percolate and collect in, the plaintiff's spring, will be diverted therefrom, and drained into the trench, from thence through the pipe and into the city sewer, that plaintiff's water supply will be thereby diminished to such an extent as wholly to incapacitate and prevent it from furnishing the city and its inhabitants with sufficient water for domestic use, as it is obliged to do under its contract with the city, the result being to deprive the people of wholesome water, to destroy the plaintiff's business, and to render its plant valueless. Stated in a few words, the plaintiff, engaged in supplying the people of Stillwater with spring water for domestic purposes, is seeking to prevent the defendant from digging a trench so close to its own means of supply, as to divert and drain percolating waters, to ruin that supply, and to deprive the people of pure water for domestic uses, for the sole purpose, so far as appears in this case, of wasting these waters into a city sewer.

The question in this case, reduced to its last analysis, involves the defendant's right to collect by drainage these fugitive sub-surface waters, and then to waste them, to the annihilation of plaintiff's business, and to the great discomfort and injury of the people who depend upon the plaintiff for water for domestic use. The books are full of cases in which the rights of an owner of the soil to collect and control percolating waters are considered and determined. A brief and comprehensive general statement of the law pertaining to the subject is found in *Pixley v. Clark*, 35 N. Y. 520, 527, 91 Am. Dec. 72, where it is said: "An owner of the soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface." This doctrine, and the reasons for it, are well stated in *Frazier v. Brown*, 12 Ohio St. 294, 311, in the following language: ⁶² "In the absence of express contract and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: 1. Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in

respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible. 2. Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility."

From this statement, which is really a synopsis of the reasons which have been given again and again for the established doctrine governing percolating waters, it is manifest that considerations of public policy have been of great and controlling weight in shaping the conclusions of the courts. Legal rules, it is said, would be involved in hopeless uncertainty if an attempt was made to administer them in respect to such waters, and any recognition of correlative rights would interfere, to the material detriment of the state, with the general improvement of the soil. In so far as the rules laid down in the opinions from which we have quoted are applicable to a given set of facts, there is no reason why they should not be followed in this court, for they are in harmony with all that has been said in the cases heretofore before us involving the rights of land owners with respect to running streams and surface waters. Nor do they conflict in the least with the doctrine which will uphold an owner of land in diverting and disposing of percolating waters for his own beneficial use, either as a water supply for himself or others or for the improvement and drainage of his own land.

If, for illustration, the excavation had been made for any purpose useful to defendant, such as supplying his buildings with water, or as a means to drain or improve his own land, we should ^{as} have a case altogether different, on the facts, from that now before us. If the collection of these waters was essential and necessary that defendant might use them for any reasonable purpose, or, even if, from the evidence, it could be found that he was competing with the plaintiff, and proposed to use the waters for a public purpose, or if it were necessary that the natural conditions of his land should be disturbed and subsurface waters drained in order to improve it, then there would be very little doubt as to the rule to be applied, and of the correctness of the conclusion reached by the court below. But such is not the situation presented by this record. The facts are not seriously in dispute, and they have compelled defendant's counsel to take the position that their client, as owner of the soil, has an absolute and unqualified right to collect, di-

vert, and waste these percolations, although the plaintiff, by these apparently unnecessary and capricious acts, is and will be further, to a greater extent, and almost wholly, deprived of waters heretofore appropriated and used by it to supply the people of Stillwater with a pure article for domestic purposes, and to their great injury.

The acts which the defendant has performed, which he proposes to continue, and to render more obnoxious and injurious by further and unnecessary drainage of waters which naturally make their way into plaintiff's spring, have not been and are not done for his own benefit, or for the beneficial use and enjoyment of his own property, but for some purpose not apparent from the record, and which can only be surmised. If, however, he has the legal right to perform these acts, the authorities are abundant, and seemingly unanimous, to the effect that his motive and purpose are immaterial. But we have arrived at the conclusion that, irrespective and independent of his motive, he has no absolute legal right to collect these subsurface waters solely that they may be wantonly wasted, and that he may be restrained from so doing.

It is true that this action must be disposed of upon principles involving natural rights of property, and, while we are first to look to the extent of the defendant's ownership in the land in which he has dug the trench, we are not altogether to lose sight of the fact that he has collected the water for no worthy purpose,⁶⁴ and that he is squandering it, to the injury of the public. Having this very situation in mind, a learned text-book writer has suggested that the maxim, "*Cujus est solum, ejus est usque ad coelum*," is not strictly and absolutely applicable to all of the relations of adjoining land proprietors. "It is obvious," he says, "that neighbors cannot be mutually indifferent to each other's doings." As applicable to their relations and their acts, this author further says: "The common law, otherwise so jealous of such interference between the owner and his property, imposes upon him the simple rule, '*Sic utere tuo ut alienum non laedas*'": Angell on Watercourses, 7th ed., par. 114. In *Haldeman v. Bruckhart*, 45 Pa. St. 514, 517, 84 Am. Dec. 511, it was said, when commenting upon the maxim last quoted, that "confessedly the absolute dominion of a proprietor over his land to the center of the earth is restrained by [it]."

This maxim has been repeatedly recognized in this court when considering the perplexing subject of surface waters, and it has been held that they must be used and disposed of so as not un-

necessarily to injure another person. And an examination of the cases in which the maxim, "Whose is the soil, his it is even to heaven and to the middle of the earth," has been applied, discloses that in nearly every one the person interrupting, collecting, and diverting percolating waters upon his own land was doing so that he might improve and benefit it, or was himself making some beneficial use of the fugitive waters with which he was interfering. We see no reason why the maxim, "So use your own property as not to injure another," should not be applied, in a proper case, to percolating waters, or why the limitation found therein is not pertinent when reason and justice suggest the need of it, or why the doctrine of reasonable use and correlative rights should not be applicable where the owner of the soil, for no beneficial purpose to himself or to his estate, and to the positive injury of his neighbor or the public, insists upon turning pure spring water into a city sewer, that it may be absolutely wasted. And this doctrine of correlative rights and obligations between land owners respecting the appropriation and use of percolating waters has been maintained in at least one state: *Bassett v. Salisbury*, 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276—in which the maxim, "*Sic est utere tuo ut alienum non laedas*," was applied, and it was held that no good reason could be given why it should not be applicable in all case where the rights of owners of adjoining lands to collect and use percolating waters are in apparent, although not real, hostility.

The subject of wholesome water for domestic purposes in our cities is fast becoming one of overwhelming importance, and the courts may have to step forward and out of the beaten paths to formulate additional, and perhaps new, rules in order to protect our citizens, and to preserve for their use a wholesome and sufficient supply. It may become absolutely necessary, in order to secure the public health, that noticeable departures be made from the doctrines which have heretofore prevailed, but which have become inefficient, inapplicable, or possibly, radically wrong, under changed and developing conditions. When that time comes, and the subject is presented, no court should feel itself bound to adhere to a previously announced rule of law, for which no substantial reason can be given, or for which a good ground no longer exists. Great injury, distress, and disaster to the public must be prevented, although time-honored precedents, of no value, are swept aside. The justification for

such a course lies, as it often does in matters for legislative action, in the fact that the public is vitally and sufficiently interested, and must be protected. In *Toledo etc. Ry. Co. v. Pennsylvania Co. (C. C.)*, 54 Fed. 746, 751, the following language, which should meet the approval of every equity court, was used: "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief."

But in holding as we do, and in laying down a rule which confessedly is something of a departure from the general doctrine found in the books, and is an advanced position, we are not really ^{as} discarding the maxim, "*Cujus est solum ejus est usque ad coelum*," or doing violence to any of the reasons which have been given for it. We are not involving any set of legal rules in hopeless uncertainty, and therefore rendering their application practically impossible, for the rule which we adopt is not only just, but it is exceedingly plain, certain, practical, and easy to apply to real conditions. Nor will our recognition of the doctrine of correlative rights interfere in any manner with material improvements, to the detriment of the state. On the contrary, it will tend to promote the prosperity and general welfare of all citizens whose necessities bring them within its influence. Nor are we entirely without authority for such a doctrine. We therefore formulate and announce the rule governing the facts here to be that, except for the benefit and improvement of his own premises, or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them. Briefly stated, a land owner must not collect and wantonly waste percolating waters which would otherwise be, or have theretofore been, appropriated by his neighbor for the general welfare of the people. If he does, an action to restrain and prohibit such waste may be maintained by the party injured.

Attention is here called, as an authority for this proposition, to *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, an exceedingly well-written and able opinion, affirmed in 160 N. Y. 357, 54 N. E. 787. It was there said, in substance, that it seemed clear from the reasoning in several cases, which were cited, that the right to collect and appropriate percolating waters, which right has always been upheld relates to the beneficial use of the waters, or to the beneficial use of the land for some purposes for which it can be used connected with its enjoyment as land, for the ordinary purposes of agriculture, mining, domestic purposes, or improvement, either public or private; and it was held—going much further than necessary in this case, and establishing a radical rule ⁶⁷—that the owner of land could not gather percolating water by pumps, or by natural means, that it might be carried to a distant place, for the use of strangers, having no right to it, in a case where the inevitable result would be to destroy a spring upon the land of an adjoining owner. The right, said the court, is predicated upon the right of the owner to benefit the land itself, or to himself enjoy the beneficial use of the waters found in the soil thereof.

The doctrine we now lay down has been to some extent recognized in other cases, although the exact question was not presented: See *Chatfield v. Wilson*, 28 Vt. 49; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Frazier v. Brown*, 12 Ohio St. 294; *Burroughs v. Saterlee*, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Collins v. Chartiers*, 131 Pa. St. 143, 17 Am. St. Rep. 791, 18 Atl. 1012, and the New Hampshire cases before referred to. In no case brought under our observation has the right of the owner of the soil to collect percolating waters that he may dissipate and waste them been recognized or upheld.

This doctrine also finds support in the reasoning found in the opinions filed in the somewhat noted case of *Ohio Oil Co. v. State*, 150 Ind. 698, 50 N. E. 1124, affirmed in 177 U. S. 190, 20 Sup. Ct. Rep. 576. The legislature of the state of Indiana had prohibited the wasting of natural gas and petroleum oil from wells by permitting the escape of either into the open air. An action was brought and successfully maintained by the state to enjoin and restrain an oil company from allowing natural gas to escape and waste in violation of this statute. The rules which govern subsurface waters, coal-oil, and natural gas—all minerals—are the same under the authorities, and the arguments made in that case in behalf of the defendant and

in support of the contention that the statute was unconstitutional were based upon the claim that, as the gas in or under the defendant's land is part of the land itself, which was conceded, the owner of the soil had the lawful right to assert absolute dominion over all that is found in or under it, including all minerals, to the center of the earth, and for an unlimited distance upward from the earth's surface—the exact claim asserted here. It was there held that the statute was constitutional, and that the state, representing its citizens, had the right, as a matter of public ⁶⁸ policy, to maintain the action, and forever to restrain and enjoin the defendant from violating the prohibitory law. The learned arguments found in the opinions rendered in the state and federal courts are pertinent to the present case.

Order reversed, and a new trial granted.

The Principal Case is cited and considered with other decisions involving similar questions in the monographic note to *Katz v. Walkingshaw*, ante, pp. 66-75.

SWEDISH-AMERICAN NATIONAL BANK v. FIRST NATIONAL BANK.

[89 Minn. 98, 94 N. W. 218.]

AN ASSIGNEE for the Benefit of Creditors **Stands in the Shoes of His Assignor** by the common law, and holds the property subject to all equities and rights which existed against him. (p. 554.)

AN ASSIGNEE for the Benefit of Creditors **Under the Statutes of Minnesota Represents the Creditors** and not the assignor, and the rights of the creditors may and must be enforced through the assignee. (p. 554.)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS, Extra-territorial Effect of.—The authority of an assignee for the benefit of creditors extends to all property of the assignor passing by the assignment, whether within or without the state. (p. 554.)

CONFLICT OF LAWS—Assignment for Benefit of Creditors.—The power of an assignee for the benefit of creditors appointed in Minnesota is governed, as to the property passing by the assignment and situate within another state, not by the laws of that state, but by those of Minnesota. The power of the assignee must be measured, as to all property covered by the assignment, by the laws of the state wherein it was made and the trust is to be administered. At

least, this must be the rule as to citizens of Minnesota who have not seized the property in another state. (p. 554.)

ASSIGNMENT FOR CREDITORS—Conflict of Laws as to Pledges.—A pledge is controlled and its validity determined by the law of the state wherein the property is situate, and if creditors of an assignor for the benefit of creditors could have contested a pledge in the state where the property is, because not valid by its laws, the assignee may accomplish the same end in the state where the assignment was made. (p. 555.)

CONFLICT OF LAWS—Place of Contract of Pledge.—If a banker residing and doing business in Massachusetts, in response to a telegram from a corporation doing business in Minnesota, agrees to make a loan to be secured by grain on deposit in the warehouse of the borrowers in Minnesota and other western states, and thereupon a promissory note is executed and mailed, with the warehouse receipts representing the grain to the lender at Boston, and a draft drawn on him for the amount of the loan, the place of the contract of pledge is not in Massachusetts, though the note by its terms is payable in that state. (pp. 556, 557.)

PLEDGE—Conflict of Laws.—The Parties to a Contract of Pledge will be Presumed to have had in View the Laws of the State where the property was situated, though the contract to secure which the pledge was made is governed by the laws of another state. (p. 557.)

CONFLICT OF LAWS.—The Validity of Contracts is to be determined by the laws of the place of performance. (p. 558.)

CONFLICT OF LAWS.—The Validity of a Pledge of Property Situate in Another State must be determined by its laws, though made by a resident of this state, of which all the parties to the controversy are residents. (pp. 560, 561.)

A PLEDGE of Property Situate in a Warehouse must be Restricted to the Identical Property Pledged, and if other property, though of like character, is subsequently substituted for it, the pledge is lost, unless some statute has changed the common-law rule. (p. 561.)

PLEDGE Made in Contravention of Law, When Void.—If a statute provides the manner in which pledges must be made, and imposes a penalty for a violation of its provisions, and creates a cause of action for damages in favor of the injured party, such penalty is not the exclusive remedy, but the contract of pledge must be treated as invalid. (p. 562.)

A WAREHOUSEMAN may not Issue a Receipt for His Own Grain as Security for the payment of his debts, unless expressly authorized to do so by statute. (p. 562.)

WAREHOUSE RECEIPTS, When not Void for Indefiniteness.—A warehouse receipt covering grain "in our system of elevators," without designating the particular elevators, is valid as to the kinds of grain specified therein stored in elevators in this state, and is not so uncertain as to be void. (p. 564.)

CONFLICT OF LAWS—Warehouse Receipts, Validity of.—A warehouse receipt issued in Minnesota for grain situate in that and other states must, as to the grain in other states, be controlled by their laws, and validity to it cannot be given by the statute of Minnesota, were it is invalid by the laws of the states where the grain is. (pp. 564, 565.)

Application by the St. Paul and Kansas City Grain Company, a corporation, for an order requiring all persons interested in the assigned estate to show cause why the securities claimed by the defendants and others should not be recognized, and the proceeds thereof paid over to them. The court made an order directing the assignees to pay over to the creditors secured by the warehouse receipts the proceeds of the property subject thereto. A motion for a new trial was denied, from which the Swedish-American Bank and others appealed.

Cohen, Atwater & Shaw, for the appellants.

Koon, Whelan & Bennett, E. F. Merkle and Louis K. Hull, Flannery & Cooke, George W. Buffington and Wilson & Derlip, for the respondents.

¹⁰⁵ BROWN, J. The St. Paul and Kansas City Grain Company, a corporation formed under and pursuant to the provisions of the statutes of this state, having its principal place of business at the city of Minneapolis, owned and operated a large number of grain elevators and warehouses at different places in the states of Minnesota, Iowa, South Dakota, and Nebraska, and received in store grain belonging to others, and purchased and stored therein grain of its own; the different varieties, wheat, oats, and corn, being separately commingled in common mass. It shipped out, as occasion required, various quantities of such grain, receiving in place thereof other grain of like character. Its business was quite extensive, reached considerable proportions, and it became necessary from time to time to borrow money to enable it properly to conduct its affairs, as security for the repayment of which warehouse receipts were issued, and delivered to the persons of whom loans were made, specifying a quantity of grain then owned by the company, and by it stored in its elevators, which it intended to pledge as security. These receipts will be more particularly referred to ¹⁰⁶ later on, but for present purposes the statement just made is sufficient.

On October 4, 1901, being heavily in debt, not only to secured, but to unsecured, creditors, and unable to meet its obligations, the company made a general assignment under the laws of this state for the benefit of all its creditors. At the time of the assignment it owned a large quantity of grain, wheat, oats, and corn, which was in store in the different elevators owned and operated by it in the states named, all of which without objection by the receipt holders, the assignees took possession of, and converted into money, in the due administration of their

trust. The warehouse receipts above referred to are not all alike in form, though similar in substance. That held by the Gardner National Bank is as follows:

ST. PAUL AND KANSAS CITY
GRAIN COMPANY.
Grain Buyers and Warehousemen,
Elevators in Iowa, Nebraska,
South Dakota and Minnesota.
Counter-signed,
E. W. Folsom,
Secretary.

ST. PAUL & KANSAS CITY GRAIN CO.

No. 1779. Minneapolis, Minn., Aug. 30th, 1901.

Received in store in our system of elevators and warehouses, seventeen thousand bushels of White Oats, subject to the order hereon of ourselves, on return of this receipt properly endorsed.

The grain represented by this receipt is fully covered by fire insurance for the benefit of the holder, and all charges are paid to February 28th, 1902.

On the back of which appears the following indorsement, which must be treated, though not expressly referred to in the body of the receipt, as a part of the contract:

St. Paul & Kansas City Grain Co.,

By J. Q. Adams, Pt.

Evanston, Ia.	2,500
Laurel, Neb.	2,000
Waltham, Minn.	2,000
Tea, S. D.	2,500
Lester, Ia.	3,500
Alvord, Ia.	1,500
Dixon, Neb.	1,500
Plainview, Neb.	1,500

17,000

¹⁰⁷ The receipts held by the Security Bank of Minnesota and the First National Bank of South Weymouth are similar to the Gardner receipt, with the exception that in the body thereof are the words, "As per list on back," following the words, "Received in store in our system of elevators," etc. Those held by the Batavian Bank and F. L. Greenleaf on their face cover the quantity of grain therein stated "in our system of elevators and warehouses," without designation of particular warehouses where the same was stored. That held by the Cape Cod National Bank covers a stated quantity of grain in an elevator located in the state of Iowa. At the time of the assignment there were in store in the company's elevators the quantities of grain specified in the several receipts, and at the places named therein; but there is no evidence that the identical grain on hand at the time they were issued was in store at the time of the assignment. The receipts held by the Batavian Bank, F. L. Greenleaf, and

the Security Bank secure the payment of promissory notes payable at Minneapolis, this state, while the other notes thus secured were payable in Boston, Massachusetts.

All of the creditors, including those holding such receipts, none of whom reside in the states of Iowa, Nebraska, or South Dakota, presented their claims to the assignees, and they were duly allowed as valid obligations of the insolvent company. The unsecured debts amount to about four hundred and fifty thousand dollars, and those secured by the receipts to about one hundred and forty thousand dollars. The receipts cover the bulk of grain owned by the company at the time of the assignment, and its assets are insufficient to pay its debts in full. The creditors holding the receipts made claim to the assignees of a preference over and above the general creditors to the extent of the grain represented by the respective receipts, which were called to the attention of the court below, whereupon issues were ordered made up, and the matter brought to trial, resulting in a judgment confirming their right to a preference, and from an order denying a new trial the general creditors appealed. The whole controversy is between the receipt holders, asserting a right of priority, on the one hand, and the general creditors, disputing the right, on the other; and the question to be determined is whether the former ¹⁰⁸ are entitled, in the distribution of the insolvent company's estate, to their asserted right, either partially or to the full extent of the grain represented by their respective receipts. The receipts relied upon are claimed by the holders thereof to constitute pledges of the grain named in each, and the decisive question is, By what law is their validity to be determined? A large number of errors are assigned, but, without referring specially to them, we come at once to a consideration of the merits of the case.

1. It may be well first to consider briefly the duties of an assignee under our statutes, and the relation he bears to the creditors in respect to an application of the property of the assignor to the payment of their claims. If the assignees in this proceeding, as to any portion of the pledged grain, as contended by counsel for receipt holders, occupy the position of the assignor, with no greater rights or duties, and are required to apply the property coming into their hands precisely as the assignor would have been required to do by law had no assignment been made, and on the basis that contracts entered into between the assignor and his creditors must be performed because valid and enforce-

able between the parties, some of the other questions presented would be very much simplified.

The general rule of the common law is that an assignee for the benefit of creditors stands in the shoes of the assignor, represents him, takes the assigned property subject to all transfers and encumbrances, whether fraudulent as to creditors or not, and subject also to all equities existing between the assignor and any particular creditor. But this rule has been changed in this state by our statutes on the subject of assignments, and the assignee represents the creditors, and not the assignor: *Walsh v. St. Paul etc. Co.*, 60 Minn. 397, 62 N. W. 383; *Thomas Mfg. Co. v. Drew*, 69 Minn. 69, 71 N. W. 921; *Kellogg v. Kelley*, 69 Minn. 124, 71 N. W. 924. He receives the property belonging to the insolvent estate, converts it into money, and pays and discharges the debts by equal proportional distribution among the creditors, recognizing valid and subsisting contracts theretofore entered into by the assignor, and instituting proceedings to set aside all such conveyances and transfers as are fraudulent or void as to creditors. ¹⁰⁹ Being clothed with this authority by express legislative enactment (*Gen. Stats. 1894, sec. 4233*), it becomes a duty, and the faithful performance of his trust requires, that he proceed in a proper way against all fraudulent or void contracts of his assignor, thus rendering unnecessary individual suits by the latter to test the validity of transfers and conveyances made by the assignor before assignment, preventing one creditor from obtaining an advantage over another, and making possible an equal distribution of the estate among those entitled to it. No rights are lost to the creditors by the assignment. The right to question fraudulent or void transfers of property still exists, but must be enforced through the assignee.

The authority thus conferred extends to all property of the assignor passing by the assignment to the assignee, whether within or without the state. It would not do to hold that an assignee appointed under the laws of this state possesses, as to property belonging to the trust estate having an actual situs in another state, such power and authority only as is conferred by the laws of such other state, whether as broad and comprehensive as is conferred by our laws or not. To do so would be destructive of the purposes of our insolvency laws, open the doors for rivalry and contests between individual creditors in their efforts to secure liens by attachment or garnishment in respect to the property in the other state, the prevention of which, and an equal

distribution of all the property of the insolvent, is the primary object of our statutes. His power and authority must be measured, as to all property covered by the assignment, by the laws of the state where the assignment was made and the trust is being administered. It is a question of procedure, remedy, and the law of the forum applies: *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113. By any other rule, where property is situated in several states, the assignee might occupy a dual position. As to property within this state he would represent the creditors, and as to property without the state he would represent the assignor, if such were the law of the other state, with no power to call in question fraudulent transfers. This would result in confusion, and be subversive of all modern insolvency or bankruptcy statutes.

110 None of the secured creditors in the case at bar are citizens of the states of Iowa, Nebraska, or South Dakota, where a part of the trust estate was located at the time of the assignment, asserting rights as such under the laws of those states, but are residents of other states, including Minnesota, and have come into this proceeding, pending in this state; and their rights, in so far as pertinent to the authority of the assignees, are fixed by the laws of this state—the *lex fori*. What would have been their rights had they seized the property in the other states, and contested the right of the assignees to take possession of it except subject to the pledge, and had not appeared in this proceeding, we need not determine. But from what has been said it must follow that the assignees in the case at bar represent the creditors, with power and authority to do all that they, individually or collectively, could have done to subject the property of the insolvent debtor, wherever located, to the payment of their claims; and that the creditors have, through them, the rights of attaching creditors: *Walsh v. St. Paul etc. Co.*, 60 Minn. 397, 62 N. W. 383. If the general creditors could, by appropriate proceedings in the courts of Iowa, Nebraska, or South Dakota, have effected a cancellation or defeated the pledge here relied upon by the receipt holders to the extent of the grain located in those states—as it must be conceded they could have done, if invalid there—the assignees may accomplish the same end in this proceeding in this state, for, as we shall presently see, the validity of the pledges as to grain having an actual situs in those states must be determined by their laws.

2. It is contended by the general creditors that the contract and pledge relied upon by the Gardner National Bank is a

Massachusetts contract, its nature and validity to be determined by the laws of that state. The facts with reference to this claim are somewhat similar to those of other receipt holders, and we state them briefly. Fogg Bros. & Co. were bankers residing and doing business in the city of Boston, Massachusetts. The grain company was a Minnesota corporation, with its principal place of business at Minneapolis, this state. The company telegraphed Fogg Bros. & Co., asking for a loan of five thousand dollars, to be secured by a warehouse ¹¹¹ receipt for seventeen thousand bushels of oats then in store in the grain company's elevators. The Boston firm agreed to make the loan, whereupon the grain company made its promissory note to J. Q. Adams, its president, for the sum of five thousand dollars, which was immediately indorsed by the payee to Fogg Bros. & Co., and, with a warehouse receipt for seventeen thousand bushels of oats issued by the grain company, mailed by the latter to Fogg Bros. & Co. at Boston. At the time of so mailing the note and receipt the grain company made draft on the Boston firm for the amount of the loan, which was subsequently honored by them. Fogg Bros. & Co. thereafter transferred the note and receipt to the Gardner National Bank.

We are of opinion that the place of this contract, in so far as the pledge is concerned, at whatever other place it may be said to have been made, was not Massachusetts. The phrase "*lex loci contractus*" is defined to be the law of the place with a view to which a contract is entered into, or by which it must, by reason of its subject matter or nature, be governed or performed; in other words, the law which the parties either expressly or presumptively incorporated into their contract: *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102; *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. Rep. 52.

The intention of the parties is an element to be considered in determining the place of a contract, though their intention may not, perhaps, be always controlling; but it is within their power ordinarily to fix the place by express agreement: *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311. The contract here involved does not fix the place by the laws of which the parties intended to be bound, nor are the surrounding circumstances or the nature of the contract such as to justify us in holding that they contracted with a view to the laws of Massachusetts. Though the promissory note was payable in Massachusetts, the security held for its payment was properly situated partly in Minnesota and partly in Iowa, South Dakota, and Nebraska, and could not be

enforced except in those states; and from this the reasonable inference is that, as to the security, at least, the pledged grain (the pledge being independent of, though accessory and an incident to, the principal contract), the parties had in view the laws ¹¹² of the states where the pledged property was actually situated, and where it must be performed or enforced. So that, though the principal contract may be said to be governed by the laws of Massachusetts, because payable and to be performed there, the pledge was not to be performed, nor can it be enforced, in that state.

3. This brings us to the question applicable to all the receipt holders, and one of the more serious and important controversies in the case, namely by what law is the validity of the receipts as pledges to be tested and determined. It is the contention of appellants, the general creditors, that their validity is to be determined by the laws of the states where the pledged grain was actually situated at the time the receipts were issued and delivered, and that by the laws of Iowa, Nebraska, and South Dakota such pledges are invalid as here attempted to be created. It is the contention of the respondents, the receipt holders, that their validity is to be determined by the laws of this state, that being the place of the contract, and the forum in which their validity is questioned. A number of the receipts cover specific quantities of grain stored in the different states named, and, if appellants' position be sound, they have a double operation, and are to be construed distinctively and according to the laws of the states where the different quantities of grain are located: *Pope v. Nickerson*, 3 Story, 465, Fed. Cas. No. 11,274; *Hartmann v. Louisville Ry. Co.*, 39 Mo. App. 88, 95; *Pomeroy v. Ainsworth*, 22 Barb. 118; *Faulkner v. Hart*, 82 N. Y. 413, 420, 37 Am. Rep. 574.

The authorities upon this question are by no means harmonious. An examination of them discloses a very decided conflict in the views of different courts and text-writers. The *lex loci contractus*, as generally understood, is not made by any of them the final test as to the validity of contracts respecting personal property, except perhaps, as to formalities in execution (*Dacosta v. Davis*, 24 N. J. L. 319), but as to their essence or essential validity other rules are applied: 22 Am. & Eng. Ency. of Law, 2d ed., 1328.

There is an old rule or fiction of the law that personal property has no situs apart from its owner; that, though such property may have an actual situs different from the domicile or

residence ¹¹³ of its owner, its situs for all purposes of the law is with the owner, termed the legal situs; and some courts cling with tenacity to this rule, and are guided by it in a great measure in determining rights in reference to such property. The rule has always been that the validity of contracts and transactions concerning real property, both as to formality and essence, is to be determined by the laws of the place where the property is situated: 22 Am. & Eng. Ency. of Law, 2d ed., 1337. And there would seem to be no logical reason why the same rule should not apply to personal property as well. The only plausible reason for not applying it is found in the legal fiction that such property has no situs apart from its owner. As remarked by the supreme court of the United States—Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876:

"The old rule expressed in the maxim, '*Mobilia sequuntur personam*,' by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used"—citing *Green v. Van Buskirk*, 5 Wall. 307, 7 Wall. 139; *Hervey v. Rhode Island etc. Works*, 93 U. S. 664; *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51; *Story on Conflict of Laws*, 8th ed., sec. 550; *Wharton on Conflict of Laws*, 2d ed., sec. 297 et seq.

It is a rule of general application that the validity of contracts is to be determined by the laws of the place of performance: 22 Am. & Eng. Ency. of Law, 2d ed., 1325; *London Assur. Co. v. Companhia de Moagens Do Barreiro*, 167 U. S. 149, 17 Sup. Ct. Rep. 785; *Coghlan v. South Carolina Ry. Co.*, 142 U. S. 101, 12 Sup. Ct. Rep. 150; *Beggs v. Bartels*, 73 Conn. 132, 84 Am. St. Rep. 152, 46 Atl. 874; *Pittsburgh Ry. Co. v. Shepard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61; *Burnett v. Pennsylvania Ry. Co.*, 176 Pa. St. 45, 34 Atl. 972; *Hubble v. Morristown Land Co.*, 95 Tenn. 590, 32 S. W. 965; *Scudder v. ¹¹⁴ Union Nat. Bank*, 91 U. S. 406; *Waverly Bank v. Hall*, 150 Pa. St. 466, 30 Am. St. Rep. 823, 24 Atl. 665; *Shoe etu. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Abt v. American Bank*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856;

Seamans v. Christian Bros. Mill Co., 66 Minn. 205, 68 N. W. 1065.

And this rule is uniformly followed as to promissory notes, and perhaps chattel mortgages, unless a contrary intent of the parties is shown. It was followed and applied in *Ames v. Benjamin*, 74 Minn. 335, 77 N. W. 230. In that case, defendant, a resident of this state, made and delivered to plaintiff his promissory note payable at Wahpeton, in the state of North Dakota, to secure the payment of which he executed a chattel mortgage upon property situated in this state. In an action in replevin by the mortgagee for the mortgaged property, brought in this state, in which the mortgagor interposed the defense of usury, the court held that the validity of the contract was to be determined by the laws of the state of North Dakota, because that was the place of performance. No objection was made to the validity of the mortgage aside from the claim that it was void because it secured the payment of a promissory note void for usury.

There are numerous authorities which hold that, where the subject matter of a contract is personal property which has an actual situs in a state other than that of the forum where its validity is questioned and the domicile of the parties, the latter two concurring, the law of the state where the property is so located will not be applied in interpreting the contract, if to do so would violate the law of the forum or impair the rights of domestic creditors: *Minor on Conflict of Laws*, sec. 6 et seq. And respondents urge with much earnestness that the validity of the receipts in question should not, in this state, be determined by the laws of the states of Iowa, Nebraska, or South Dakota; that the laws of those state should not be imported into this, for to do so would violate the settled policy of our laws in respect to such transaction, and impair the rights of domestic creditors.

It seems to us that this rule, if it can be said to apply to the facts before us, cuts both ways. We have no creditors in this proceeding, residents of the states named, asserting rights under their laws. All those here interested, both secured and unsecured, ¹¹⁵ may be treated as residents of this state; some of them are such in fact; and, if the receipt holders may be heard to say that it would be an injustice to them to determine the validity of their contracts by the laws of those states, the general creditors, also residents of this state, could with equal propriety contend that to apply the statutes of Minnesota would

be unjust to them. To ignore the laws of the states where the property was in fact situated, and with reference to which the parties must be deemed to have contracted, and where the contract must be performed, and infuse life and validity by an application of our laws into that which, without such action of the court, would be wholly invalid, would extend to them greater rights than they had before the assignment. There is force in this suggestion, for it must be conceded that the general creditors could, prior to the assignment, have seized the pledged grain situated in those states, and defeated the pledges as to the receipt holders, though perhaps not as to the assignees: *Bacon v. Horne*, 123 Pa. St. 452, 16 Atl. 794.

Some courts have apparently ignored many of the theories and fictions of the text-writers, and aimed to place contracts concerning personal property upon the same basis with contracts respecting real property, by applying the law of the actual, rather than that of the legal, situs. Prominent in this line is the supreme court of the United States. These courts apply the principle, which has always been unyielding in respect to real property, that every state, by virtue of its own sovereign power, has the right to regulate persons and things within its territory, and to provide and control the method and manner of sale, encumbrance, or other transfer of property therein: *Green v. Van Buskirk*, 7 Wall. 139; *Hervey v. Rhode Island etc. Works*, 93 U. S. 664; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. Rep. 329; *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102; *Loftus v. Farmers' etc. Bank*, 133 Pa. St. 97, 19 Atl. 347. This rule is also laid down by many of the text-writers: *Wharton on Conflict of Laws*, 2d ed., sec. 297 et seq.; *Story on Conflict of Laws*, 8th ed., sec. 383; *Foote on Private International Law*, 236.

But we need not review the authorities further. It would serve no good purpose, and we refrain. Without attempting to lay down any abstract rules on the subject, we have no difficulty in ¹¹⁶ holding in this case, applying the general rule that the validity of contracts is to be determined by the laws of the place of performance, that as to the portions of grain having an actual situs in the states of Iowa, South Dakota, and Nebraska, the nature of the contract being such as to require its performance and enforcement in those states, the validity of the receipts as pledges of such grain must be determined by their laws. There being nothing in the contract to show a contrary intention, conceding that such an intention might be effectual

in a case of this kind, the inference is that the parties contracted with a view to the laws of those states; and those states as to the grain located therein, became the "venue of their agreement." In reaching this conclusion we are not importing foreign laws to the detriment of domestic creditors. All parties before the court occupy the position of domestic creditors, are before the court with such rights as they possessed immediately preceding the assignment, in which they are entitled to protection. In determining what those rights are, we apply the rules of the universal law, the common law, to an undisputed state of facts. The general creditors are not attempting to establish rights under foreign laws. They are simply contending against a right of priority in the distribution of the insolvent company's estate asserted by the receipt holders, and we are to determine whether that right in fact exists; and the rule which precludes the courts of one state from giving effect to the laws of another state, when to do so would impair the rights of domestic creditors, can have no application to the case.

4. We come, then, to the question whether the receipts are valid under the laws of those states. The contention that they are valid by force of the statutes of this state will be considered when that subject is reached. It is elementary that a valid pledge of personal property can be created only by a delivery to the pledgee of either an actual or constructive possession of the pledged property. The delivery of a recognized symbol of title, such as a warehouse receipt issued by a warehouse as owner, is sufficient as a constructive delivery. But in such case the identical property must be retained by the pledgor as bailee of the pledgee. Other property of like character and kind cannot be substituted: *National* ¹¹⁷ etc. *Bank v. Wilder*, 34 Minn. 149, 24 N. W. 699. This is the common-law rule, and is presumed to be the same in all the states.

There is no explicit finding, or any evidence in the case before us to the effect that the identical grain owned by the grain company at the time the receipts in question were issued, and which it intended to pledge, was retained by it, or was in its possession at the time of the assignment, but the contrary clearly appears from the record. The grain received and stored by it during its business career was constantly undergoing changes by additions to and shipments from the common mass in the usual course of business. The contention on this phase of the case by counsel for the Security Bank, to the effect that the grain company did retain the oats covered by its receipt,

is not supported by the record. If the findings of the trial court can be said to support this contention, they cannot be sustained. The evidence points the other way. So that none of the receipts constitute a valid pledge at common law; and, unless there be some statutory provision in the states named modifying and extending that rule, as in this state, they are wholly invalid as to creditors of the grain company.

There is such a statute in the state of Iowa, but, for the reason that the receipts were not issued in compliance with its provisions, they are invalid under it. This was conceded at the argument by one of the counsel for the receipt holders, and the others do not claim that the statutes of that state were complied with. It is contended, however, that, as the Iowa statute provides in detail the manner in which pledges of this character may be created, and for a violation of any of its provisions a penalty is imposed, and a cause of action for damages given the injured party, the penalty provided is the exclusive remedy, and that the pledges, though not in compliance with the statutes, are valid. We see no strength in this argument. A contract entered into in contravention of express law is wholly void.

It does not seem to us that the statutes of the states of South Dakota and Nebraska leave the question in serious doubt as to those states. The provisions of the South Dakota statute, which are substantially similar to those of Nebraska, provide generally ¹¹⁸ for the issuance of warehouse receipts by the owners of elevators and warehouses to depositors of grain, and particularly that "no warehouse receipt shall be issued except from actual delivery of grain into store in the warehouse from which it purports to be issued, and which is to be represented by the receipts, nor shall any receipt be issued for a greater quantity of grain than was contained in the lot or parcel stated to have been received."

No provisions are found in the statutes of either state authorizing a warehouseman to issue such receipts for his own grain as security for the payment of his debts, and, taking all the statutory provisions of those states bearing upon this subject together, it is quite clear that the lawmakers had no intention of modifying or changing the common law as to pledges of personal property. On the contrary, the fair import of the statutes is that they were intended as a regulation of the business of marketing and storing grain and other farm products as between the warehouseman and an actual depositor. Sec-

tion 5534 of the Annotated Statutes of South Dakota of 1901, expressly provides that a transfer of personal property as security creates a lien only when accompanied by an actual change of possession of the property intended to be pledged, and there is nothing in the warehouse laws of that state to indicate an intention on the part of the legislature to repeal or modify that statute. We were cited to no case in either of the states named construing their statutes on this subject, and we give them such construction as seems consistent with legal principles, and hold that they do not authorize the pledge of grain owned by a warehouseman in the manner here attempted.

The statutes of those states are quite different from our act of 1876 (Laws 1876, p. 96, c. 86), in this, that the act of 1876 contains no restrictions as to when or to whom receipts of this kind may be issued. It requires that they be issued on the deposit of grain with a warehouseman, but does not, as in South Dakota, and Nebraska, expressly forbid their issuance except upon an actual deposit of grain. There being no such restriction contained in the act of 1876, this court, in the Wilder case, held that a warehouseman ¹¹⁹ might issue receipts for his own grain as security for loans of money; but such construction cannot be given to the statutes of those states except by ignoring their express language.

5. But it is strenuously contended by counsel for the receipt holders that the receipts are valid by force and reason of the statute of this state, not only as to the parts of grain actually situated therein, but as to the grain situated in the other states as well; while the converse of the proposition is urged with equal force by counsel for the general creditors, who insist that the receipts are invalid even as to grain in this state—1. Because the rule of National etc. Bank v. Wilder, 34 Minn. 149, 24 N. W. 699, has been abrogated and changed by the Laws of 1895, page 313, chapter 148; and 2. Because the receipts are indefinite and uncertain, and designate no particular grain as the subject of the pledge. We have no particular difficulty in applying the rule of the Wilder case to the receipts in question, in so far as they cover grain situated in this state. That decision, based upon the statutory provisions of the act of 1876 (Laws 1876, c. 86), established a rule that has since been followed in one of our great branches of commerce, and, if it is to be departed from, it should be by express legislation. It has become a rule of property right, a legally sanctioned rule of business, and has been relied upon by the bar and business circles, and

should not be disturbed. It was not abrogated or changed by the act of 1895. Though the two acts are in some respects dissimilar, it was not the intention of the legislature by the later act to change the rule. Had they so intended, language would have been employed to that end which would not have required a judicial interpretation to ascertain the meaning of the law-makers.

And we are also of opinion, and so hold, that those receipts which cover grain "in our system of elevators," without designation of particular elevators, are also valid as to grain of the kind specified therein stored in elevators in this state, and are not so indefinite and uncertain as to render them ineffectual or void. The appropriation of grain to the contract is as definite, specific, and certain as in the receipts which designate particular elevators. In either case the identical grain in store at the time of the ¹²⁰ issuance of the receipts is not retained by the warehouseman. Grain in all elevators of the kind is constantly undergoing changes by shipments from and additions to the common mass, and it is generally understood in business circles that the grain actually on hand at any particular time may be subject to the claim of receipt holders. No notice is given of the issuance of such receipts, whether for grain in a particular elevator or covering grain in all the elevators owned by the warehouseman. The only protection furnished those dealing with the warehouseman is the general understanding of the nature of such business and the method of its transaction. These blanket receipts come fairly within the principle of the Wilder case, and, following that decision, we sustain them.

But we are unable to concur in the contention of respondents that all the receipts are valid as to all the grain, wherever actually situated at the time they were issued, by force of the statutes of this state. It is an elementary rule that statutory law has no extraterritorial effect. Statutes of a state have no effect *ex proprio vigore* beyond its own limits, and, even if a legislature should intend its laws to apply to persons and property in other states, its enactments in that direction would be wholly inoperative and void. It is beyond the power of a state to impose its laws upon another state, or to provide that contracts entered into in accordance with its laws shall be valid and enforceable in a foreign jurisdiction; and it is clear that the legislature of our state did not intend its warehouse statutes to apply to transactions in reference to grain actually in store in elevators in some other state. We are unable to con-

cur in the ingenious argument of counsel for respondents in this respect, and apply the general rule which limits the operation of statutory law to the state of its enactment.

It is not important, as argued in the Security Bank case, whether the general creditors gave credit or altered their position after the receipts were issued to that bank. The legal rights, not the equitable, are alone involved. The same reasoning would sustain an unrecorded chattel mortgage.

It follows that the order denying a new trial must be reversed ¹²¹ as to the Security Bank, the Gardner National Bank, First National Bank of Weymouth, and the Cape Cod National Bank, but affirmed as to F. L. Greenleaf and the Batavian National Bank. As to the latter two the receipts cover grain in the system of elevators owned by the grain company without specification as to particular elevators, and are valid, being construed to apply to grain in store in elevators within this state.

Reversed, in part.

On April 13, 1903, the following opinion was filed:

Per CURIAM. Since the foregoing opinion was filed, our attention has been called to the fact that one of the receipts by the Batavian Bank and that held by F. L. Greenleaf cover the specific article of corn, and the further fact that at the time of the assignment the grain company had no corn in any of its elevators in Minnesota. This being so, the affirmance of the order appealed from as to those claimants was erroneous, and should be corrected.

It is therefore ordered that the order appealed from be reversed, and the cause remanded for further proceedings. The former order herein is modified accordingly.

Order denying new trial reversed.

Conflict of Laws.—The remedies to be pursued on contracts are governed by the law of the forum: *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 88 Am. St. Rep. 614, 63 N. E. 672; *Woodward v. Brooks*, 128 Ill. 222, 15 Am. St. Rep. 104, 20 N. E. 685. And all matters bearing upon the execution, interpretation, and validity of contracts, are determined by the law of the place where they are made: *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672; *Shaw v. Postal Tel. etc. Co.*, 79 Miss. 670, 89 Am. St. Rep. 666, 31 South. 222; *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363. But if a contract is made in one state to be performed in another, it is governed by the laws of the latter. They determine its validity, obligation, and effect: *Pittsburgh etc. Ry. Co. v. Shepard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61; *Crumlish v.*

Central Imp. Co., 38 W. Va. 390, 45 Am. St. Rep. 872, 18 S. E. 456; *Abt v. American Trust etc. Bank*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856; *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 South. 711; *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 851; monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 48. Although when a contract is to be partly performed in the state where made, and partly in another, the law of the former prevails: *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703; *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608. As to what law governs the sale and mortgaging of personal property, see *Aultman etc. Machinery Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373, 87 N. W. 435; *Beggs v. Bartels*, 73 Conn. 132, 84 Am. St. Rep. 152, 46 Atl. 874; *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703; monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 49, 50.

KEITH v. ALBRECHT.

[89 Minn. 247, 94 N. W. 677.]

A HOMESTEAD May be Claimed in Land of Which the Party is in Possession Under a Contract of Purchase or any other equitable title as well as if he held the legal title. (p. 568.)

HOMESTEAD—Fraudulent Conveyances.—As to a homestead there can be no conveyance which is fraudulent as to the grantor's creditors, for they have no legal claims upon it. (p. 568.)

FRAUDULENT CONVEYANCES.—A Conveyance Cannot be Fraudulent as Against Creditors Unless it can legally defraud them by delaying or preventing the collection of their claims. (p. 568.)

HOMESTEAD—Vendor's Lien.—If the whole of a tract is subject to a vendor's lien, and part of it is a homestead, the owner has a right to have the part which is not a homestead first applied to the satisfaction of such lien, and a voluntary conveyance of the whole tract to his wife is not a fraud as against his creditors, if the part not exempt as a homestead is not of sufficient value to satisfy such lien. (p. 570.)

Cliff & Purcell and R. G. Farrington, for the appellant.

Frank Palmer, for the respondent.

248 **START, C. J.** Action to set aside a transfer of a quarter section of land in the county of Lac qui Parle to the defendant as fraudulent as to the creditors of her husband, John Albrecht. The cause was tried by a referee, who, as a conclusion of law from his findings of fact, found that the conveyance was fraudulent as alleged; that the defendant held the land, and the whole thereof, in trust in favor of the creditors of her husband; that it be sold, and the proceeds thereof applied to the payment of the claims of such creditors; and that judgment be so entered. The defendant then made a motion to set aside the

report and decision of the referee, and for a new trial of the action, which was granted, and the plaintiff appealed from the order of the court granting a new trial.

There is but little dispute as to the material facts of the case, and the real question here to be determined is whether the facts justify the conclusion of law of the referee. The here material facts as found by the referee or admitted by the parties on the trial are, in substance, these: On February 25, 1892, John F. Rosenwald and J. J. Little were the owners in fee of the one hundred and sixty acres of land here in question, and on that day they entered into a written contract with John Albrecht, the defendant's husband, whereby they sold and agreed to convey to him the land upon being paid therefor the sum of nineteen hundred and twenty dollars in installments, which, with all taxes on the land, he agreed to pay as they became due. It was further agreed between the parties that, if he made default in such payments, or any part thereof, the contract should ²⁴⁹ be void at the election of the vendors, and that he should, on their demand, surrender possession of the land. The land at this time was vacant, and there were no improvements thereon. On the day named, the vendee, with his family, entered into possession of the land, and they have since resided thereon. His residence, barn, and other buildings are on the south half of the quarter section, and have been ever since he and his family entered into possession of the land.

On November 17, 1897, there was due and unpaid on the purchase price of the land to the vendors the sum of eighteen hundred and ninety-six dollars and sixty-eight cents, and they then canceled the contract to convey the land with the consent of the vendee, and in place thereof executed a contract to his wife to convey the land to her upon being paid the balance of the purchase price. She paid no consideration for the contract to her, but the consideration therefor was the payments which her husband had previously made on his contract for the land. On December 22, 1899, the vendors conveyed the land by warranty deed to the defendant, which was duly recorded. The balance of the purchase price then due was two thousand dollars, which was secured by two mortgages on the land. There has been paid on the mortgages four to five hundred dollars; the exact amount, or by whom paid, the evidence fails to show.

At the time the contract for the land was made to the defendant, the whole land was of the value of two thousand five hundred dollars, and no more. The north half thereof was then

of no greater value than twelve hundred dollars. The value of the whole of the land, when the deed was made to the defendant, was two thousand six hundred dollars. When the contract of John Albrecht was canceled, and a contract for the land made to the defendant, he was insolvent. His debts aggregated some one thousand dollars, and have never been paid. On January 24, 1900, he was, upon his own petition, adjudged a bankrupt. The plaintiff is the duly appointed and qualified trustee of his estate.

Do these facts justify the referee's conclusion of law? The answer to this question depends upon whether the south half of the land was the homestead of the debtor, Albrecht, at the time his contract for the land was canceled and a new one given to the defendant; and, if so, whether the respective rights of the debtor ²⁵⁰ and his creditors with reference to the land were the same as they would have been if the land had been actually conveyed to him, and he had given a mortgage thereon to secure the balance of the purchase price. A homestead may be claimed in land of which a party is in possession under a contract of purchase, or under any other equitable title, as well as if it were a legal title: *Wilder v. Haughey*, 21 Minn. 101; *Kaser v. Haas*, 27 Minn. 406, 7 N. W. 824; *In re Emerson's Homestead*, 58 Minn. 450, 60 N. W. 23. It follows that at the time the interest of the defendant's husband in the land was transferred to her the south half of it was his homestead, as to which there could be no fraudulent transfer as to the husband's creditors, for they had no legal claim upon it: *Morrison v. Abbott*, 27 Minn. 116, 6 N. W. 455; *Horton v. Kelly*, 40 Minn. 193, 41 N. W. 1031.

The plaintiff, however, claims that the facts of this case bring it within the rule laid down in *Rogers v. McCauley*, 22 Minn. 384, to the effect that, where the husband pays the purchase price for land, and it is conveyed, at his request, to his wife, presumptively a resulting trust attaches to the land in favor of his creditors at the time, which is not defeated by the fact that the purchase was made and the title vested in the wife for the purpose of making the land the homestead of the family, and that after the purchase he placed a house thereon, and always thereafter resided with his family upon it.

The case relied upon has no application to the facts of the case under consideration, for in that case the trust in favor of creditors attached immediately upon the conveyance of the land to the wife, and at a time when neither the husband nor his

wife had any homestead rights in the land, and she took it subject to the trust. But in this case the homestead rights attached more than five years before the transfer of the husband's interest in the land to his wife. The eighty acres of land which was the homestead passed to the defendant free from any claims of her husband's creditors. As to the other eighty acres the transfer was fraudulent as to such creditors, unless it was an act which could not legally defraud them by delaying or preventing the collection of their claims; but, if such were the character of the act, the transfer ²⁵¹ was not fraudulent: *Baldwin v. Rogers*, 28 Minn. 544, 11 N. W. 77; *Horton v. Kelly*, 40 Minn. 195, 41 N. W. 1031.

The undisputed facts in this case show beyond controversy that the value of the nonexempt eighty acres was materially less than the amount of the vendor's lien for the unpaid purchase price at the time the contract was made to the defendant, and also when the land was deeded to her. Now, if the debtor, as between himself and his creditors, had the equitable right to have the nonexempt part of his land first applied to the payment of the lien for the unpaid purchase price upon it and his homestead, precisely as if the land had been deeded to him and a purchase price mortgage given back (see *McArthur v. Martin*, 23 Minn. 74, and *Horton v. Kelly*, 40 Minn. 195, 41 N. W. 1031), the case would fall within the doctrine of *Baldwin v. Rogers*, 28 Minn. 544, 11 N. W. 77.

But the defendant claims that the rule only applies to cases where the relation of mortgagor and mortgagee actually and formally exists; that where the debtor has only an equitable title to his homestead by virtue of a contract of purchase, the vendor holding the legal title to secure the payment of the purchase price, the rule cannot apply, for in such case the creditor has the right to levy on the unexempt part of the land, and compel the homestead claimant to contribute his pro rata share of the amount necessary to pay the balance of the purchase price due. This claim, in its last analysis, is to the effect that equity will protect the homestead right where the legal title is in the debtor, subject to a mortgage lien for the purchase price, by first applying the nonexempt part of his land to the payment of the lien; but, if he has only an equitable title, and the legal title is held by the vendor to secure a lien for the purchase price, equity will not so protect his homestead rights. And yet the protection of the homestead in the latter case is quite as much within the spirit and policy of the homestead law as the former,

for, as happily expressed by Justice Cornell, "the law originated in the wise and humane policy of securing to the citizen, against all the misfortunes and uncertainties of life, the benefits of a home, not in the interest of himself, or, if a married man, of himself and family alone, but likewise in the interest of the state, whose welfare and ²⁶² prosperity so largely depend upon the growth and cultivation among its citizens of feelings of personal independence, together with love of country and kindred sentiments that find their deepest root and best nourishment where the home life is spent and enjoyed": *Ferguson v. Kumler*, 27 Minn. 156, 159, 6 N. W. 619.

Equity looks to the essential nature of a transaction, and disregards the forms in which it is cast. And we hold that the respective rights of the debtor and his creditors with reference to the land transferred to the defendant in this case were essentially the same as they would have been if the land had been deeded to him, and he had given a mortgage to secure the unpaid purchase price. It follows that this case falls within the rule of *Baldwin v. Rogers*, 28 Minn. 544, 11 N. W. 77, and that the conclusions of law of the referee were not justified by the facts of the case, and that the court rightly granted a new trial.

Order affirmed.

A Homestead may be claimed in land held under a contract of purchase: *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158, 23 Pac. 593; *Lessell v. Goodman*, 97 Iowa, 681, 59 Am. St. Rep. 432, 66 N. W. 917.

The Transfer of a Homestead cannot ordinarily be fraudulent as to the grantor's creditors, for they have no right to complain of dealings with property which the law does not allow them to apply to their claims: *First Nat. Bank v. Browne*, 128 Ala. 557, 86 Am. St. Rep. 156, 29 South. 552; *Morrow v. Bailey*, 109 Ky. 359, 95 Am. St. Rep. 382, 59 S. W. 2; *Eagle v. Amylie*, 126 Mich. 612, 85 N. W. 1111, 86 Am. St. Rep. 562, and cases cited in the cross-reference note thereto.

JOHNSON v. CHADBOURN FINANCE COMPANY.

[89 Minn. 310, 94 N. W. 874.]

INNKEEPERS, Who are.—The proprietor of an establishment who advertises and represents to his guests that he is keeping a hotel or inn, by means of signs upon the outside of the building, posts notices in the rooms as an innkeeper, and advertises that there is a café in connection with his sleeping apartments, cannot avoid his duties and responsibilities as innkeeper by showing that the café in the same building is owned and operated by other persons and that he has no hand in its management. (p. 574.)

INNKEEPERS are Prima Facie Liable for Goods Lost by Fire, but may discharge themselves from such liability by showing that the loss happened from an irresistible force or an unavoidable accident, such as by the fire originating upon premises over which they had no control and without fault or negligence on their part. (p. 576.)

INNKEEPERS—Burden of Proof.—Where goods of a guest are lost by fire while in the inn, the burden of proof is not on him to show that the innkeeper was negligent. (p. 576.)

Harrison E. Fryberger, for the appellant.

Wadsworth & Wadsworth, for the respondent.

312 COLLINS, J. The defendant in this action, a corporation, was the proprietor of what was known as the "Hotel Vendome," in the city of Minneapolis. The plaintiff and his wife, residents of Morris, in this state, while on their way to Florida, stopped for a few days at the Vendome, making preparations for their journey. They were undoubtedly transients, and were in this building when a fire occurred, February 7, 1902. They lost a quantity of personal property, such as wearing apparel and ornaments, and brought this action to recover the value of the same.

There was a general verdict for defendant, and the jury also answered three questions submitted to them by the court. By these answers they found that the defendant was not guilty of negligence by reason of its failure to remove or cause to be removed the plaintiff's property from the building at the time of the fire. **313** They also found that the plaintiff was not guilty of negligence contributing to the loss by reason of his failure to remove the goods from his room, while the third answer related to the value of the goods. Thereafter the plaintiff, upon a settled case, made a motion for judgment notwithstanding the verdict, or for a new trial. This motion being denied, plaintiff appealed.

The complaint alleged that the defendant was a hotel or inn keeper, and also that the goods were lost through its negligence. The answer denied that the establishment in question was a hotel or inn, and thereby the burden of proof was cast upon the plaintiff to show, by competent testimony, that the defendant was such a proprietor, as alleged in the complaint. Upon the testimony the court below charged the jury that the establishment was not a hotel or an inn, within the meaning of the law, and that the defendant was not a hotel or an innkeeper. The view taken by the trial court seems to have been that the establishment was shown to be nothing but a lodging-house, and then the rule was applied governing common lodging-house keepers—in effect, that the plaintiff could not recover unless the defendant failed to exercise ordinary care at the time of the fire, and was thus guilty of negligence by reason of which the goods were lost. In instructing the jury upon the subject of defendant's negligence, the trial court also charged that the burden of proof was upon the plaintiff to show that the defendant was negligent.

1. The first question which we wish to consider grows out of the fact that the court charged the jury that the building in question was not a hotel or an inn, and that the defendant was not a hotel or an inn keeper. The facts in relation to the character of the establishment were undisputed. The building was originally fitted up for offices in the upper stories, with stores upon the ground floor. One of these stores had been used as a restaurant, the proprietors being Regan Brothers. The defendant finally converted the upper stories of the building into first-class sleeping apartments. The office was upon the ground floor in one of the storerooms before mentioned. The business was conducted, concededly, as is the business in any large, first-class hotel, except that the defendant itself did not furnish meals for the guests. It had ³¹⁴ no dining-room or café. A door opened from the general entrance or hallway into the restaurant or café before mentioned, but the defendant had nothing to do with the management or operation of the café.

The establishment did not come within the definition sometimes given to the term "hotel" or "inn," and yet it answered the description of Petersdorf, who, in his Abridgment, says that an inn is a house for the reception and entertainment of all comers for gain. That the Vendome received and entertained all comers, to the extent of supplying them with rooms, for compensation, is not disputed. Justice Best describes an inn

as a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a state in which they are fit to be received. Other writers have defined an inn as a house where a traveler is furnished with everything he has occasion for while on his way, and that in an inn there must be provision for the essential needs of a traveler upon his journey—lodging as well as food. An inn has often been defined as a place for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. There is no doubt that circumstances and changes in modes of life and innovations in methods of traveling have very much affected and qualified the character of hotels and inns, and consequently the definitions thereof, of fifty years ago. At that time an inn was a house where the entertainment was for both man and beast—for one quite as much as for the other. In these days very few people travel with horses, and the old hostelries have almost entirely disappeared. Few hotel-keepers in the state, in places of any size, have barns of their own in connection with their hotels.

With these changes in the ways of the traveling public, and innovations in hotel-keeping, the definitions which have heretofore prevailed must also be changed and modified. In many cities all of the first-class places for entertainment of travelers are conducted upon the European plan solely—the rooms being furnished and rented, and the guests permitted to dine where they please³¹⁵ or are kept upon both European and American plans. Usually there is a café owned and operated by the hotel proprietor, but, as stated, in this particular instance there was none. Just what should be held if a case presented itself where there was no café or restaurant in connection with such an establishment, we are not prepared to say; but here there was a café in the building—access thereto being afforded from the office and sleeping apartments without going out of doors—and it was shown by the testimony that on the letter-heads furnished by the defendant to the guests of its house it was stated that there was a “first-class café in connection; popular prices.” And it is not disputed that the Regan Brothers’ café was referred to in this advertisement. The building itself was a hotel, according to large signs upon the outside thereof—three or more in number—announcing it as the “Hotel Vendome” and as an “European Hotel.” It also appeared from the proofs that the defendant had availed itself of the innkeeper’s law (Gen. Stats.

1894, sec. 7997 et seq.), by posting notices in each room, whereby the proprietor attempted to restrict its liability to the occupants of the rooms in case of loss of property. If the establishment was not a hotel or inn, it was masquerading as one; and we are of the opinion that the proprietor would have promptly represented a charge made, before the fire, that it was nothing but a lodging-house.

Upon the ground of public policy, we think it must be held that where the proprietor of such an establishment as this was advertises and represents to his guests that he is keeping a hotel or inn—a public place for the entertainment of transient guests—by means of signs upon the outside of the building, posts notices in the rooms as an innkeeper, and advertises and represents that there is a café in connection with his sleeping apartments, thus representing to them that he furnishes not only rooms, but meals, he must be bound thereby, and cannot avoid his duties and responsibilities as a hotel or an inn keeper by simply showing that the café in the same building is owned and operated by other persons, and that he has no hand or voice in its management.

2. The second question in this case, of importance, is as to the ³¹⁶ extent of an innkeeper's liability. That he has been held to very stringent, unyielding rule in this respect is manifest from an examination of the cases. The policy of the law has been to render him liable to the same extent as a common carrier of goods for hire, although there has been much doubt expressed as to this extraordinary responsibility in some cases. That the law requires of him extraordinary diligence in many respects—such as the care of his guests' baggage or other property which has been confided to his actual custody—there can be no doubt.

In the case of *Lusk v. Belote*, 22 Minn. 468, the common-law rule was adopted, and it was held that a landlord is responsible for the loss in his inn of the goods of a traveler who is his guest, except when such loss arises from the negligence of the guest, or the act of God or of the public enemy. There the guest's goods had been stolen from his room. It must be admitted that there has been a strong indisposition upon the part of courts to admit of any relaxation, just or unjust, of this rule, and it has been applied to all classes of public hotels. In *Edwards on Bailments*, section 462, it is stated as a reason for so stringent a rule that it was established in a period when theft and robbery were quite frequent, and innkeepers were thought

to have many opportunities, and some temptations, to combine and connive with ruffians and others in the plunder of strangers, and that it has been continued in more modern times on the ground of public utility and convenience. In two cases the reason for the continuance of such a doctrine has been discussed with great vigor, and, under the circumstances there appearing, not improperly: *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655. But the fact is that, in nearly all of the cases supporting the doctrine of absolute liability, unexplained thefts or losses of property were involved. No distinction was made between goods stolen, and goods destroyed by fire for which the landlord was in no manner responsible. That there might be a well-defined distinction does not seem to have been thought of.

But it must be admitted that the logical consequence of the strict rule is that no discrimination can be made between losses arising from thefts by other guests, or by servants, and those which result from such an entirely distinct cause as an accidental fire. However, in a number of states there has been a departure, and there has been adopted what is called the "rule of prima facie liability," and there are also decisions in England to the same effect. The doctrine is thus stated in 16 American and English Encyclopedia of Law, second edition, 536: "An innkeeper is prima facie liable for the loss of goods in his charge, but may discharge himself by showing that it happened by irresistible forces, though not the act of God or a public enemy, or by inevitable accident, or otherwise, without fault or negligence on his part"; a number of cases being cited in support thereof. *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127, and *Merritt v. Claghorn*, 23 Vt. 177, are very strong opinions in support of this rule, and in them the subject is discussed with much force and ability. *Vance v. Throckmorton*, 5 Bush (Ky.), 41, 96 Am. Dec. 327, is also a strong case in support of this view. See, also, cases cited in note to 16 Am. & Eng. Ency. of Law, 2d ed., 538.

Conceding that the rigorous rule before stated was just and necessary in its day, there never was any reason or foundation for it in cases where the loss was occasioned by an accidental fire, for which the landlord was not responsible, and when no negligence in connection therewith could be attributed to him. In the present case the fire originated upon premises not occupied by the defendant, and over which it had no control, although in the same building. From the record, it does not ap-

pear that the fire spread into that part of the building occupied by the defendant through its negligence; and, as before stated, the jury found, in answer to a special question, that the defendant was not negligent in any manner which contributed to the loss. With these conflicting rules in respect to the liability of the proprietor of a hotel or inn, we are justified in stating one to govern this case which is more just and sensible than the common-law doctrine, before referred to; but we are not quite willing to go to the extent that some of the courts have, and absolve the landlord from all liability in case of loss through thefts if he can show that they were unavoidable accidents, or were otherwise committed without fault or negligence on his part. We do not think that the landlord of a public ³¹⁸ hotel or inn should in every case of loss be held responsible to the same extent as a common carrier, and that under some circumstances they do not stand upon precisely the same footing. Public policy does not require it, nor is such a doctrine reasonable.

We therefore adopt what is known as the "rule of prima facie liability." All losses of property incurred by guests at a public hotel or inn by fire are prima facie due to the negligence of the proprietor, but he may discharge or relieve himself from liability by showing that the loss happened by an irresistible force or unavoidable accident, such as a fire originating upon premises over which he had no control, without fault or negligence on his part. This doctrine does not infringe upon the common-law rule, which makes him responsible for all thefts from within his house, or unexplained, whether committed by guests, servants, or strangers, upon the general principle that an innkeeper guarantees the good behaviour of all who may be under his roof—particularly his servants. The doctrine which we adopt, and which must control this case, is that an action cannot be maintained against a hotel or inn keeper by a guest to recover for property lost by fire which was occasioned by unavoidable casualty or superior force, and without any negligence on the part of the innkeeper or his servants. A landlord is not liable for a loss by fire happening through a cause beyond his control. He must be reasonably diligent under the circumstances known to exist after the fire breaks out, but it is not necessary that he should be extremely vigilant or cautious.

This rule is more in accordance with our views of justice, and will, we believe, commend itself to all. As before stated, the jury found that there was no negligence on the part of either plaintiff or defendant. If this cause had been properly sub-

mitted to the jury, and the jury had been instructed along the lines herein indicated, judgment could properly have been ordered for the defendant, but such was not the case. The trial court was in error not only as to the nature of the establishment kept by the defendant, but it also charged that the burden of proof was upon the plaintiff to show that the defendant was negligent. Such is not the rule, under the doctrine of *prima facie* liability, herein indorsed.

319 3. The question of the extent of defendant's liability (that is, for what goods the plaintiff may recover) is not before us. It does not seem to have been in controversy in the court below, for, without objection, the jury was permitted to find the value of all the goods lost by plaintiff. By not discussing this question we do not want to be understood as indorsing this view. That question can be considered after it has been passed upon by the court below.

Order reversed and new trial granted.

THE LIABILITY OF INNKEEPERS FOR INJURY TO, OR LOSS OF, THE PROPERTY OF THEIR GUESTS.*

- I. Nature of the Liability.**
 - a. Insurers.
 - b. Liable for Negligence.
 - c. Must Show Circumstances of Loss.
 - d. Goods Subject to Deterioration.
 - e. Liability for Loss from Fire.
- II. Relation of the Guest and Innkeeper must Exist.**
 - a. In General.
 - b. Difference Between Boarders and Guests.
- III. When the Liability Attaches and Ends.**
 - a. As soon as Intrusted to His Care.
 - b. When Goods are *Infra Hospitium*.
 - c. When Leaving the Hotel.
 - d. Liability for Goods Left After Guest's Departure.
 1. Merely as Bailee.
 2. Has Reasonable Time to Remove Goods.
 3. Effect of Intention to Return.
 4. Character of the Property.
- IV. For What Goods Liable.**
 - a. Opposing Views.
 - b. Money.
 - c. Goods for Sale or Show.
- V. Power to Make Reasonable Regulations and Limit Liability.**
 - a. Guest Must Comply Therewith.
 - b. Limiting Liability by Statute.

***REFERENCES TO MONOGRAPHIC NOTES.**

Extent of innkeepers' liability, when it begins and ends: 7 Am. Dec. 452.
For what goods innkeepers are liable: 49 Am. Dec. 229.
Negligence of guest barring action for robbery: 41 Am. Rep. 777.
Liability of innkeepers for baggage: 30 Am. St. Rep. 338; 18 Am. Rep. 130.
Am. St. Rep., Vol. 99—37

1. Nature of such Statutes.
2. To be Strictly Construed.
 - A. Posting of Notice.
 - B. Establishing Safe Place.
 - C. What Goods They Embrace.

VI. Defenses to the Action.

- a. Contributory Negligence.
 1. Generally.
 2. Failure to Lock the Door.
 3. Intoxication.
- b. Illegality.
 1. Lack of License by Landlord.
 2. Illegal Acts of the Guest.
- c. Guest Taking Exclusive Control of Goods, or Depositing Them with Other Guest.
- d. Want of Authority in Servant.

VII. Nature of the Action.

VIII. Measure of Damages.

IX. Liability to Boarders.

X. Liability of Restaurant-keepers.

I. Nature of the Liability.

a. **Insurers.**—The authorities are by no means harmonious in defining the liability of an innkeeper for the loss of, or injury to, the property of his guests, and three distinct views have been taken in this connection. The doctrine which is the strongest numerically is the one regarding the innkeeper as an insurer of the property of his guests, and liable therefor unless the loss or injury was caused by an act of God, or a public enemy, or by the fault, direct or implied of the guest: *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152, 13 Pac. 589; *O'Brien v. Vaill*, 22 Fla. 627, 12 Am. St. Rep. 219, 1 South. 137; *Cookery v. Nagle*, 83 Ga. 696, 20 Am. St. Rep. 333, 10 S. E. 491; *Weisenger v. Taylor*, 64 Ky. (1 Bush) 275, 89 Am. Dec. 626; *Shaw v. Berry*, 31 Me. 478, 52 Am. Dec. 628; *Norcross v. Norcross*, 53 Me. 163; *Mason v. Thompson*, 26 Mass. (9 Pick.) 280, 20 Am. Dec. 471; *Lusk v. Belote*, 22 Minn. 468; *Olson v. Crossman*, 31 Minn. 222, 17 N. W. 375; *Sibley v. Aldrich*, 33 N. H. 553, 66 Am. Dec. 745; *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655; *Wies v. Hoffman House*, 28 Misc. Rep. 225, 59 N. Y. Supp. 38; *Neal v. Wilcox*, 49 N. C. (4 Jones) 146, 67 Am. Dec. 266; *Houser v. Tully*, 62 Pa. St. 92, 1 Am. Rep. 390; *Manning v. Wells*, 28 Tenn. (9 Humph.) 746, 51 Am. Dec. 688; *Morgan v. Ravey*, 6 Hurl. & N. 265, 30 L. J. Ex. 131; *Richmond v. Smith*, 2 Man. & R. 235, 8 Barn. & C. 9. And see *Minton v. Courtney*, 2 N. C. (1 Hayw.) 40.

The reasons for the establishment of this rule are clearly set forth in *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405, affirming 42 Barb. 230, in the following language: "This custom, like that in the kir-

ired case of the common carrier, had its origin in considerations of public policy. It was essential in the interests of the realm that every facility should be furnished for secure and convenient intercourse between different portions of the kingdom. The safeguards, of which the law gave assurance to the wayfarer, were akin to those which invested each English home with the legal security of a castle. The traveler was peculiarly exposed to depredation and fraud; he was compelled to repose confidence in a host, who was subject to constant temptation, and favored with peculiar opportunities, if he chose to betray his trust. The innkeeper was at liberty to fix his own compensation, and enforce summary payment; his lien, then, as now, fastened upon the goods of his guest from the time they came to his custody. The care of the property was usually committed to servants, over whom the guest had no control, and who had no interest in its preservation, unless their employer was held responsible for its safety. In case of depredation by collusion, or of injury or destruction, by neglect, the stranger would, of necessity, be at every possible disadvantage; he would be without the means either of proving guilt or of detecting it. The witnesses to whom he must resort for information, if not accessories to the injury, would, ordinarily, be in the interest of the innkeeper. The sufferer would be deprived, by the very wrong of which he complained, of the means of remaining to ascertain and enforce his rights, and redress would be wellnigh hopeless, but for the rule of law casting the loss on the party intrusted with the custody of the property, and paid for keeping it safely.

"The considerations of public policy in which the rule had its origin forbid any relaxation of its rigor. The number of travelers was few, when this custom was established for their protection. The growth of commerce and increased facilities of communication have so multiplied the class for whose security it was designed, that its abrogation would be the removal of a safeguard against fraud, in which almost every citizen has an immediate interest. The rule is in the highest degree remedial. No public interest would be promoted by changing the legal effect of the implied contract between the host and the guest, and relieving the former from his common-law liability."

The innkeeper is liable without actual fault or neglect on his part, which is presumed and need not be proved; and the fact that he was not negligent on his part, but actually diligent in attempting to preserve the property of his guests, is no bar to an action for their loss: *Shaw v. Berry*, 31 Me. 478, 52 Am. Dec. 628; *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212; *Burrows v. Trieber*, 21 Md. 320, 83 Am. Dec. 590; *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762; *Batterson v. Vogel*, 10 Mo. App. 235; *Cheesebrough v. Taylor*, 12 Abb. Pr. 227; *Willard v. Reinhardt*, 2 E. D. Smith, 148; *Van Wyck v. Howard*, 12 How. Pr. 147; *Fowler v. Dorlon*, 24 Barb. 384; *Shultz v. Wall*, 134

Pa. St. 262, 19 Am. St. Rep. 686, 19 Atl. 742; *Jalie v. Cardinal*, 35 Wis. 118.

The burden of proving that the loss of the goods was due to the negligence of the guest himself, of a companion of his, or an act of irresistible force, is on the innkeeper: *Dunbier v. Day*, 12 Neb. 596, 41 Am. Rep. 772, 12 N. W. 109.

In *Treiber v. Burrows*, 27 Md. 180, it was held that as to baggage, an innkeeper stood on the same footing as a carrier of passengers. That his liability, though not precisely the same, is analogous to that of a common carrier, see *Batterson v. Vogel*, 10 Mo. App. 235.

b. Liable for Negligence.—The second view is that he is *prima facie* liable for the loss of goods in his charge; but he may relieve himself from this liability by showing that they were not lost by his negligence or default, the burden of proof in such case being on him: *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *Eden v. Drey*, 75 Ill. App. 102; *Hulbert v. Hartman*, 79 Ill. App. 289; *Hill v. Owen*, 5 Blatchf. (Ind.) 323, 35 Am. Dec. 124; *Laird v. Eichold*, 10 Ind. 212, 71 Am. Dec. 323; *Baker v. Dessauer*, 49 Ind. 28; *Bowell v. De Wald*, 2 Ind. App. 303, 50 Am. St. Rep. 240, 28 N. E. 430; *Newson v. Axon*, 1 McCord (S. C.), 509, 10 Am. Dec. 685; *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218; *Dawson v. Chamney*, D. & M. 348, 5 N. B. 164.

Metcalf v. Hess, 14 Ill. 129, and *Hill v. Owen*, 5 Blatchf. (Ind.) 323, 35 Am. Dec. 124, which established this doctrine in Illinois and Indiana, were cases dealing with the liability of an innkeeper for the death of a horse, in the former of which it was said: "It is a harsh rule which makes a person in any case responsible for a loss which has occurred without any fault of his, and it can only be justified upon grounds of public policy, and in consideration of the numerous opportunities afforded by the nature of his business, for fraudulent combination and clandestine dealing, to the injury of the owner of the property. The rule ought not to be extended beyond the reason in which it originated. An innkeeper can have no motive to destroy the animal of his guest, and there is not the same reason for holding him responsible, at all events, for such a loss, as there would be a common carrier, or even an innkeeper, for the loss of goods which had disappeared from his possession; because, in the latter case, he may have converted the goods to his own use, while in the former he would gain nothing by the death of the animal." The rule, however, is not confined to the loss of animals, but extends to the other personal property of the guest.

c. Must Show Circumstances of Loss.—The third view, in reality an offshoot of the one just discussed, is that the innkeeper is discharged by showing how the accident happened; that it occurred by inevitable accident or irresistible force, although the accident might not amount to what is known as an act of God, and the force

might not be the power of a common enemy: *Merritt v. Claghorn*, 23 Vt. 177. In *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574, Chief Justice Redfield said: "I do not think a jury could be allowed to exonerate an innkeeper from the loss of the goods of his guest upon presumption merely, or indeed without proof of some of the circumstances ordinarily attending the breaking of a house securely fastened. It is the distinctive peculiarity of this species of bailment that the host is *prima facie* holden for the restitution of the goods of his guests. And to make this rule of any practical utility, it is indispensable to hold the host to proof of the mode in which the goods were taken from him, and that it was without any fault or negligence on his part.

"And if his house is properly secured, and the goods properly guarded, . . . it is fairly supposable that some trace of its departure may ordinarily be found. And when a case occurs that possibly or probably professional robbers may have succeeded in eloining money or other goods without leaving footprints, it is better that the innkeeper should be held liable until he can prove the mode of the loss than that so beneficial a rule of law, and one so indispensable to the quiet and comfort of travelers, should be virtually demolished."

In *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72, 48 Am. Dec. 416, the court held that he would not be liable for any loss occasioned by external force or robbery; and in *Woodworth v. Morse*, 18 La. Ann. 156, that he would be responsible where their effects were stolen, but not if he showed that force and arms, or extraordinary violence, were used in accomplishing that object.

d. **Goods Subject to Deterioration.**—In *Howe Mach. Co. v. Pease*, 49 Vt. 477, after stating the rule that the loss of goods at an inn will be presumptive evidence of the innkeeper's negligence, but that he may repel this presumption by showing no negligence, or inevitable casualty or superior force, the court proceeded: "This rule of law is of universal application as to all species of property put in charge of the landlord by the guest. But when the matter of fact, whether the landlord is in fault in a particular case, is being inquired into and ascertained, in the application of the rule to different species of property and different conditions of property, counter presumptions are often met which exonerate the landlord from any fault. Animals subject to disease; cutlery and machinery, liable to rust; fresh fruits and fish, liable to decay—possess within themselves the germs and susceptibilities that that work out such results. If a horse becomes suddenly diseased, with the botts or other malady, or if fruits perish in the package as delivered to the landlord, the natural presumption is that this condition occurred in the due course and order of things, and from the inherent qualities of the property; and the imputed fault or negligence of the landlord is repelled."

e. **Liability for Loss from Fire.**—The liability of innkeepers for loss originating from fire has caused much discussion among the authorities, and many of them are inclined to relax the rigor of the rule holding them responsible, even in the absence of neglect on their part.

The cases which hold the innkeeper responsible for loss by fire not originating from their negligence, have been severely criticised. Mr. Justice Campbell, in *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127, speaking in this connection, said: "The doctrine imposing such a liability may be said to rest entirely on what was said by Justice Porter, in *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405. In that case the subject is discussed at some length, and with much ability. But no foundation is shown there for the doctrine asserted, beyond remarks which are confessedly opposed to the text-books, and which were foreign to what was actually decided in the cases where they are found. The whole opinion of the learned judge is open to the same criticism; as he himself declares the point discussed did not really arise, inasmuch as no proof was introduced changing the presumption raised by law against the defendant. The opinion was not unanimous, and the dissent of Judge Denio would detract much from its force, even if it had been pertinent to the facts.

"Opposed to this is the case of *Merritt v. Claghorn*, 23 Vt. 177, in which Judge Redfield, delivering the opinion of the court, reached the conclusion that where there was no negligence there was no responsibility for loss by fire. This opinion is an able one, and was not given beyond the facts. It has been both approved and criticised, but no occasion has heretofore arisen to consider its correctness upon similar facts. *Vance v. Throckmorton*, 68 Ky. (5 Bush) 41, 96 Am. Dec. 327, is to the same effect, but there, too, the decision might have rested on other grounds, and its authority is therefore diminished": See, also, *Johnson v. Chadbourne Finance Co.* (principal case), 89 Minn. 310, 94 N. Y. 870, ante, p. 571.

The case of *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405, adverted to in the above quotation, occasioned the passage of a statute providing that no innkeeper should be liable for loss or damage to the goods of his guests by fire, unless it should appear that such was the work of an incendiary, and occurred without the fault or negligence of the innkeeper. Construing this statute, the court held that the burden was upon the innkeeper to show that the fire was an incendiary one, and that there was no negligence on his part; and that negligence which precedes and facilitates the commission of the crime was as much within the statute as the negligent omission to protect and remove the property of the guest after the fire had commenced: *Faucett v. Nichols*, 64 N. Y. 377.

In Maine by statute, innholders are made answerable to their guests, in case of loss by fire, only for ordinary and reasonable care in the custody of their property: *Burnham v. Young*, 72 Me. 273.

A fire is not within the meaning of the phrase, "irresistible superhuman cause," as used in the California statute, such being equivalent to the words "act of God," and not relieving from liability unless the fire was started by lightning or some superhuman agency: *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198, 28 Pac. 243, affirming 93 Cal. 253, 26 Pac. 1099.

II. Relation of Guest and Innkeeper must Exist.

a. **In General.**—Before liability as an innkeeper can be made to attach, it is absolutely necessary that the relation of guest and host exist: *Thickstun v. Howard*, 8 Blackf. (Ind.) 535; *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762; *Centlivre v. Ryder*, 1 Edm. Sel. Cas. 273; *Coykendall v. Eaton*, 55 Barb. 188, 37 How. Pr. 438; *Strauss v. County Hotel etc. Co.*, 12 Q. B. Div. 27. Where, therefore, the plaintiff was the guest of a club, which gave a banquet at an inn, which he attended on the invitation and at the expense of the club, and at which he lost his hat, it was held that the innkeeper was not liable, he acting merely as caterer: *Amey v. Winchester*, 68 N. H. 447, 73 Am. St. Rep. 614, 39 Atl. 487.

A conflict has arisen as to whether the relation of guest and host arises where the plaintiff leaves property of his at the inn, but does not receive entertainment there himself. In *Russell v. Fagan*, 7 Houst. (Del.) 389, 8 Atl. 258, and *Mason v. Thompson*, 26 Mass. (9 Pick.) 280, 20 Am. Dec. 745, it was held such person was a guest, and entitled to recover for the loss of a horse, which had been delivered to the innkeeper: See, also, *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574. Other authorities entertain a different view, holding that in such case he is liable only as an ordinary bailee for hire: *Healey v. Gray*, 68 Me. 489, 28 Am. Rep. 80; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663; *Ingallsbee v. Wood*, 33 N. Y. 577, 88 Am. Dec. 405.

b. **Difference Between Boarders and Guests.**—The fact that a person is living at an inn is not of controlling importance in determining the relation existing between him and the owner thereof. It is necessary that he be living there as guest and not boarder, for as to the latter the innkeeper is not held to the same high degree of care, but only as bailee: *Chamberlain v. Masterson*, 26 Ala. 371; *Haff v. Adams* (Ariz.), 59 Pac. 111; *Russell v. Fagan*, 7 Houst. (Del.) 389, 8 Atl. 258; *Vance v. Throckmorton*, 68 Ky. (5 Bush) 41, 96 Am. Dec. 327; *Taylor v. Downey*, 104 Mich. 532, 53 Am. St. Rep. 472, 62 N. W. 716; *Neal v. Wilcox*, 49 N. C. (4 Jones) 146, 67 Am. Dec. 266; *Manning v. Wells*, 28 Tenn. (9 Humph.) 746, 51 Am. Dec. 688. "An establishment may have a double character," said the court in *Haff v. Adams* (Ariz.), 59 Pac. 111, "being both a boarding-house and an inn. In respect to transient persons, who, without any stipulated contract, remain from day to day, it would be an

inn; while as to those residing there under special contracts, it would be a boarding-house: *Hale on Bailments*, 262, and cases cited. 'In this country, hotel-keepers act in a double capacity, being both innkeepers and boarding-house keepers. As innkeepers they entertain travelers and transient persons—those who come without bargain as to time and price, and go away at pleasure, paying only for actual entertainment received. As boarding-house keepers they entertain residents and regular boarders for definite lengths of time, and at special prices, previously agreed upon': *Lawrence v. Howard*, 1 Utah, 142."

A restaurant is not an inn, so as to subject the proprietor to the liability of an innkeeper: *Carpenter v. Taylor*, 1 Hilt. (N. Y.) 193; nor is a bath-house, the proprietor of which also keeps an inn, separate and apart therefrom: *Minor v. Staples*, 71 Me. 316, 36 Am. Rep. 318.

III. When the Liability Attaches and Ends.

a. *As Soon as Intrusted to His Care.*—It next becomes important to determine when liability for the property of the guests attaches, and the rule in this connection is well expressed in *Sasseen v. Clark*, 37 Ga. 242, in the following language: "The liability of an innkeeper for the goods of his guests, intrusted to his care, or to the care of his servants, begins from the time the goods are intrusted, and the place where the innkeeper usually takes charge of the baggage of his guests. At our railroad depots the innkeepers very often have their servants, usually called porters, for the purpose of taking charge of the goods of travelers in order to induce them to become guests of the hotel. A traveler delivers his trunk or other personal property to one of these servants to be taken to the hotel, he thereby impliedly contracts to become a guest of the hotel to which the servant is attached; and if he comply with such implied contract, the liability of the hotel-keeper for the care of the goods begins from the time of the delivery to his servant, and that liability continues until the goods be again delivered to the actual custody and control of the guest": See, also, *Eden v. Drey*, 75 Ill. App. 102. The baggage itself need not be delivered, and it is sufficient if a check therefor be given, the liability commencing then: *Williams v. Moore*, 69 Ill. App. 618; the delivery of such check being *prima facie* evidence of the delivery of the baggage which it represents: *Carhart v. Wainman*, 114 Ga. 632, 88 Am. St. Rep. 45, 40 S. E. 781.

It makes no difference that the porter was not authorized to receive baggage or checks or guests at the hotel, his duty being simply to advertise the hotel and suggest it to strangers, where the traveler knew of no such limitation on his authority, but only knew that he was the porter of the hotel: *Caskery v. Nagle*, 83 Ga. 696, 20 Am. St. Rep. 333, 10 S. E. 491. Nor is he relieved from liability

by the fact that the conveyance which he used for transportation was not his, but was furnished by an independent carrier: *Caskery v. Nagle*, 83 Ga. 696, 20 Am. St. Rep. 333, 10 S. E. 491; *Dickinson v. Winchester*, 58-Mass. (4 Cush.) 114, 50 Am. Dec. 760.

b. **When Goods are Infra Hospitium.**—It is not necessary that the goods should have been placed in the special keeping of the innkeeper, in order to make him liable, and if the plaintiff is a guest and the goods are within the inn, that is sufficient to charge him: *Norcross v. Norcross*, 53 Me. 163; *McDonald v. Edgerton*, 5 Barb. 560, citing *Bennett v. Mellor*, 5 Term Rep. 273.

No little difficulty has been encountered in determining when goods of a guest may be said to be *infra hospitium*, or within the inn so as to hold the innkeeper responsible. In *Maloney v. Bacon*, 33 Mo. App. 501, a traveler, after turning his trunk over to a transfer company at the depot to be taken to his hotel, proceeded to the hotel, registered, and was assigned a room. Before going there he told the clerk that the trunk was following him, and asked that it be sent to his room as soon as it came, which the clerk promised to do. The transfer company, in the customary way as practiced between the hotel-keeper and the transfer men, delivered the trunk on a platform immediately in front of the hotel, where the baggage of guests was commonly received. This was held a delivery of the trunk within the inn, making the innkeeper liable for its loss.

In that case several of the authorities are discussed, showing what acts have been considered as placing property within the inn, the court saying: "In *Piper v. Manny*, 21 Wend. 282, the plaintiffs stopped at defendant's inn with a sleigh-load of butter. The hostler, with plaintiff's knowledge, directed the sleigh to be placed in the 'yard,' which was 'an open, uninclosed space, within sixteen or eighteen yards of the center of the traveled part of the highway from where defendant's house was situated.' A tub of butter being stolen during the night, it was held that the butter was *infra hospitium*, and that defendant was liable therefor.

"In *Clute v. Wiggins*, 14 Johns. 175, 7 Am. Dec. 448, plaintiffs stopped at defendant's inn with a sleigh-load of wheat, which was placed in an outhouse appurtenant to the inn, 'where it had been usual for the defendant to receive loads of that description.' The wheat being stolen, defendant was held liable.

"In *Jones v. Tyler*, 1 Ad. & E. 522, plaintiff drove his gig to defendant's inn on Bewdley fair day; the hostler 'of the defendant took the horse out of the gig and put him into a stable, and plaintiff carried his coat and whip from the gig into the house, and took some refreshments there. The hostler placed the gig outside of the innyard, in a part of the open street in which the defendant was in the habit of placing the carriages of his guests on fair days. The gig was stolen from thence,' and the decision was that it was *infra hospitium*.

"In Calye's Case, 8 Coke, 32 (1 Smith Lead. Cas. 131), which contains much of the foundation of the law of the mutual relations and responsibilities of innkeepers and guests, it was held that if the guest direct that his horse be put to pasture and it be stolen, there is no liability; but if he do not so request and the innkeeper put the horse to pasture, 'of his own head,' he shall answer if the horse be stolen.

"So, in *Hawley v. Smith*, 25 Wend. 642, plaintiff, a drover with seven hundred sheep, stopped at defendant's inn, and 'the sheep were put to pasture under the direction of the guest,' and the defendant was held not answerable as an innkeeper for their being poisoned. This from the fact that they were not within the inn.

"From these authorities it may be stated that, in order to render the innkeeper liable for a loss of his guest's property, it is not essential in all cases, in order to be *infra hospitium*, that such property should be left within the walls of the inn, nor within the walls of buildings appurtenant and used in connection therewith, nor yet within the limits of the inclosure surrounding such buildings."

Where a traveler, after arriving at an inn, placed his loaded wagon under an open shed near the highway, and made no request to the innkeeper to take the custody of it, and goods were stolen from it in the night, the innkeeper was held not liable for the loss, notwithstanding it was usual to place loaded teams in that place: *Albin v. Presby*, 8 N. H. 408, 29 Am. Dec. 679; and this decision was followed in *Bradley Livery Co. v. Snook*, 66 N. J. L. 654, 50 Atl. 358, where a team of horses was tied under a shed without calling the innkeeper's attention to the fact or putting them in the custody of the hostler.

In *Cohen v. Manuel*, 91 Me. 274, 64 Am. St. Rep. 225, 39 Atl. 1030, an innkeeper directed his guest to take his horse and cart to a livery-stable belonging to the innkeeper, but not connected with the inn, and the guest did so, putting the horse and cart in the care of the innkeeper's hostler. This was held to constitute a delivery to the innkeeper, and that the property was *infra hospitium*.

That he is liable for the loss of a parcel left in the lobby or hall of an inn, see *Candy v. Spencer*, 3 Fost. & F. 306.

c. *When Leaving the Hotel.*—Where the innkeeper take charge of the goods at the hotel, to deliver them at the depot, or other point of departure, for the guest, his liability continues until such delivery: *Sasseen v. Clark*, 37 Ga. 242. So where a guest paid his hotel bill at noon, which entitled him to the use of his room for the entire day, and he informed the clerk that he intended leaving, and requested him to send his trunk at 4 o'clock on the same day to a particular steamer, leaving him money for that purpose, and the clerk delivered the trunk to the porter, the hotel proprietor was held liable where through negligence or mistake, the trunk was

taken to the wrong steamer, and there broken open and its contents stolen: *Giles v. Fauntleroy*, 13 Md. 126.

In *Seymour v. Cook*, 53 Barb. 451, 35 How. Pr. 180, the plaintiff paid his bill and requested the innkeeper to get his horses, which had been stabled in the barn. The latter told him to go on and be hitching up and he, the innkeeper, would be out in a few minutes. While leading one of his horses out, it received a kick from a horse belonging to a third person, resulting in its death. The court held that the defendant was responsible therefor, his liability as an innkeeper not being at an end when the injury occurred, and the horses being still on his premises, and that the plaintiff was only doing for the defendant, and with his assent, what it was his duty to do himself.

d. Liability for Goods Left After Guest's Departure.

1. **Merely as Bailee.**—We now come to a class of cases dealing with the liability of an innkeeper for loss or injury to property left with him by a guest after the latter has left the hotel. The general rule in such a case is that the guest, by his departure, has ceased to become such, and that the hotel-keeper's liability is not that of an innkeeper, but merely of a bailee, where the goods are committed to his charge: *Wear v. Gleason*, 52 Ark. 364, 20 Am. St. Rep. 186, 12 S. W. 756; *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152, 13 Pac. 589; *Brown Hotel Co. v. Burckhart*, 13 Colo. App. 59, 56 Pac. 183; *O'Brien v. Vail*, 22 Fla. 627, 12 Am. St. Rep. 219, 1 South. 137; *Hoffman v. Roessle*, 39 Misc. Rep. 787, 81 N. Y. Supp. 291; *White-more v. Haroldson*, 70 Tenn. (2 Lea) 312; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; 28 Vt. 387, 67 Am. Dec. 720. And where the property is left behind without calling the innkeeper's attention to that fact, the owner acts at his own peril, as the host has a right to believe that he has taken it with him, and is therefore no longer responsible for its safekeeping: *Glenn v. Jackson*, 93 Ala. 842, 9 South. 259; *Wintermute v. Clarke*, 7 N. Y. Super. Ct. (Sand.) 242. In *Stewart v. Head*, 70 Ga. 449, a guest left a valise in the hotel office, without calling attention thereto, and the clerk, not knowing who the owner was, took it into a room where baggage was kept, and it was subsequently broken open and the contents taken. The landlord was held to be a naked depositary, liable only for gross negligence.

2. **Has Reasonable Time to Remove Goods.**—The innkeeper's liability does not cease the very instant the guest pays his bill, but he has a reasonable time in which to remove his goods, during which period the extraordinary liability attaches, what is a reasonable time to be estimated according to the circumstances of the case: *Adams v. Clem*, 41 Ga. 66, 5 Am. Rep. 524; *Baehr v. Downey* (Mich.), 94 N. W. 750; *Maxwell v. Gerard*, 84 Hun, 537, 32 N. Y. Supp. 849.

He may also become liable for property of the guest which arrives at the inn after his departure. So where a landlord promised to for-

ward goods which were expected to arrive after the guest had left, and it was delivered at the hotel, but not forwarded or returned to the sender, the landlord was held liable as an ordinary bailee, the refusal or neglect to return the property on demand making out a *prima facie* case against him: *Baehr v. Downey* (Mich.), 94 N. W. 750.

3. *Effect of Intention to Return.*—The fact that a guest leaves for a brief period of time, intending to return, does not terminate the relation of guest and innkeeper so as to relieve the latter from responsibility for the safekeeping of property left at his hotel during that time: *McDonald v. Edgerton*, 5 Barb. 560, citing *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663.

The expectation of returning is not of controlling importance, however, where that relation has actually been severed. Where, therefore, a guest paid his bill and had his name checked from the register in order to release himself from liability as a guest during a days' absence out of town, although he intended to return at night, the relation of guest and innkeeper was held terminated so as to relieve the latter from liability for the loss of a valise left at his inn: *Miller v. Peebles*, 60 Miss. 819, 45 Am. Rep. 423. See, also, *Hays v. Turner*, 23 Iowa, 214.

In *Murray v. Clarke*, 2 Daly, 102, a guest surrendered his room and requested the defendant's clerk to take charge of his valise during a short absence from the city, when he would return and pay his bill. The valise was handed over, a brass check being given therefor to its owner. On his return several days later, after registering his name and being assigned a room, he called for his valise and presented the check, but it could not be found. The court held that the landlord was bound to the exercise of ordinary care, whether regarded as a bailment or property in his hands, on which he had a lien for the unpaid bill, and that the burden was on him to show the circumstances of the loss, in the absence of which he would be presumed guilty of negligence.

4. *Character of the Property.*—The character of the property left behind is also of importance, and a distinction has been made where it is such that the innkeeper derives profit from its keep and where he does not: *Towson v. Havre de Grace Bank*, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254, where the court said: "Innkeepers are answerable, by reason of the profit arising either from the keeping of the horses, etc., of their guests, or from the entertaining of the guests themselves, in the case of money or other property, from the keeping of which alone no profit can arise. So that if a guest goes to an inn, and leaves his horse there with the host, and goes away himself for a time, and, in his absence, the horse is stolen, the host is chargeable on account of the profit arising from the keeping of the horse; but if he goes away for several days, leaving money or other 'dead' property there, which is stolen or lost during his absence, the host

is not answerable for the loss, as at that time he was deriving no profit or gain, either from the keeping of the money or goods, or from the entertaining of the guest himself. . . . An innkeeper is only responsible for money or other dead property lost in his inn, where the party losing it was a guest at the inn at the time of the loss, the profit arising from the entertaining of the guests, as before remarked, being the foundation of his liability. In an action, therefore, against an innkeeper, for the loss of such property in his inn, it is necessary to be set out in the declaration that the plaintiff was a guest at the inn at the time of the loss, that being the essence of the action, without which the court could not have sufficient ground to give judgment": See, also, *Hays v. Turner*, 23 Iowa, 214.

IV. For What Goods Liable.

a. *Opposing Views.*—If a guest puts up at an inn, the landlord must take care of the goods belonging to him, and which are within the inn. In *Bennett v. Mellor*, 5 Term Rep. 273, the plaintiff's servant came to an inn and desired permission to leave certain goods which he could not dispose of in the market until the next week, which proposal was rejected. He then sat down in the inn as a guest, with the goods behind him, and during that time they were taken away. The court held that he was a guest and his goods entitled to protection, and this, although the proposal to leave them there had been rejected.

His responsibility extends, *prima facie*, to every part of the house into which it is usual for property to be taken, and he is therefore liable for money stolen from his guest's trunk, which had been taken to his room, in the absence of a different understanding in regard thereto: *Eppe v. Hinds*, 27 Miss. 651, 61 Am. Dec. 528.

Two opposing doctrines present themselves in determining to what property the innkeeper's liability extends. One is to the effect that he is liable for all the goods brought by a guest and received within the inn; the other, that his responsibility is limited to such only as are necessary incidents of travel, usually denominated "baggage."

In support of the former view may be cited *Eden v. Drey*, 75 Ill. App. 102; *Hilton v. Adams*, 71 Me. 19; *Berkshire Woolen Co. v. Proctor*, 61 Mass. (7 Cush.) 417; *Kellogg v. Sweeney*, 1 Lans. 397; *Needles v. Howard*, 1 E. D. Smith, 54; *Van Wyck v. Howard*, 12 How. Pr. 147; *Taylor v. Monnot*, 1 Abb. Pr. 325; *Houser v. Tully*, 62 Pa. St. 92, 1 Am. Rep. 390. That he is liable for property subsequently arriving see *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Needles v. Howard*, 1 E. D. Smith, 54.

Several respectable authorities, however, follow the latter doctrine, limiting the innkeeper's liability to baggage alone: *Sesseen v. Clark*, 37 Ga. 242; *Vance v. Throckmorton*, 68 Ky. (5 Bush) 41, 96 Am. Dec. 327; *Woodworth v. Morse*, 18 La. Ann. 156; *Freiber v. Burrows*, 27 Md. 130. It is for the jury to decide from all the facts

and circumstances what articles may be denominated baggage: *Sasseen v. Clark*, 37 Ga. 242. Accordingly, it has been held that a revolver and surgical instruments, the guest not being a physician, surgeon, or medical student, were not within the meaning of that term: *Giles v. Fauntleroy*, 13 Md. 126; nor were silver knives, forks and spoon carried in a guest's trunk: *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212.

b. **Money.**—The landlord is responsible to the same extent for money belonging to his guest as he is for other kinds of property: *Kent v. Shuckard*, 2 Barn. & Adol. 803; and at common law this liability was not limited as to amount: *Smith v. Wilson*, 36 Minn. 334, 1 Am. St. Rep. 669, 31 N. W. 167. But under the authorities restricting the innkeeper's liability to the guest's baggage, only a sufficient amount of money, reasonably necessary on the journey, is to be regarded as within that term: *Simon v. Miller*, 7 La. Ann. 360; *Noble v. Milliken*, 74 Me. 225, 43 Am. Rep. 581; *Freiber v. Burrows*, 27 Md. 130; *Taylor v. Monnot*, 1 Abb. Pr. 325; and whether it is reasonable and necessary for traveling expenses is a question of fact for the jury: *Maltby v. Chapman*, 25 Md. 310.

A traveler need not deposit all his money with the landlord, and the fact that he keep a fairly large sum for use on the journey about his person will not render the innkeeper less liable: *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *Pope v. Hall*, 14 La. Ann. 324; nor is a usage at an inn, for guests to leave their money or valuables in the keeping of the proprietor, binding upon the guest, in the absence of actual knowledge thereof by him, and evidence of such a custom is inadmissible: *Berkshire Woolen Co. v. Proctor*, 61 Mass. (7 Cush.) 417.

Where money has been specially intrusted to his hands, the landlord is liable, regardless of amount: *Simon v. Miller*, 7 La. Ann. 360; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655. So where an innkeeper gave notice that he would not be responsible for the money of his guests unless deposited in the safe at the office, and it was the custom for guest to deposit there, it was no defense that the amount so placed there was beyond what was sufficient for reasonable traveling expenses: *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

In *Woodward v. Birch*, 67 Ky. (4 Bush) 510, the innkeeper was held liable though he told his guest that he would not be responsible for money deposited in his safe, it having recently been robbed, but it was nevertheless placed there and stolen by a discharged clerk, who had had a false key to the safe made, which fact was known to the innkeeper, who made no change in the lock.

c. **Goods for Sale or Show.**—In regard to property brought to a hotel for the purposes of sale or show, such as the goods of commercial travelers, the law does not hold the innkeeper to his strict liability, but only to the exercise of ordinary care, and answerable

for negligence: *Neal v. Wilcox*, 49 N. C. (4 Jones) 146, 67 Am. Dec. 266; *Scheffer v. Corson*, 5 S. Dak. 233, 58 N. W. 555; *Jalie v. Cardinal*, 35 Wis. 118; *Myers v. Cottrill*, 5 Biss. 465, Fed. Cas. No. 9985; *Farnworth v. Packwood*, 1 Stark. 249.

Where a Missouri statute provided that no innkeeper should be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest should have given written notice of having such merchandise in his possession, it was held that actual knowledge that a guest had such goods for sale, or the innkeeper's consent to the guest's use of one of his rooms for such purpose, did not render him liable for the safety of the property, the written notice required by statute being absolutely essential: *Fisher v. Kelsey*, 121 U. S. 383, 7 Sup. Ct. Rep. 929, affirming 16 Fed. 71. See, also, *Becker v. Haynes*, 29 Fed. 441.

V. Power to Make Reasonable Regulations and Limit Liability.

a. **Guest Must Comply Therewith.**—In *Van Wyck v. Howard*, 12 How. Pr. 147, the court said: "There can be no doubt of the innkeeper's right to make such regulations in the management of his inn as will more effectually secure the property of his guests and operate as a protection to himself, and that it is incumbent upon the guest, if he means to hold the innkeeper to his responsibility, to comply with any regulation that is just and reasonable, when he is requested to do so: *Richmond v. Smith*, 8 Barn. & C. 9; *Burgess v. Clements*, 4 Maule & S. 306. . . .

"If the landlord, to enable him the more effectually to secure the property, requires something to be done by the guest, it must appear that what was required was in itself reasonable, and that the guest was distinctly informed of what was necessary to be done on his part. Whether the request was made orally or in the form of a printed notice, it should be in terms so clear and unmistakable as to leave room for no reasonable doubt as to what was intended": See, also, *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754; *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82.

In *Bodwell v. Bragg*, 29 Iowa, 232, it was held that the mere posting in a guest's room of a notice limiting the liability of the innkeeper, unless deposited in the hotel safe, did not operate as notice to the guest of its contents, if it was not shown to have been brought to his knowledge, or that he willfully and fraudulently remained in ignorance thereof.

b. Limiting Liability by Statute.

1. **Nature of Such Statutes.**—In several jurisdictions innkeepers are enabled by statute to limit their liability by providing a safe place in which money and valuables of a guest may be deposited, and by posting notice of that fact in certain designated places: *Beale v. Posey*, 72 Ala. 323; *Watson v. Loughran*, 112 Ga. 837, 38 S. E.

82; *Woodworth v. Morse*, 18 La. Ann. 156; *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728; *Elcox v. Hill*, 98 U. S. 218; and the burden is on the innkeeper to show a substantial compliance with all its requirements: *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114.

While limiting the common-law liability of innkeeper so that it does not extend to money, jewels or ornaments not deposited in the safe, where the statute is complied with, it does not alter their liability as insurers aside from this: *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655. See, also, *McClay v. Nash*, 6 Ky. Law Rep. 298. It is said in *Wies v. Hoffman House*, 28 Misc. Rep. 225, 59 N. Y. Supp. 38: "The statutory provisions exempting the innkeeper from liability for the loss of money, jewels or ornaments where he provides a safe for their keeping and posts the requisite notice in conspicuous places on the premises . . . are to be construed, not so much as limiting or modifying his liability as insurer, but as making the guest chargeable with negligence if he omits to avail himself of the means of protection afforded. The innkeeper is still strictly an insurer; but a failure by the guest to comply with the statute on his part will be such negligence as will defeat the enforcement of liability."

The benefit of such statute may be waived by the managing officer or clerk of a hotel, as where he authorizes a guest to leave valuables in his room: *Friedman v. Breslin*, 51 App. Div. 268, 65 N. Y. Supp. 5, affirmed, 169 N. Y. 574, 61 N. E. 1129.

2. To be Strictly Construed.

A. Posting of Notice.—Statutes of this character, being in derogation of the common law, are to be strictly construed: *Briggs v. Todd*, 28 Misc. Rep. 208, 59 N. Y. Supp. 23. So where it is provided that he must keep posted on his door, and other public places in his house of entertainment, written or printed notices to his guests that they must leave their valuables with the landlord, it must be held to mean that such notices should be posted on all the doors of rooms occupied by guests: *Lanier v. Youngblood*, 73 Ala. 587; and a mere posting of notice on a single door of the hotel, however public it may be, is not a compliance with the statute: *Beale v. Posey*, 72 Ala. 323.

A printed copy of the notice at the head of the hotel register is not a compliance with the statute, nor is a verbal notice: *Olson v. Crossman*, 31 Minn. 222, 17 N. W. 375. See, also, *Bernstein v. Sweeny*, 33 N. Y. Sup. Ct. (1 Jones & S.) 271, holding that no notice was given from the mere fact of signing the register on which there was a notice requiring the deposit of valuables, there being no proof that it was seen or assented to by the guest.

To relieve from liability, the notice itself must be exact. So where there must be exhibited in the room a copy of the statute, reading that the landlord shall not be liable except when the property is "stolen, lost or injured through the willful act, neglect or

default'' of the innkeeper or his servant, the omission of the word "act" vitiates the entire notice, such omission completely altering the operation of the act: *Spice v. Bacon*, 46 L. J. Ex. 713, 36 L. T. 896. And where the statute provides that the notice must be printed in a certain style of type, printing it in a smaller style is no compliance therewith, and does not relieve from responsibility: *Porter v. Gilkey*, 57 Mo. 235.

The object of the statute being to give constructive notice to guests of the existence of safe place and of their duty to deposit there, it would seem that where actual knowledge was had, such notices would be useless, the result which they were designed to bring about having been effected in another way, and some of the authorities so hold: *Purvis v. Coleman*, 21 N. Y. 111, affirming 14 N. Y. Sup. Ct. (1 Bosw.) 321; *Shultz v. Wall*, 134 Pa. St. 262, 19 Am. St. Rep. 686, 19 Atl. 742. Others, however, maintain that the statute must be strictly followed and notices posted, in spite of the fact that actual notice was had: *Olson v. Crossman*, 31 Minn. 222, 17 N. W. 375; *Batterson v. Vogel*, 8 Mo. App. 24. See, also, *Lanier v. Youngblood*, 73 Ala. 587.

B. Establishing Safe Place.—Where a statute provides, among other things, that an innkeeper shall not be liable for any article of wearing apparel, not within a room assigned to a guest, unless specially intrusted to his own care and custody, or that of his servants, he is liable if a guest hangs his overcoat upon one of a row of hooks, placed in the office of a hotel behind the desk and used for that purpose by guest, for the subsequent loss of the overcoat, where he has not established any particular place for keeping overcoats, and cannot escape liability on the ground that it was not especially intrusted to his care as mentioned in the statute: *Bradner v. Mullen*, 27 Misc. Rep. 479, 59 N. Y. Supp. 178.

C. What Goods They Embrace.—The strictness of construction of statutes of this character applies not only to the notice to be given, but also to the particular species of property embraced within its operation: *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728. So where the statute provides that the guests' jewels and ornaments be deposited with the innkeeper in order to hold him responsible therefor, it is held that a watch does not come within the meaning of either of these terms: *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. (1 Jones & S.) 271; *Becker v. Warner*, 90 Hun, 187, 35 N. Y. Supp. 739; *Briggs v. Todd*, 28 Misc. Rep. 208, 59 N. Y. Supp. 23; *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728, in which case the court said: "A watch is neither a jewel or ornament, as these words are used and understood, either in common parlance or by lexicographers. It is not used or carried as a jewel or ornament, but as a timepiece or chronometer, an article of ordinary wear by most travelers of every class, and of daily and hourly use by all. It is as useful and neces-

sary to the guest in his room as out of it, in the night as the daytime. It is carried for use and convenience and not for ornament."

That silver table forks and a silver soup ladle are not within the term "jewels or ornaments," see *Briggs v. Todd*, 28 Misc. Rep. 208, 59 N. Y. Supp. 23.

A watch and chain, although for personal use, come within the operation of a statute requiring the deposit of articles of gold and silver manufacture: *Stewart v. Parsons*, 24 Wis. 241; but such statute does not apply to a large quantity of watches, chains and jewelry brought for sale, as there would be no room in the safe therefor: *Myers v. Cottrill*, 5 Biss. 465, Fed. Cas. No. 9985.

Where a statute requires the deposit of money and jewelry or ornaments, it has been held that this did not include money necessary for personal use, and if such sum were not given into the keeping of the landlord he would still be liable for its loss: *Murchison v. Sergeant*, 69 Ga. 266, 47 Am. Rep. 754; *Maltby v. Chapman*, 25 Md. 310; *Gile v. Libby*, 36 Barb. 70; *Krohn v. Sweeney*, 2 Daly, 200.

The New York cases have, however, been overruled and the statute is held to apply to all money and jewelry, and not to the excess above a reasonable amount: *Hyatt v. Taylor*, 42 N. Y. 258, affirming, 51 Barb. 632; *Rosenplaenter v. Roessle*, 54 N. Y. 262, the court saying in the former case: "When it is asked, Could the legislature have intended that, on entering a hotel, the guest should strip himself of all money, jewels and ornaments, or be without protection? it may be answered, the guest walks the streets, he visits places of public resort or amusement, or the places to which business calls him, and he enters his own abode, and he takes with him to each, without any especial guaranty of safety, so much money and so many jewels and ornaments as he sees fit, and the hardship is not great if his entrance or his stay at a hotel places him in no worse condition. If it be said in all other places he acts voluntarily and uses the means he deems proper for his own protection, it may be added that when he enters a hotel, the landlord is still bound by the statute to assume his protection and bear his risks. He is therefore not only in no worse condition than while without its doors or within his own home, but better, much better; he may, if he chose, require the landlord to keep this hazardous property for him."

The law as to when the deposit must be made is well brought out in *Rosenplaenter v. Roessle*, 54 N. Y. 262. There a guest and his wife arrived at a hotel, were shown to a room, to which their trunk was brought, and were there nearly an hour before going to dinner. Upon returning a short time after, they found their trunk broken open and various articles of jewelry missing. The court held that wherever the guest has an opportunity to make the deposit, and does not do so, he neglects to make it within the meaning of the statute, although there must be a brief period after the arrival of a guest at a hotel before he can make the deposit, during which

time the statute affords the hotelkeeper no protection; and that the plaintiffs in the case before them had time to deposit the property, and, having neglected to do so, could not recover.

The neglect of the guest to deposit must, however, be the cause of the loss. So where a package of jewelry was lost after the guest had packed up and was about to leave, and which, even if it had been deposited, would have been returned to the guest to be packed prior to departure, the innkeeper was held liable, the neglect to deposit it not having caused the loss: *Bendetson v. French*, 46 N. Y. 266; *Stanton v. Leland*, 4 E. D. Smith, 88.

Where a statute, limiting the liability of innkeepers for losses sustained by their guests, excepts wearing apparel, articles worn or carried upon the person to a reasonable amount, personal baggage and money necessary for traveling expenses, a gold watch, gold rings, a thimble and a neck-pin were considered as within the exception, and the innkeeper liable for their loss: *Noble v. Milliken*, 77 Me. 359.

VI. Defenses to the Action.

a. Contributory Negligence.

1. Generally.—Contributory negligence on the part of the guest is a valid defense to an action against an innkeeper for loss of property while a guest: *Fowler v. Dorton*, 24 Barb. 384; *Read v. Amidon*, 41 Vt. 15, 98 Am. Dec. 560; *Elcox v. Hill*, 98 U. S. 218; *Cashill v. Wright*, 6 El. & B. 891. What is sufficient thus to bar an action is well expressed in *Lanier v. Youngblood*, 73 Ala. 587, in the following language: "It is not every slight negligence on the part of the guest, of course, which will be held to excuse, as coming within this principle. Nor is the rule perhaps sound, as sometimes found to be intimated that the negligence required to be imputed must be gross negligence, or such as evinces a want of good faith on the part of the plaintiff. The true rule in our judgment, and the one which seems to be sustained by the analogies of the law in other cases, is, that the want of ordinary care on the part of the guest, or of such as a prudent man may reasonably be expected to exercise under like circumstances, is sufficient to defeat a recovery against the innkeeper where it appears that such negligence proximately contributed to the loss, and that the loss would not otherwise have happened."

The question of negligence is one of fact for the jury: *Bohler v. Owens*, 60 Ga. 185; *Hadley v. Upshaw*, 27 Tex. 547, 86 Am. Dec. 654; *Jalie v. Cardinal*, 35 Wis. 118; *Armistead v. White*, 17 N. B. 261, 15 Jur. 1010. Evidence of neglect on the part of the plaintiff must be confined to the period while he was a guest at the inn, and testimony tending to show neglect previous to his becoming such, or his subsequent conduct after leaving the hotel, is inadmissible: *Burrows v. Trieber*, 21 Md. 320, 83 Am. Dec. 590.

If the plaintiff was negligent, but it was discovered by the innkeeper or his servants in time to have prevented the loss by the exercise of extraordinary diligence, the latter is nevertheless liable, as where a guest went out without closing and locking the door, which fact was known to the servants, who had an opportunity of locking it, but failed to do so for over an hour: *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82.

Contributory negligence is a matter of defense, and lack thereof need not be set up by the guest in his complaint: *Bowell v. De Wald*, 2 Ind. App. 303, 50 Am. St. Rep. 240, 28 N. E. 430.

If the owner of baggage allows another to exercise acts of ownership over it, without informing the landlord that the property is his, and such person afterward carries it away, the plaintiff is guilty of such negligence as to preclude recovery: *Kelsey v. Berry*, 42 Ill. 469. But it is no excuse to a landlord where a chambermaid unlocked the door of a guest's room for a person, who took goods therefrom, from the mere fact that the guest had been seen in company with such person, who was also a guest: *Jacobi v. Haynes*, 14 Misc. Rep. 15, 35 N. Y. Supp. 120.

A guest is not chargeable with negligence in consenting to sleep in the same room with another guest, who was a stranger to him and with whom he did not come to the inn, by whom his goods were stolen: *Olson v. Crossman*, 31 Minn. 222, 17 N. W. 375. Nor does the mere fact that a guest does not ask for his baggage or inquire as to its safety for a period of several days after its reception by the innkeeper, constitute negligence: *Eden v. Drey*, 75 Ill. App. 102. It has been held not negligence for a guest to fail to tell a clerk that there was money in a pocket-book which he handed to him, it being of the kind commonly used for carrying money: *Shoecraft v. Bailey*, 25 Iowa, 553; or that a valise contained valuables: *Bowell v. De Wald*, 2 Ind. App. 303, 50 Am. St. Rep. 240, 28 N. E. 430; or to have the value of a package marked upon it: *Baehr v. Downey* (Mich.), 94 N. W. 750. And where the innkeeper has received from his guest a satchel, such as is ordinarily used to carry clothing and is informed that it contains valuables, he cannot avoid liability for a loss of coin contained therein, on the ground that the guest was negligent in putting it there: *Kellogg v. Sweeney*, 1 Lans. 397.

It is not negligence for a guest not to avail himself of a check-room for his hat and coat while at meals, where the proprietor employs a servant to receive and keep the property of his guests during that time, to whom the plaintiff intrusted his hat and coat: *Labold v. Southern Hotel Co.*, 54 Mo. App. 567.

In *Smith v. Wilson*, 36 Minn. 334, 1 Am. St. Rep. 669, 31 N. W. 176, it was held not negligence as a matter of law for a guest, who occupied a room alone, to sleep with about five hundred dollars in a belt about his person. But it has been held that where a guest has an opportunity of securing valuables in his possession by giv-

ing them over to the custody of the innkeeper and he fails to do so, that is such negligence as to bar an action if they are lost or stolen: *Jones v. Jackson*, 29 L. T. 399. In *Armistead v. White*, 17 Q. B. 261, 20 L. J. Q. B. 524, the court held that it was correct for a jury to find it gross negligence to leave money in the commercial room of a hotel in a box with a defective lock, which was easily slipped back, and that the plaintiff had opened the box in the room and counted the money in the presence of several persons.

A noncompliance with a reasonable and proper regulation of the inn, brought to the notice of the guest, resulting in the loss of his goods, is negligence: *Purvis v. Coleman*, 21 N. Y. 111; *Classen v. Leopold*, 32 N. Y. Super. Ct. (2 Sweeny) 705; *Fuller v. Coats*, 18 Ohio St. 343. So where a guest is told to put his goods in a particular place, but he does not do so, the innkeeper is exonerated from liability: *Wilson v. Halpin*, 30 How. Pr. 124, 1 Daly, 496. If, however, the noncompliance with a reasonable regulation is not the cause of the loss, the innkeeper is not relieved from liability: *Burbank v. Chapin*, 140 Mass. 123, 2 N. E. 934. And see *Gile v. Libby*, 36 Barb. 70.

2. Failure to Lock the Door.—The question has often arisen as to how far it is negligence for a guest to fail to bolt or lock his door, and several decisions have held a failure to do so not negligence so as to bar a recovery against an innkeeper: *Classen v. Leopold*, 32 N. Y. Super. Ct. (2 Sweeny) 705; *Mitchell v. Woods*, 16 L. T. 676; *Filipowski v. Merryweather*, 2 Fost. & F. 285. Nor is it so, in the absence of a rule requiring the door to be locked or bolted: *Murhison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754; *Spring v. Hager*, 145 Mass. 186, 1 Am. St. Rep. 451, 13 N. E. 479.

A guest need not keep his room locked the whole time: *Buddenburg v. Benner*, 1 Hilt. (N. Y.) 84. "Where one is in an inn as a guest," said the court in *Batterson v. Vogel*, 10 Mo. App. 236, "and has the means of securing the door, the mere leaving the door of his private room unlocked is not negligence that relieves the innkeeper, even though the latter has given the guest a key.

"The fact of the guest having the means of securing himself and not choosing to use them, is one which, with the other circumstances of the case, should be left to the jury. It should not be singled out and put to the jury as a test of negligence. The question is, whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances: *Oppenheim v. White Lion*, L. R. 6 C. P. 515; *Wharton on Negligence*, 691. The jury are not to be told that, if by reasonable care, the plaintiff might have locked his door and did not do so, this is such negligence as to exonerate the innkeeper, if the loss occurred through leaving the door unlocked." And it cannot be laid down as a proposition of law that leaving the door unbolted is not evidence of negligence.

as each case must depend on its own facts: *Herbert v. Markwell*, 45 L. T. 649, affirmed, C. A., W. N. 1882, 112.

It is not contributory negligence because a guest sleeps in a room, the lock on the door of which is out of repair, or because, knowing the condition of the door, he fails to notify the innkeeper thereof: *Lanier v. Youngblood*, 73 Ala. 587.

3. **Intoxication.**—Intoxication on the part of a guest may have contributed to his loss, and in such case he cannot recover from the landlord therefor: *Becker v. Warner*, 90 Hun, 187, 35 N. Y. Supp. 739; *Walsh v. Porterfield*, 87 Pa. St. 376. It has even been held that a state of intoxication raises a presumption of negligence: *Profflet v. Hall*, 14 La. Ann. 524. But, in *Rubenstein v. Cruikshanks*, 54 Mich. 199, 52 Am. Rep. 806, 19 N. W. 954, the court was of the opinion that a host's liability for the baggage of his guest was not diminished but rather increased, by the fact that the guest got too drunk at his bar to take care of himself: See, also, *Jalie v. Cardinal*, 35 Wis. 118. The fact that the guest was intoxicated will not destroy the landlord's liability for robbery committed on him by one of his servants: *Cunningham v. Bucky*, 42 W. Va. 671, 57 Am. St. Rep. 878, 26 S. E. 442.

b. **Illegality.**

1. **Lack of License by Landlord.**—The fact that an innkeeper, holding himself out to the public as such, has not taken out a license, as provided by statute, does not relieve him from the strict liability attaching to licensed innkeepers: *Lanier v. Youngblood*, 73 Ala. 587, citing *Beale v. Posey*, 72 Ala. 323.

2. **Illegal Acts of the Guest.**—In several instances, innkeepers have attempted to avoid responsibility by setting up as a defense that their guests were acting illegally. In *Cohen v. Manual*, 91 Me. 274, 64 Am. St. Rep. 225, 39 Atl. 1030, the goods for which it was sought to hold the hotel-keeper liable were to be peddled without a license, which fact was relied upon as an answer to the action. The court held it to be no defense, saying: "It is not unlawful for a peddler, with or without a license, to put up at an inn. The plaintiff did not lodge at the defendant's inn as a peddler, but as an individual. As a property owner merely he intrusted his property to the defendant's safekeeping. It was not unlawful for him to eat, drink and be sheltered in an inn, nor to deliver, or offer to deliver, his money and other property to the innkeeper for safe custody. If his property consisted of merchandise carried by him for the purpose of sale, without a license, in violation of law, it was none the less property. A peddler may lawfully care for and protect his property. If he exposes it for sale, or sells it, without license, he may be fined. No penalty attaches to the merchandise itself. It cannot be seized or forfeited. It is neither contraband nor outlawed. The rights and liabilities which exist between the

innkeeper and his guest, who is a peddler, are created by law, and grow out of the relation between them, and are in no degree dependent upon the purpose of the owner to sell the goods at some future time without license. It is therefore the opinion of the court that even if the plaintiff had no license to peddle, that fact would not constitute a defense to this action."

The innkeeper is liable for the loss of a buggy-robe, although it occurred while the guest was traveling on Sunday, in violation of a statute: *Cox v. Cook*, 96 Mass. (14 Allen) 165.

In *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242, 22 N. W. 825, the plaintiff went to a hotel near his residence at midnight, with a prostitute and registered as man and wife. He delivered a sum of money to the hotel clerk for safekeeping. During the night, the clerk absconded with the money. The court held that, having come solely for the purpose of having sexual intercourse with the woman, he was not a guest, and could not recover. A different case is presented, however, where the woman had already left the plaintiff, and he was robbed after her departure: *Lucia v. Omel*, 46 App. Div. 200, 61 N. Y. 659, affirmed, 53 App. Div. 641, 66 N. Y. Supp. 1136. The court there mentioned *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242, 22 N. W. 825, saying: "If he had been robbed while occupying his room with the strumpet, the decision cited would apply. If he had been robbed by the strumpet with whom he associated, we would be entirely clear that his loss would be the result of his own negligence and misconduct, and thus preclude a recovery against the landlord within the general rule, even apart from the authority of the Wisconsin case. But the misconduct and immorality of the plaintiff had ceased before he met with his loss. We cannot see how that previous immorality affected his subsequent status as a guest in the hotel."

c. **Guest Taking Exclusive Control of Goods, or Depositing Them with Other Guest.**—The proprietor of a hotel may exonerate himself by showing that the guest had taken exclusive custody of his own goods: *Packard v. Northcraft*, 59 Ky. (2 Met.) 439; *Burgess v. Clements*, 4 Maule & S. 306; but this must be an exclusive custody and control of a guest, and must not be held under the supervision and care of the innkeeper, as where they are kept in a room assigned to a guest or other proper depository in the house: *Fuller v. Coats*, 18 Ohio St. 343. See, also, *Packard v. Northcraft*, 59 Ky. (2 Met.) 439. Therefore, a guest may retain personal custody of his trunk, wearing apparel, watch, money and jewelry without discharging the innkeeper from responsibility, they being considered likewise in the custody of the innkeeper, and subject to that uncommon care which he is bound to exercise respecting the effects of his guests: *Weisenberger v. Taylor*, 64 Ky. (1 Bush) 275, 89 Am. Dec. 626; *Jalie v. Cardinal*, 35 Wis. 118.

The same rule applies where he deposits the property with another guest or inmate, in whom he reposes confidence, and the innkeeper is relieved from responsibility therefor: *Sneider v. Geiss*, 1 Yeates (Pa.), 34; *Houser v. Tully*, 62 Pa. St. 92, 1 Am. Rep. 390.

d. **Want of Authority in Servant.**—Lack of authority in an innkeeper's servant to act for his master will not be available as a defense if he apparently had such authority: *Rockwell v. Proctor*, 39 Ga. 105; *Buckle v. Probasco*, 58 Mo. App. 49. See, also, *Cookery v. Nagle* 83 Ga. 696, 20 Am. St. Rep. 333, 10 S. E. 491.

VII. Nature of the Action.

There seems to be a conflict as to the nature of an action of this kind against an innkeeper. In *Gile v. Libby*, 36 Barb. 70, it was said: "The liability of an innkeeper by custom, or the common law, for the loss of the goods of his guest, would appear to have been founded on contract—on the implied undertaking on the part of the innkeeper to safely keep the goods, in consideration of the usual charge to be paid by the guest for his lodging and entertainment. The action might be either assumpsit or case. In either action it was usual, and perhaps necessary, to allege in the declaration that the loss occurred by and through the carelessness of the innkeeper and his servants." But, in *People v. Willett*, 26 Barb. 78, it was decided that an action of this character was founded in tort or misfeasance, and not on contract. That trover will not lie, unless an actual conversion is shown, see *Hallenback v. Fish*, 8 Wend. 547, 24 Am. Dec. 88.

VIII. Measure of Damages.

The measure of damages to be applied in actions by a guest against a landlord for loss of his property is the market value thereof at the time of loss, to which interest may be added and included in the total sum of damages allowed. While the cost of the property may be considered, in connection with other facts, in determining its value, evidence of its cost, without more, is not sufficient proof of its market value: *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82. See, also, *Wies v. Hoffman House*, 28 Misc. Rep. 225, 59 N. Y. Supp. 38. That the giving of interest upon the amount of the goods lost is not compulsory, see *Sparr v. Wellman*, 11 Mo. 230.

If the innkeeper has capriciously refused to deliver the guest's property, and he is thereby compelled to employ counsel to enforce his rights, the jury may allow the plaintiff his attorney's fees as damages: *Carhart v. Wainman*, 114 Ga. 632, 88 Am. St. Rep. 45, 40 S. E. 781.

IX. Liability to Boarders.

An innkeeper or boarding-house keeper is not liable to a boarder as an insurer, but is held only to the exercise of ordinary care, and liable for his own negligence or that of his servants, resulting in loss or injury to the goods of his boarders: *Smith v. Read*, 52 How. Pr.

14; *Siegmán v. Keeler*, 4 Misc. Rep. 528, 24 N. Y. Supp. 821; *George v. Depierris*, 17 Misc. Rep. 400, 39 N. Y. Supp. 1082; *Meacham v. Galloway*, 102 Tenn. 415, 73 Am. St. Rep. 886, 52 S. W. 859; and where he gratuitously receives a deposit of money or valuables from a boarder, he is liable only for gross negligence: *Johnson v. Reynolds*, 3 Kan. 257; *Wiser v. Chesley*, 53 Mo. 547.

If a boarder at a hotel fails to take such care of his watch as a person of ordinary prudence should take, the landlord is not responsible for its loss: *Chamberlain v. Masterson*, 26 Ala. 371; nor is he where he is lacking in ordinary care in not keeping his door locked: *Swann v. Smith*, 14 Daly, 114.

In *Lawrence v. Howard*, 1 Utah, 142, a boarder was ordered to leave a hotel for failure to pay his board. He left without taking his baggage or asking therefor, although it would have been delivered upon demand, and it was subsequently lost. The hotel-keeper was held to be a bailee without reward, liable only for gross negligence, and as the boarder's negligence in not asking for his property, which he would have received, contributed to his loss, he could not recover.

X. Liability of Restaurant-keepers.

A restaurant is not an inn, so as to subject the keeper to the liability of an innkeeper: *Carpenter v. Taylor*, 1 Hilt. (N. Y.) 193. Where liquors could be sold legally only under a license, and such licenses could be issued only to persons keeping inns, and it was proved that the plaintiff lost certain property in a restaurant, in which liquors were sold, it was held that the court would presume that the defendant was an innkeeper, in the absence of evidence to the contrary, and liable as such for the property of guests: *Korn v. Schedler*, 11 Daly, 234.

In *La Salle Restaurant v. McMasters*, 85 Ill. App. 677, the plaintiff entered defendant's restaurant as a patron, and after telling the waiter that he did not see a vacant rack upon which to hang his coat, the waiter took the coat, saying he would take care of it, and hung it upon a rack near plaintiff. When the meal was finished, it could not be found. On the bill of fare was conspicuously printed the words, "Not responsible for hats and coats." The plaintiff was allowed to recover. See, also, *Ultzen v. Nicol* (1894), 1 Q. B. 92.

At a quick-lunch restaurant, the proprietor provided nails on which to hang hats and overcoats, and posted placards warning against thieves, and for guests to watch their hats and overcoats. At the bottom of each bill of fare was a notice disclaiming responsibility for personal property unless checked by the manager. A manager was in attendance, constantly on watch to protect the property of patrons, and provided a system of checking, which afforded ample protection if availed of. Under these facts it was held that there could be no recovery for the loss of a coat, as there was no negligence: *Harris v. Child's Unique Dairy Co.*, 84 N. Y. Supp. 260.

In *Montgomery v. Ladjing*, 30 Misc. Rep. 92, 61 N. Y. Supp. 840, the court reviewed decisions dealing with the liability of restaurant-keepers, saying in part: "In *Buttman v. Dennett*, 9 Misc. Rep. 403, 30 N. Y. Supp. 247, it was held that a restaurant-keeper, in whose custody wraps and other articles of wearing apparel have been temporarily placed for safekeeping, is liable as a bailee. This liability has been enforced where a waiter took the hat and coat of a customer when he entered the restaurant and seated himself at a table: *Appleton v. Welch*, 20 Misc. Rep. 343, 45 N. Y. Supp. 751.

"But in *Simpson v. Bourke*, 13 Misc. Rep. 230, 34 N. Y. Supp. 11, it was held that a restaurant-keeper is not an insurer of the effects of customers who may have accepted the invitation held out to him, but at most is required to use only the ordinary care called for by the circumstances. In that case the plaintiff had not placed his overcoat in the physical custody of the defendant or his servant, but had it removed after having selected a seat and personally placed it on a rack, and it was therefore held that the question merely was as to the sufficiency of the general supervision exercised over the restaurant for the protection of customers' property placed therein, and it not appearing that the size of the restaurant or any special conditions called for greater vigilance than was actually exercised, the judgment in favor of the defendant was affirmed."

The court then discussed analogous cases, dealing with the liability of keepers of bath-houses, theaters and clothing stores, and proceeded: "The rule to be deduced from all these cases, therefore, is: That, before a restaurant-keeper will be held liable for the loss of an overcoat of a customer, while such customer takes a meal or refreshments, it must appear either that the overcoat was placed in the physical custody of the keeper of the restaurant or his servants, in which case there is an actual bailment, or that the overcoat was necessarily laid aside under circumstances showing at least notice of the fact and of such necessity to the keeper of the restaurant or his servants, in which case there is an implied bailment or constructive custody, or that the loss occurred by reason of the insufficiency of the general supervision exercised by the keeper of the restaurant for the protection of the property of customers temporarily laid aside. After all, each case must largely depend upon its particular facts and circumstances, for it is well known that there are all kinds of restaurants. In some of them good taste and etiquette require that a customer should take his hat and overcoat off while taking a meal, while in others, especially the so-called quick-lunch establishments, customers frequently remove neither hat nor overcoat."

KAMMRATH v. KIDD.

[89 Minn. 380, 95 N. W. 213.]

GROWING CROPS are Transferred by a Conveyance of the Land, unless expressly reserved. (p. 604.)

GROWING CROPS, Parol Evidence to Show Reservation of by the Grantor.—Parol evidence is not admissible to show that an agreement that the grantor might retain the growing crops was a part of the consideration of the conveyance, and hence that such crops should be exempt from its operation. (p. 604.)

CONVEYANCE, Delivery, Evidence to Show Intended Date of.—When a conveyance is placed in the hands of a third person, to be afterward delivered by him, evidence is admissible to prove that he was instructed not to deliver it until a date specified, though most of the consideration was paid before that time, for the purpose of proving that the conveyance did not become operative until that time, and hence did not include growing crops which previously matured. (p. 605.)

Action to recover grain or damages for its detention. Verdict and judgment for the plaintiff. A motion for a new trial was made and denied, and defendant appealed.

Knox & Faber, for the appellant.

Allen & Ward, for the respondent.

380 LEWIS, J. June 22, 1901, defendant was the owner of a certain farm, upon which was a growing crop of wheat and oats, put in by a tenant upon shares, a one-third interest going to the owner. An arrangement was entered into on that day by which it was agreed that the land should be sold to plaintiff, and pursuant to such arrangement, on July 1st of the same year, defendant executed a warranty deed in the usual form, and left it with a banker by the name of Broun, to whom plaintiff was to pay the money expressed in the ³⁸¹ deed as a consideration—three thousand two hundred dollars. On the following July 9th, defendant cut and removed from the premises a certain quantity of grass, and between July 19th and 22d he cut the grain. Plaintiff caused sixteen hundred dollars of the money to be paid to Mr. Broun on July 9th, and the remainder was paid on July 19th, and the deed was delivered by Mr. Broun to plaintiff on July 29th. At threshing time, defendant took possession of one-third of the grain, and, this action having been brought by the purchaser to recover its value, the trial court directed the jury to return a verdict for plaintiff for the value of the wheat and oats, and refused to submit

the question of the value of the grass—taking the position that, under the evidence, plaintiff was not entitled to anything in that respect—and appeal was taken by defendant from an order denying a motion for a new trial.

1. Error is assigned upon the order of the court in refusing to admit oral testimony to the effect that, in addition to the money consideration expressed in the deed, appellant was to retain his interest in the growing crops. The testimony was refused upon the ground that it tended to change the terms of the contract as expressed in the deed. In this ruling we think the court was correct. In this state the law is settled that growing crops, such as wheat and oats, are attached to and become a part of the real estate, and are transferred by a conveyance of the land, unless expressly reserved: *Erickson v. Paterson*, 47 Minn. 525, 50 N. W. 699; *Cummings v. Newell*, 86 Minn. 130, 90 N. W. 311. The record is silent as to the nature of the preliminary contract, whatever it was, and we must assume that it was merged into the deed, which, according to its terms, carried the crops. The parol testimony offered was not admissible upon the ground that an agreement to retain the crops by the grantor was part of the consideration of the conveyance. The true consideration may generally be shown, but, when evidence offered for such purpose will have the effect to restrict the legal operation of the covenants, it is incompetent: *Rooney v. Koenig*, 80 Minn. 483, 83 N. W. 399.

2. On July 1st the deed was handed by appellant to Mr. Broun, and appellant offered to show by him his instruction as to when ³²⁹ the deed should be delivered to respondent. Objection to the question was sustained upon the ground that it was a repetition, but the record does not show such to be the fact, and the testimony was competent for the purpose of showing when the deed was to be delivered. Notwithstanding the fact that the parties had embodied their agreement in the deed, with reference to the crops, yet they might have provided that the deed should not take effect until after the crops were severed from the land. It is claimed by respondent that the evidence is conclusive that the deed took effect prior to the time the crops were cut, because the entire amount of the consideration was paid before the crops were finally harvested. In the absence of any other evidence than the mere fact that the deed was executed and given to Mr. Broun to be delivered to respondent upon payment of the money, the respondent would have a reasonable time within which to make such payment; and, if payment were

made within a reasonable time, then the delivery of the deed, or the time it took effect, would date back to the date of its execution. In such case, delivery as of the date of execution would be presumed: *Cummings v. Newell*, 86 Minn. 130, 90 N. W. 311.

But although the payments were made prior to the time the crops were harvested, payment was not completed until nineteen days after the deed was given to Mr. Broun, and in the meantime the crops had matured and had to be taken care of; and since, according to the offer of evidence, the deed was not handed to Mr. Broun to be delivered unconditionally upon payment, but only within a certain time, we are of the opinion that it was a question of fact whether the deed was intended to take effect on July 1st, relating back, upon payment, or on the date when it was actually delivered to respondent. This question was for the jury to determine, and it was error for the court to hold that respondent was entitled to the crops. This conclusion is not altogether free from doubt, and it would appear from the record that the attorneys on both sides had strenuously endeavored to avoid trying the case upon its merits, and allowing all the facts to be presented to the court; but we are inclined to the view that the court ~~363~~ should have received the testimony offered, and submitted to the jury the question as to when the deed was to take effect.

Order reversed and new trial granted.

START, C. J. I concur in the result. My understanding is that a deed takes effect only from its delivery, and not from its date. When deposited in escrow, nothing passes by it until the condition is performed, and the title of the grantee dates only from the final delivery of the deed to him, except in cases where it is shown that the intention of the parties was otherwise, or the ends of justice required the application of a different rule: *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. 161; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26. Therefore it seems to me that the burden was upon respondent in this case to show that it was within the exception to the general rule stated.

Growing Crops have been held to pass by a deed of the soil without any express reservation: *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449; *Smith v. Leighton*, 38 Kan. 544, 5 Am. St. Rep. 778, 17 Pac. 52; *Wootton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, 44 Atl. 1026; *Jones v. Adams*, 37 Or. 473, 82 Am. St. Rep. 766, 59 Pac. 811, 62 Pac. 16.

Compare *Smith v. Johnson*, 1 Penr. & W. 471, 21 Am. Dec. 404; *Aldrich v. Bank of Ohio*, 64 Neb. 276, 89 N. W. 772, 97 Am. St. Rep. 643, and see the cases cited in the cross-reference note thereto. And it is held that a reservation of the crop cannot be shown by parol: *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438. Compare *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592; *Flynt v. Conrad*, Phill. (N. C.) 190, 93 Am. Dec. 588. As to whether ripened crops follow the title of the land, see *First Nat. Bank v. Beegle*, 52 Kan. 709, 39 Am. St. Rep. 365, 35 Pac. 814. And as to a parol sale of growing crops, see *Mighell v. Dougherty*, 86 Iowa, 480, 41 Am. St. Rep. 511, 53 N. W. 402.

McKITTRICK v. CAHOON.

[89 Minn. 383, 95 N. W. 223.]

JUDGMENT—Merger, Effect of.—Where a precedent liability is made the basis of a final money judgment the rights of the parties are merged therein. Hence, such judgment may be discharged by proceedings in bankruptcy, though the cause of action out of which it arose was not subject to such discharge. (p. 607.)

BANKRUPTCY.—A Judgment Against the Putative Father of a Bastard for sums awarded against him for its maintenance was subject to be discharged by the national bankruptcy act as it existed prior to 1903. Whether a different rule resulted from the amendment of that year is not determined. (p. 608.)

Bowers & Howard, for the appellant.

M. E. Mathews, for the respondent.

384 **LOVELY, J.** In 1878 defendant was adjudged to be the putative father of a natural child, and charged with its maintenance until fifteen years of age, to the extent of six dollars per month, to be paid to the mother each month, in advance, under General Statutes of 1866, chapter 17, sections 6, 7 (Gen. Stats. 1894, secs. 2044, 2045). No payments were ever made. In 1896 the mother assigned her rights under the order of filiation to plaintiff, and in 1897 the latter commenced an action to recover the total sum which should have been paid by defendant. Thereafter, and on April 28, 1898, judgment was obtained and docketed in plaintiff's favor for two thousand two hundred and seventy-three dollars. On December 30, 1899, defendant was duly adjudged a bankrupt by the United States district court for Minnesota (the judgment having been scheduled), and he was, upon hearing, discharged from all debts and claims provable against his estate which existed on March 10, 1899. After the discharge a motion was made in behalf of defendant, in the proper state court, to have the judgment satisfied and dis-

charged of record, under Laws of 1899, page 306, chapter 262, which was denied. From this order, defendant appeals.

The learned trial court was of the opinion that this judgment, upon the grounds of public policy and just necessity, retained all the legal attributes of the original order for maintenance, and therefore was not provable in the bankruptcy court. Undoubtedly the authorities justify the view that an original order for the support of an illegitimate child will not be discharged in bankruptcy proceedings. There are likewise authorities that hold that orders for alimony would not be excepted from a discharge in bankruptcy: *Brandenberg on Bankruptcy*, c. 4 sec. 4 of note, p. 156; *In re Baker* (D. C.), 96 Fed. 954; *In re Hubbard* (D. C.), 98 Fed. 710; *Hawes v. Cooksey*, 13 Ohio, 242; *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. Rep. 735. These decisions are placed upon the ground that such claims are uncertain, and of the nature of police regulations, ²⁸⁵ involving the authority of courts to enforce their orders for the protection of public welfare and good government; but the question here is of a different character, and must be controlled by the express terms of the bankruptcy act in force at the time of defendant's discharge. The only exceptions to relief from the obligations of claims as therein recognized were: 1. Taxes; 2. Judgments for fraud, false pretenses, willful and malicious injuries to personal property; 3. Those not scheduled in time for allowance; and 4. Results of fraud, embezzlement, misappropriation, or defalcation in office or in a fiduciary capacity: *National Bankruptcy Act of 1898*, sec. 17 (Act July 1, 1898, c. 541; 30 Stats. 550, 551; U. S. Comp. Stats. 1901, 3428).

It seems very clear that the final judgment in this case does not fall within either of these exceptions, and it is also equally clear that, by securing the judgment, plaintiff acquired valuable and substantial rights in having it docketed, which would make it a lien upon real estate—the right to have supplemental proceedings or maintain a creditors' suit, with other privileges incident only to the highest obligation which the law recognizes—but there are no processes, and there could be none, upon constitutional grounds, in this state, by which a judgment for money only could be enforced by imprisonment, even though the judgment is rendered for amounts due on an order of filiation, which fixes the nature of the obligation without reference to the character of the claim upon which it is founded. After the judgment, obviously, there cannot be two distinct claims; and sound policy has led to the adoption of the rule

that, where a precedent liability is made the basis of a final money judgment, the rights of the parties are merged in what the law treats as the higher obligation: 1 Freeman on Judgments, secs. 215-217. In the application of this principle to the question presented here, it must be held that by obtaining the judgment the plaintiff elected to stand thereon alone, with all the rights acquired thereby, and subject to all the burdens which insolvency and bankruptcy laws may impose. Therefore the plaintiff, by putting her floating claims into judgment, established a debt of a different nature in material respects, and of a character ³⁹⁸ that subjects it to bankruptcy supervision. Hence it is within the authority of Congress alone to give her relief from the discharge it authorizes: Wolcott v. Hodge, 15 Gray, 547, 77 Am. Dec. 381; Manning v. Keyes, 9 R. I. 224, 11 Am. Rep. 249; Comstock v. Grout, 17 Vt. 512; In re Benedict, 37 Misc. Rep. 230, 75 N. Y. Supp. 165. The liability of the debtor is affected by his judgment, and while the bankruptcy law might except a judgment rendered for maintenance, as it has for fraud in certain cases, it is sufficient for the disposition of this case to say that at the time of defendant's discharge it had not done so.

In 1903 Congress amended section 17 of the bankruptcy act by adding to subdivision 2, as it then read, a provision also excepting claims for debts "for alimony due or to become due or for maintenance or support of wife or child": Act of February 5, 1903, c. 487, sec. 5; 32 Stats. 798. Whether this amendment would apply to a judgment based on the nature of plaintiff's original claims, we are not required to determine, for the discharge relied upon here was obtained before the amendment; and, while we recognize the high moral obligation and duty of the father to fulfill his natural duties in the support of his offspring which may have been recognized by Congress in this amendment, we are unable to agree with the learned trial court that the final judgment upon which plaintiff relies was not extinguished by the debtor's discharge in the bankruptcy court.

Order reversed and case remanded.

Bankruptcy.—As to whether a judgment for alimony, or the agreement of a man to pay monthly installments for the support of his former wife and their minor son, is discharged or barred by his discharge in bankruptcy, see Dunbar v. Dunbar, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623, and note; Welty v. Welty, 195 Ill. 335, 88 Am. St. Rep. 208, 63 N. E. 161; Arrington v. Arrington, 131 N. C. 143, 92 Am. St. Rep. 769, 42 S. E. 554.

STELLMACHER v. BRUDER.

[89 Minn. 507, 95 N. W. 324.]

WILLS, Agreements to Make.—A Party may Obligate Himself to make his will in a particular way or to give specified property to a particular person, so as to bind his estate. (p. 611.)

WILLS, Agreements to Make—Scrutiny of by the Courts.—Courts will be strict in looking into the circumstances of agreements to make wills and require full and satisfactory proof of the fairness and justness of the transaction. (p. 611.)

WILLS, Agreements to Make, Remedies for Enforcement of.—The remedy for the breach of a contract to make a will depends on the circumstances of each particular case. If the contract is an oral one to devise land and is reasonably certain, equity will decree a specific performance if there has been such a part performance as will take a parol agreement to convey land out of the statute of frauds. (p. 611.)

WILLS, Agreements to Make, When will not be Enforced.—If the consideration of a contract to make a will is labor and services which may be estimated and their value liquidated in money, so as to reasonably make the promisee whole, specific performance will not be decreed. (p. 611.)

WILLS, Agreements to Make, When will be Specifically Enforced.—If the consideration to make a will is that the promisee shall assume a peculiar and distinct relation to the promisor and render certain services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed. (p. 611.)

WILLS.—An Agreement to Make a Will will not be Enforced when the consideration consisted of board and services already furnished and rendered, a promise to furnish board, room and washing, and to care for the wants of the promisor for the remainder of his life, because the other party to the agreement may be compensated in money. (p. 612.)

C. N. Andrews, for the appellant.

Conant & Conant and Putnam & Nichol森, for the respondents.

⁵⁰⁷ START, C. J. Appeal from an order of the district court of the county of Faribault ⁵⁰⁸ sustaining a demurrer to the complaint on the ground that it did not allege facts constituting a cause of action, and for a defect of parties defendant.

The complaint alleges that Ferdinand Stellmacher, deceased, was at the time of his death, and had been for more than thirteen years prior thereto, the owner in fee of a certain tract of land in county of Faribault; that the defendant Bruder is the administrator of the estate of the deceased, and that the other

defendants are his sole heirs at law. The complaint also alleges, in effect, these facts: For more than thirteen years prior to his death the deceased was an unmarried man, a cripple, unable to do ordinary work, never in good health, not pleasant to have around, required special care on the part of those with whom he lived, and he had no children or home of his own. On July 14, 1889, he requested permission of P. Otilie Stellmacher and Gustav Stellmacher, the father and mother of plaintiff, to make his home with them, and, with their consent, he then became a member of their household, and thereafter continued to reside with them at their house up to the time of his death. After he had so resided nearly three years with them, he made to and with P. Otilie Stellmacher, Gustav Stellmacher, and the plaintiff an oral promise, and verbally agreed with them, that for the board and services already rendered and furnished to him, and if P. Otilie Stellmacher would continue to furnish him with board, room, and washing in the household of herself and husband during his life, and if her husband would assent to the arrangement, and if plaintiff would assist in caring for his wants, she should have his land at his death, and that he would leave it to her when he died, and that he would make provision by deed or will, in proper time, to carry out the agreement. P. Otilie Stellmacher and Gustav Stellmacher and the plaintiff all assented to the agreement, and thereafter, in pursuance of the same, the deceased continuously up to the time of his death resided with P. Otilie Stellmacher and Gustav Stellmacher, and during all of the time, in pursuance of and relying on his promise and agreement, P. Otilie Stellmacher furnished him room, board, and washing, and a home in her household, and during all of the time the plaintiff, in pursuance of the ⁵⁰⁹ agreement, assisted in caring for his wants, and nursed him in sickness, and remained single in order to carry out the agreement; and in all things P. Otilie Stellmacher and Gustav Stellmacher and the plaintiff at all times fully kept and performed the agreement on their part. The services so rendered by them to the deceased are incapable of estimate by any pecuniary standard, and neither party to the contract intended that the services should be so measured, and it is impossible to estimate the value of such services in money, and no payment has ever been made therefor. The deceased was the brother of the plaintiff's father, and there was at all times a special affection on his part for the plaintiff, and this fact entered into and was a moving cause for the making of the con-

tract. The deceased did not, by deed, will, or otherwise, make any provision for carrying out the agreement on his part, but he died intestate. Do these facts constitute a cause of action? We answer the question in the negative.

A party may obligate himself to make his will in a particular way, or to give specific property to a particular person, so as to bind his estate. But the courts will be strict in looking into the circumstances of such agreements, and require full and satisfactory proof of the fairness and justness of the transaction: *Newton v. Newton*, 46 Minn. 33, 48 N. W. 450; *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4. The remedy for the breach of such a contract depends upon the facts of each particular case. If the contract be an oral one to devise land, and is reasonably certain as to its subject matter and its stipulations, equity will decree specific performance, if there has been a part performance of such a character as will take a parol agreement to convey land out of the statute of frauds, upon principles which courts of equity recognize and act upon. If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promise whole, specific performance will not be decreed. But where the consideration of the contract is that the promisee shall assume a peculiar and domestic relation to the promisor, and render to him services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance ⁵¹⁰ will be decreed: *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4; *Johnson v. Hubbell*, 66 Am. Dec. 773, notes.

It is the claim of plaintiff's counsel that the facts stated in the complaint bring this case within the rule we have stated as to the specific performance of such contracts. The correctness of the claim must be tested by the allegations of the complaint as to the contract, and an inquiry as to what relation, if any, did the plaintiff and her mother agree to assume to the deceased, and what services did they promise to perform, because acts in part performance, to take an oral contract to devise or convey land out of the statute of frauds, must be done under and pursuant to the contract. Now, the alleged contract between the parties was to the effect that the deceased orally agreed, in consideration of board and services already furnished and rendered, and a promise by the plaintiff's mother, with the consent of her father, to continue to furnish him board, room, and washing in their household, and the plaintiff's promise to assist in caring for

his wants, he would leave the land to her by deed or will. The fair import from the express terms of the contract is that the deceased was to be furnished board, room, and washing in the home of the plaintiff's parents, and she was to assist her mother in caring for his wants.

It is clear that there is a material difference between this contract and the one in the case of *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4. The complaint in that case alleged that the plaintiff and her sisters were orphans of the ages of eight, ten, and thirteen years, respectively, and that an oral contract was made with their uncle and aunt to the effect that, if the plaintiff and her sisters would live with them and give them their services as they should be directed until they grew up, the uncle and aunt would at their death leave the plaintiff and her sisters all of the property they might own at their death, which agreement was performed on the part of the plaintiff and her sisters. Or, in other words, the orphans agreed to, and did, assume to their uncle and aunt the relation of children to their parents, and obeyed and served them as agreed.

There being no element of a peculiar personal and domestic relation in the contract, as alleged in the complaint under consideration,⁵¹¹ it does not appear upon the face thereof that the plaintiff cannot be fairly compensated in money for her uncle's breach of his oral contract. Therefore the complaint does not allege facts constituting a case for specific performance of the contract, and the demurrer was correctly sustained on this ground.

With reference to an amendment of the complaint, we deem it proper to state that the wife of the defendant Gustav Stellmacher is a necessary party to an action to compel specific performance of the alleged contract to convey or devise the land to the plaintiff, and, further, that the district court has jurisdiction of the action.

Order affirmed.

Agreements to Make Wills and the manner of their enforcement are discussed in the monographic note to *Johnson v. Hubbell*, 66 Am. Dec. 784-790. If one renders services to another under an agreement for compensation by will, the value of such services may be recovered from the estate of the latter in case he dies without making the expected compensation: *Grant v. Grant*, 63 Conn. 530. 38 Am. St. Rep. 379, 29 Atl. 15; *Hudson v. Hudson*, 87 Ga. 673. 27 Am. St. Rep. 270, 13 S. E. 583. See, also, *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572; *Huguley v. Lanier*,

86 Ga. 678, 22 Am. St. Rep. 487, 12 S. E. 922. And such agreements may, in a proper case, be enforced by specific performance: Svanburg v. Fosseen, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4; Burns v. Smith, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742; Burdine v. Burdine, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992. But see Winne v. Winne, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CITY OF ST. LOUIS v. FISCHER.

[187 Mo. 654, 67 S. W. 872.]

MUNICIPAL CORPORATIONS.—The Charter of the city of St. Louis, adopted by the voters therein pursuant to the constitution of the state, has all the force and effect of a charter which emanates from the general assembly. (p. 617.)

POLICE POWER—Dairies, Right of City to Prohibit.—Where express authority is conferred upon a city to prohibit, remove, and regulate cow-stables and dairies "within prescribed limits," it may make the prohibited area coextensive with the city limits. (p. 619.)

POLICE POWER—Dairies, Regulating Their Location.—An ordinance declaring that no dairy or cow-stable shall be established or maintained within the limits of the city without permission from the municipal assembly by ordinance, is not invalid as empowering the assembly to discriminate against one man and favor another, or as contravening the fourteenth amendment. (p. 620.)

POLICE POWER.—Nothing in the Fourteenth Amendment has shorn the states of their police power to prohibit or regulate unwholesome trades and occupations. p. 620.)

POLICE POWER—Dairies.—If an Ordinance Forbids dairies to be established without permission from the municipal assembly, the fact that prior to the enactment of the ordinance premises had been used, but subsequently were abandoned, as a dairy, does not authorize a person to establish a new dairy thereon without permission. (p. 621.)

Louis A. Steber, for the appellant.

B. Schnurmacher and Bass & Brock, for the respondent.

657 GANTT, J. This is a civil action by the city of St. Louis to recover a fine of one hundred dollars for the violation

of section 5 of a city ordinance of said city No. 18,407, approved April 6, 1896, which said section is in these words: "No dairy or cow-stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow-stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars or more than five hundred dollars." The complaint charged that defendant, in the city of St. Louis and state of Missouri was, on the sixteenth day of November, 1898, and on divers other days and times prior thereto, the occupant of certain premises, known as 7208 and 7210 North Broadway, in said city, and did then and there erect, build, and establish on said premises a dairy and cow-stable, without first having obtained permission so to do from the municipal assembly by proper ordinance, and furthermore did at said times and place maintain said dairy and cow-stable without having obtained permission from said municipal assembly of said city by proper ordinance, and that said dairy and cow-stable was not in operation at the time of the approval of said Ordinance No. 18,407, to wit, April 6, 1896, contrary to the said ordinance. ⁶⁵⁸ The defendant was found guilty in the police court, and appealed to the court of criminal correction. In the last-mentioned court he moved to quash the complaint on nine grounds, as follows: "1. Because the statement does not set forth facts sufficient to constitute any offense under the ordinances of the city of St. Louis; 2. Because section 5 of said Ordinance No. 18,407, is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law; 3. Because said section 5 is void as being unreasonable and oppressive to the citizen and the property owner; 4. Because said section is void, there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same; 5. Because said section is retrospective in its nature and application, and therefore in violation of the rights of private property; 6. Because said section 5 is void, being a delegation of the powers of the municipal assembly; 7. Because said section is in violation of section 30, article 2, of the constitution of the state of Mis-

souri; 8. Because said section 5 is in violation of section 4 of article 2 of the constitution of Missouri; 9. Because said section 5 is void as being in violation of the fourteenth amendment to the constitution of the United States, in that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, 'nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'” The court of criminal correction overruled this motion, and thereupon entered his plea of not guilty, and the cause was submitted to that court upon an agreed statement of facts, without a jury; and the court found defendant guilty of a violation ^{and} of said ordinance, and fined him one hundred dollars, from which he appeals to this court.

The agreed statement of facts is in these words: “It is hereby agreed and stipulated by and between the parties to the above-entitled cause, by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to wit: The plaintiff, the city of St. Louis, is a municipal corporation organized and existing under the laws of the state of Missouri; and defendant is, and was on the sixteenth day of November, 1898, the occupant of certain premises, known as 7208 and 7210 North Broadway, in the city of St. Louis, state of Missouri, upon which premises at said time stood a dwelling-house and frame stable, which had been erected and built prior to the occupancy of said premises by defendant. At the time of the approval of Ordinance No. 18,407 of said city, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant, for the purpose of operating a dairy and maintaining a cow-stable; and this defendant was at the same time operating a dairy and maintaining a cow-stable on premises known as No. 6305 Bulwer avenue, said city. Some time in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow-stable, and the dwelling-house thereon was occupied by a private family for residence purposes only; and no dairy or cow-stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows (about thirty in number) from premises No. 6305 Bulwer avenue, onto premises Nos. 7208 and 7210 North Broadway, placed

them in the old stable, and did proceed to conduct upon said premises a dairy establishment, and produce from said cows milk, and sell the same to his customers for profit, and was so doing on the said sixteenth day of November, 1898, without having first obtained permission so to do from the ~~the~~ municipal assembly by proper ordinance, as provided by section 5 of Ordinance No. 18,407 of the city of St. Louis, approved April 6, 1896. It is hereby stipulated and agreed by the parties to this cause, by their respective attorneys, that the printed ordinance, marked 'Exhibit A,' which is attached to and made a part of this agreed statement of facts, is a full, true, and correct copy of said Ordinance No. 18,407, and may be considered in evidence in this cause."

The transcript in this case is somewhat difficult to understand. It is either all record proper, or all bill of exceptions. There is nothing in the nature of the record proper, showing a trial, the entry of judgment, the filing of any of the motions, or the action taken by the court thereon. There is nothing in the transcript showing any copy of the affidavit for appeal, the bond for appeal, or the order granting an appeal to this court. At the same time these matters are set forth as if in a bill of exceptions, signed by the judge of the trial court.

1. The city of St. Louis is a municipal corporation existing under a charter framed and adopted by the qualified voters therein on August 22, 1876, which took effect October 22, 1876 (State ex. rel. v. Sutton, 3 Mo. App. 388), pursuant to the provisions of sections 20, 21, 22, 23, 24, and 25 of article 9 of the constitution of Missouri, 1875, and has all the force and effect of a charter which emanates from the general assembly (Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943). By the sixth paragraph of section 26 of article 3 of the said charter the mayor and the municipal assembly of St. Louis are given power within the city, by ordinance not inconsistent with the constitution or any law of this state or the charter itself, "to prohibit the erection of soap factories, stockyards, and slaughter-houses, pigpens, cow-stables and dairies, coal-oil and vitriol factories, within prescribed limits, and to remove and regulate the same; and to regulate or prevent the carrying ~~on~~ of any business which may be dangerous or detrimental to the public health." On April 6, 1896, the mayor and municipal assembly passed the ordinance set out in the accompanying statement, mak-

ing it a misdemeanor for any person thereafter to erect, build, or establish or maintain within the limits of said city any dairy or cow-stable, without having first obtained permission so to do from the municipal assembly by a proper ordinance, and prescribing a penalty for a violation thereof. At the outset it will be observed that express power is conferred upon the mayor and municipal assembly to prohibit and to remove and regulate cow-stables and dairies, within prescribed limits. To the mayor and assembly is confided the power of fixing and prescribing the limits within which no dairy or cow-stable shall be built or maintained in the city of St. Louis. As the grant in the charter is express, we are relieved from any discussion to demonstrate that the dairy business is of a character that brings it within the police power of the state, and properly subjects it to rigid rules of regulation, and even absolute prohibition, in large and populous cities. Indeed, few occupations are so peculiarly liable to cause injury, by the sale of impure milk to people who purchase milk as a necessary article of food, or which are more generally regarded as nuisances even under favorable circumstances. That the people of the state could delegate this power to the municipality is no longer open to dispute. It clearly falls within the proper function of municipal government. As the people of the state have conferred the power upon the city without restriction, it was entirely within the discretion of the mayor and assembly to prescribe the limits, and it was competent to fix the boundaries of the city as the prescribed limits, and this was done by Ordinance No. 18,407. Counsel for defendant insists that the municipal assembly must have first designated certain districts within the city ⁶⁶² by metes and bounds, within which no dairy or cowhouse should be erected or maintained but the charter does not so command. It nowhere limits the prohibited territory to less than the whole city. Counsel for defendant cites *In re Linehan*, 72 Cal. 114, 13 Pac. 170, as sustaining his position. But reference to that case will show that the charter power was "to exclude from certain limits" the obnoxious occupations, and the city council had merely defined a district, bounded by certain streets, in which it should be unlawful for any person to keep more than two cows, and the supreme court upheld the ordinance. No question of the power of the city of San Francisco to make such an ordinance applicable to the whole of said city arose in that case, and nothing in the decision supports the proposition now advanced—that the

city of St. Louis must necessarily prescribe a district therein less than its municipal boundaries; and we have no doubt of the power, under the charter, to make the prescribed limits coextensive with the city limits, and this we construe this ordinance to have done. But learned counsel for defendant argues that because the city has not made the prohibition absolute, and prevented all persons from erecting or maintaining dairies and cow-stables anywhere in the city, but has deemed it proper to say that no person should erect or maintain a dairy or cow-stable without permission first obtained by a proper ordinance, this ordinance is void; that it provides for special privileges to one man, by special ordinance, which it might deny to another man, his next-door neighbor. We think his position is entirely untenable. The charter confers not only the power to prohibit, but to remove and regulate; and it was entirely competent for the assembly to decline to prohibit dairies altogether, but to impose upon all persons desiring to erect or maintain a dairy or cow-stable the duty to first obtain permission from the mayor and assembly by duly enacted ordinance. Having absolute power to prohibit, it could make its own conditions: *St. Louis & M. R. Co. v. City of Kirkwood*, 159 Mo. 239, 60 S. W. 110. As was said ^{see} in *City of St. Louis v. Howard*, 119 Mo. 46, 41 Am. St. Rep. 630, 24 S. W. 770: " 'Regulations' means a rule or order for management or government. So that paragraph 6 of section 26 of article 3 of the charter empowers the city (by ordinance, of course, for that is the only way the city can legislate) to prescribe rules whereby slaughter-houses may be erected or operated, or whereby such erection or operation may be checked or restrained, either partially or in toto." But in that case the defendant was acquitted because, although the city had plenary powers in this regard, it had not seen fit to exercise them by an ordinance making it a misdemeanor to carry on or operate a slaughter-house "without first having obtained permission so to do from the municipal assembly by proper ordinance." In this case the city has passed just such an ordinance, and made it coextensive with the boundaries of the city; and just such an ordinance met the approval of this court in *City of St. Louis v. Howard*, 119 Mo. 47, 41 Am. St. Rep. 630, 24 S. W. 770; the only difference being that in the last-mentioned case it was forbidden to erect a slaughter-house within three hundred feet of any dwelling-house, whereas in this ordinance dairies are prohibited throughout the city unless the assembly shall first permit them by

proper ordinances. We are asked to declare this ordinance void, in the face of the unrestricted power in the charter, because, forsooth, the assembly may at sometime discriminate against one man and favor another. We cannot and shall not indulge any such presumption against the integrity of the municipal assembly, but shall, as was said in *City of St. Louis v. Howard*, 119 Mo. 50, 41 Am. St. Rep. 630, 24 S. W. 770, assume that the municipal assembly, before granting permission, will inquire and determine whether the place and the neighborhood is a proper one in which to allow a dairy to be maintained, and will act impartially. "Such favorable presumptions are constantly indulged in regard to legislative action": *State ex. rel. v. Mead*, 71 Mo. 272. It is at once apparent that no ironclad rule can fit every ⁶⁶⁴ case. The assembly may well determine that the keeping of a dairy in the outskirts of a city, where the population is sparse and the areas large, would not be a nuisance, whereas to permit a dairy in the thickly populated portion of the city, or near a schoolhouse, church, or hospital, would seriously endanger the public health, and, in the exercise of its plenary powers, permit it in the one case, and prohibit it in the other, without being obnoxious to the criticism of partiality. Under the charter it is given legislative discretion in this matter. In our opinion, the ordinance prescribed the limits, and it was entirely proper and lawful to require every person desiring to erect or maintain a dairy to obtain permission by a proper ordinance, and such an ordinance is the only defense to an action like this: *City of Louis v. Howard*, 119 Mo. 47, 41 Am. St. Rep. 630, 24 S. W. 770. We can see no more objection to such an ordinance than could be urged against the granting of a franchise to run a street railroad on a particular street. A railroad laid in a street without authority is a nuisance, and yet it has never been held that an ordinance, to be valid, must permit everybody to maintain railways in all the streets. It is a matter within the authority of the assembly.

2. As to the objection that the ordinance violates the fourteenth amendment to the constitution of the United States, it is sufficient to say that it does not contravene that amendment, because it operates upon all persons alike, and that every man holds its property subject to the maxim that he must so use it as not to injure his neighbor. Nothing in that amendment has shorn the states of their police power to prohibit or regulate unwholesome trades and occupations: Slaughter-house

Cases, 16 Wall. 36, 21 L. ed. 394; Tiedeman on State and Federal Control of Personal Property, 731; In re Linehan, 72 Cal. 114, 13 Pac. 170; State v. Broadbelt, 89 Md. 565, 73 Am. St. Rep. 201, 43 Atl. 771, 45 L. R. A. 433; 2 Kent's Commentaries, 340; City of St. Louis v. Howard, 119 Mo. 47, 41 Am. St. Rep. 630, 24 S. W. 770; Eichenlaub v. City of St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590. Nothing in the constitution of the United States or of this state secures to any man the right to maintain a ⁶⁶⁵nuisance to the discomfort and peril of the health of his neighbor.

It is not deemed necessary to answer seriatim all the objections urged to the constitutionality of this ordinance. We have considered them all, and are satisfied they are not tenable or sound. There is nothing retrospective in the application of this ordinance to defendant. It was adopted in 1896. He began, without the permission of a proper ordinance, to carry on and maintain this dairy at the premises mentioned in the complaint in 1898—long after the ordinance was in force.

The ordinance is leveled at the maintenance of a dairy—the keeping of cows for the sale of milk; and the mere fact that the premises had once been so occupied prior to 1896, but subsequently abandoned for such a use, did not authorize defendant to start up a new dairy on said premises without the necessary condition precedent of a lawful ordinance. Accordingly we hold that his conviction was proper, and the judgment is affirmed.

Burgess, C. J., concurs in these views.

Per CURIAM. Upon a rehearing by the court in Bank, the foregoing opinion of Gantt, J., in division No. 2, is adopted by the court in Bank.

Burgess, C. J., and Robinson, Brace, Marshall and Valliant, JJ., concur therein.

Sherwood, J., dissents.

The Supreme Court of the United States affirmed the decision of the principal case: See *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. Rep. 673. Mr. Justice Brown delivered the opinion therein as follows:

"The authority of the city of St. Louis to adopt the ordinance in question is found in the Revised Statutes of the state (Rev.

Stats. 1899, pp. 2484, 2488), which declare: 'The mayor and assembly shall have power, within the city, by ordinance not inconsistent with the constitution or any law of this state, or of this charter, . . . to . . . prohibit the erection of . . . cow-stables and dairies . . . within prescribed limits, and to remove and regulate the same.'

"Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or of the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars and by forfeitures not exceeding one thousand dollars.

"The authority of the municipality of St. Louis, under this charter, to adopt the ordinance in question, was settled by the decision of the supreme court, and is not open to attack here.

"Considerable stress is laid upon the fact that at the time the ordinance was adopted (April 6, 1896), the dairy and cow-stable had already been erected, and at that time was occupied and in use for that purpose, though such use was subsequently abandoned, and the premises used as a private residence for a short time, when defendant moved his cattle there and established anew the dairy and cow-stable which had theretofore been used. The supreme court, however, found that defendant was guilty of maintaining a dairy and cow-stable, within the meaning of the ordinance, without permission of the municipal assembly, and as this construction of the ordinance involves no federal question, we are relieved from the necessity of considering it.

"Defendant's objection to the ordinance, that it is made to apply to the whole city, when authority was only given by the charter to prohibit the erection of cow-stables and dairies 'within prescribed limits,' is equally without foundation. If it were possible to prescribe limits for the operation of the ordinance, it was held by the supreme court to be equally possible to declare that those limits should be coincident with the limits of the city. This is also a non-federal question.

"Defendant's main contention, however, is that, by vesting in the municipal assembly the power to permit the erection of dairy and cow-stables to certain persons, a discrimination is thus declared in favor of such persons, and against all other persons, and the equal protection of the laws denied to all the disfavored class. The power of the legislature to authorize its municipalities to regulate and suppress all such places or occupations as, in its judgment, are likely to be injurious to the health of its inhabitants, or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question. The keeping of swine and cattle within the city or designated limits of the city has been declared in a number of cases

to be within the police power. The keeping of cow-stables and dairies is not only likely to be offensive to neighbors, but it is too often made an excuse for the supply of impure milk from cows which are fed upon unhealthful food, such as the refuse from distilleries, etc.: *In re Linehan*, 72 Cal. 114, 13 Pac. 170; *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Love v. Recorder's Court Judge*, 128 Mich. 545, 87 N. W. 785.

"We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing, in any degree, the validity of the ordinance, or as denying to the disfavored dairy-keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows, and another fifty; where one desired to establish a stable in the heart of the city, and another in the suburbs; or where one was known to keep his stable in a filthy condition, and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors, and denying it to others. The question in each case is whether the establishing of a dairy and cow-stable is likely, in the hands of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused and the permission accorded to social or political favorites and denied to others, who, for reasons totally disconnected with the merits of the case, are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood: *Crowley v. Christiansen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13; *Davis v. Massachusetts*, 167 U. S. 43, 17 Sup. Ct. Rep. 731; *Soon Hing v. Crowley*, 113 U. S. 703, 710, 5 Sup. Ct. Rep. 730.

"The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal. This would operate with great hardship upon persons who desire to establish dairies and cow-stables in the outskirts of the city, as well as inconvenience to the inhabitants, who, to that extent, would be limited in their supply of milk. It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases; and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. It has been

held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual (*Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *In re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *State v. Fiske*, 9 R. I. 94; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Sioux Falls v. Kirby*, 6 S. Dak. 62, 60 N. W. 156), and in others that such authority cannot be delegated to the adjoining lot owners: *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470; *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245. But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority: *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Commonwealth v. Davis*, 162 Mass. 510, 44 Am. St. Rep. 389, 39 N. E. 113; and by this court the delegation of such power even to a single individual, was sustained in *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. Rep. 317, and *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. Rep. 633.

"Whether the defendant be in a position to avail himself of the alleged invalidity of the ordinance without averring that he applied for, and had been refused a permit to establish the dairy and cow-stable in question, as was intimated in the latter case, is not necessary to a decision here, and we express no opinion upon the point.

"It is sufficient for us to hold, as we do, that the ordinance in question does not deprive the defendant of his property without due process of law, nor deny to him the equal protection of the laws.

"The judgment of the supreme court of Missouri is therefore affirmed."

STATE v. SHEPHERD.

[177 Mo. 205, 76 S. W. 79.]

CONTEMPT—Inherent Power to Punish Summarily.—The supreme court has inherent power to punish contempts summarily. (p. 641.)

CONTEMPTS are Classified as civil or criminal, and as direct or constructive. (p. 641.)

CIVIL CONTEMPTS are such as affect a private person. (p. 641.)

CRIMINAL CONTEMPTS are all acts committed against the majesty of the law or against courts as an agency of the government, and in which, therefore, the commonwealth and the whole people are concerned. (p. 641.)

DIRECT CONTEMPTS are those committed in the presence of the court while in session, or so near as to interrupt its proceedings, but also include any improper conduct tending to defeat or impair the administration of justice. (p. 641.)

CONSTRUCTIVE CONTEMPTS arise from matters not transpiring in court which tend to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the administration of justice. (p. 641.)

CONTEMPT.—Scandalizing a Court Itself is a criminal contempt, and the contempt need not relate to a cause that is still pending. (p. 642.)

CONTEMPT—Summary Punishment of Different Kinds of.—The supreme court has jurisdiction to punish, summarily, civil as well as criminal contempts; and this power is the same whether the contempt is direct or constructive, there being only a difference of procedure in the two cases. (p. 644.)

CONTEMPT—When Both Civil and Criminal.—A Newspaper article scandalizing the court and abusing one of the parties to a cause still pending, by charging bribery and corruption, is both a civil and a criminal contempt. (p. 644.)

CONTEMPT—What Court may Punish.—Only the Court in which a contempt is committed, or whose authority is defied, has power to punish it or entertain proceedings to that end. (p. 648.)

CONTEMPT—Legislature cannot Regulate Right to Punish.—The supreme court has an inherent and constitutional right to punish contempt summarily, which cannot be taken away, abridged, limited, or regulated by the legislature. (p. 648.)

CONTEMPT—Right to Jury Trial.—Cases of contempt are not triable by jury, either at the common law or under constitutional guaranties of the right of trial by jury. (p. 652.)

CONTEMPT—Due Process of Law.—One who has been regularly charged with contempt in an information filed by the attorney general, and brought into court, and has appeared in person and by counsel, has pleaded, and had a trial according to the practice in such cases, has had the benefit of due process of law. (p. 653.)

THE LIBERTY of the Press Means that anyone can publish anything he pleases, but he is liable for the abuse of this liberty; if he does this by scandalizing the courts of his country, he is liable to be punished for contempt. (p. 660.)

LIBERTY OF THE PRESS.—Newspapers have no Greater Privilege than the ordinary citizen; they have the right to publish the truth, but no right to publish falsehood to the injury of others. (p. 661.)

FREEDOM OF SPEECH.—Criticism and Defamation distinguished. (p. 664.)

FREEDOM OF SPEECH.—Everyone may Speak, Write, or publish what he will, but is responsible for the abuse of the privilege; courts cannot prevent a man telling an untruth about another, but their power is limited to punishing him if he does so. (p. 675.)

Edward C. Crow, attorney general, for the informant.

N. M. Bradley and Karnes, New & Krauthoff, for the respondent.

²⁰⁰ **MARSHALL, J.** This is an ex-officio information by the attorney general, informing the court that the defendant, as publisher of a certain weekly newspaper at Warrensburg,

Missouri, called the "Standard-Herald," on the 19th of June, 1903, published in said paper the following article:

"When a citizen of Missouri stops long enough to think of the condition of affairs in his state, it is enough to chill his blood. A grand jury in Cole county has just found indictments against four members of the highest law-making body in the state, and the St. Louis grand jury has heard evidence within the past few months that, if it had the necessary jurisdiction, would have indicted many other members of the state senate. The Missouri citizen has also seen the Cole county grand jury dissolved before the work mapped out for it was hardly begun, on the advice of the attorney general of the state. They also see the chief executive sitting passively at his office in the statehouse, not making a move to bring to justice the men who have been proven guilty of boodling in the Missouri legislature by the St. Louis grand jury, but over whom the authorities of that city have no jurisdiction. And now, as the cap-sheaf of all this corruption in high places, the supreme court has at the whiplash of the Missouri Pacific railroad, sold its soul to the corporations, and allowed Rube Oglesby to drag his wrecked frame through this life without even the pitiful remuneration of a few paltry dollars. Learned men of the law say that Rube Oglesby had the best damage suit against a corporation ever taken to the supreme court. This very tribunal, after reading the evidence, and hearing the arguments of the attorneys, rendered a decision sustaining the judgment of the lower court, which decision was concurred in by six of the seven members of the court. This is usually the end of such cases, and the decision of a supreme court, once made, usually stands. But not so in the ²¹⁰ Oglesby case. Three times was this case, at the request of the railway attorneys, opened for rehearing, and three times was the judgment of the lower court sustained. But during this time, which extended over a period of several years, the legal department of this great corporation was not the only department which was busy in circumventing the defeat of the Oglesby case. The political department was very, very busy. Each election has seen the hoisting of a railway attorney to the supreme bench, and when that body was to the satisfaction of the Missouri Pacific, the onslaught to kill the Oglesby case began. A motion for a rehearing was granted, and at the hearing of the case, it was reversed on an error in record of the trial court and was sent back for retrial. That was in the early part of the year 1902. The case was tried in

Sedalia before Circuit Judge Longan, one of the ablest jurists in the state, and we have been informed that no error was allowed to creep into the record at the second trial. Again the jury rendered judgment in favor of Oglesby for fifteen thousand dollars, and again the case was appealed to the supreme court. An election was coming on, and the railroad needed yet another man to beat the Oglesby case. The Democratic nominating convention was kind, and furnished him in the person of Fox. The railroad, backed by four judges on the bench, allowed the case to come up for final hearing, and Monday the decision was handed down, reversed and not remanded for retrial. The victory of the railroad has been complete, and the corruption of the supreme court has been thorough. It has reversed and stultified itself in this case until no sane man can have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad. What hope have the ordinary citizens of Missouri for justice and equitable laws in bodies where such open venality is practiced and how long will they stand it? The corporations have long owned the legislature,²¹¹ now they own the supreme court, and the citizen who applies to either for justice against the corporation gets nothing. Rube Oglesby and his attorney, Mr. O. L. Houts, have made a strong fight for justice. They have not got it. The quivering limb that Rube left beneath the rotten freight-car on Independence hill, and his blood that stained the right of way of the soulless corporation, have been buried beneath the wise legal verbiage of a venal court, and the wheels of the Juggernaut will continue to grind out men's lives, and a crooked court will continue to refuse them and their relatives damages, until the time comes when Missourians, irrespective of politics, rise up in their might and slay at the ballot-box the corporation bought lawmakers of the state."

Upon the filing of said information, the court caused to be issued against the defendant the following citation: "Whereas, it is represented to our supreme court in Bank—by the information of Edward C. Crow, attorney general of the state of Missouri, ex-officio (a copy of which information is hereto attached), that you, the said J. M. Shepherd, publisher of a certain weekly newspaper at the city of Warrensburg, Missouri, called the 'Standard-Herald,' did on the nineteenth day of June, 1903, while the case of H. R. Oglesby, respondent, against the Missouri Pacific Railway Company, appellant, was and still

is pending in this court, publish a certain editorial and article then and there charging the supreme court of the state of Missouri, and the members thereof, with bribery and corruption, in connection with the action of the court in the disposition of said case; and that you, the said J. M. Shepherd, by said editorial and article aforesaid, published in the said 'Standard-Herald,' did defame, degrade and insult the supreme court of the state of Missouri and the members thereof, and did charge the said court and its members with corruption and partiality in the discharge of their official duties,³¹² and in the judicial official determination and disposition of said case of *Oglesby v. Missouri Pacific R. R. Co.*, 177 Mo. 272, 76 S. W. 623; and that said action in publishing said editorial and article, brings the supreme court and the members thereof and the highest department of the judicial branch of the state government, charged with the final disposition and enforcement of law and justice, into disrepute, contumely and contempt, and tends to destroy the power and influence of the court as an independent co-ordinate branch of the state government in the enforcement of the law and the administration of justice, and tends to and does causelessly inflame and incite the prejudices of the people against the said supreme court, and tends to and does affect the said court so as to directly obstruct and interfere with and impede the administration of justice in the above-mentioned cause, and which said cause is now and here pending in said supreme court. Now, therefore, you, the said J. M. Shepherd, are hereby commanded to be and appear before the honorable supreme court of Missouri, in Bank—on Wednesday, July 22, 1903, at 9 o'clock in the forenoon, at the supreme court house in the city of Jefferson, in the county of Cole, in the state of Missouri, then and there to show cause, if any you have, why an attachment should not issue against you for contempt of this court, in publishing said editorial and article aforesaid, and hereof fail not."

On the return day of the rule, the defendant filed the following return:

"In obedience to the command of this court heretofore made upon him, comes J. M. Shepherd, and for his return to the order to show cause heretofore issued herein, respectfully shows:

"1. That this court has no jurisdiction to hear and determine the charges as contained in said complaint.

"2. That said complaint and information does not state facts sufficient to authorize the issuance of an attachment for contempt of this court.

213 "3. That it is true that on the nineteenth day of June, 1903, and long prior thereto, he was and is still the publisher and proprietor of a weekly newspaper published in the city of Warrensburg, state of Missouri, called the 'Standard-Herald,' and that at said date he caused to be published in said newspaper the article set out in full in said complaint.

"4. That he denies the other allegations set out in said complaint and information, and demands strict proof thereof.

"5. Said article was not issued or circulated in the presence or hearing of the court, and was not intended to interfere, nor did it interfere, with any of the business of said court or any of its officers.

"6. That nothing in said article referred to in said information tends to or does it affect the said court so as to obstruct or interfere with or impede the administration of justice by said court.

"7. That at the time said article was published respondent believed the cause therein referred to had been finally disposed of by this court, and if said cause was still pending in this court, he had no knowledge of that fact.

"8. Said complaint and information and the notice issued therein and all proceedings thereunder were and are in violation of section 14, article 2, of the constitution of Missouri, which provision is specially invoked herein.

"9. That said information and the proceedings thereunder as proposed deny to said Shepherd the right of a trial by jury of questions of which this court has no personal knowledge, all in violation of section 28, article 2 of the constitution of Missouri, which is specially invoked herein.

"10. That said complaint and the proceedings thereunder as proposed are in violation of section 30, article 2 of the constitution of Missouri, which is specially invoked herein.

214 "11. That said complaint and information and the proceedings had and proposed thereunder are all in violation of section 1 of the fourteenth amendment to the constitution of the United States, which is specially invoked herein, together with all the rights and privileges guaranteed thereunder.

"12. That section 1616 of the Revised Statutes of Missouri of 1899 provides: 'Every court of record shall have power to punish, as for a criminal contempt, persons guilty of any of

the following acts, and no other: 1. Disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; 2. Any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; 3. Willful disobedience of any process or order, lawfully issued or made by it; 4. Resistance willfully offered by any person to the lawful order or process of the court; 5. The contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatory.' And this respondent states that by virtue of said statute this court is not authorized to punish this respondent on account of any of the matters charged in the information herein.

"Wherefore he asks that this complaint be dismissed."

The matter coming on for hearing, the defendant appeared in person and by counsel. The attorney general, in open court, demanded of the defendant and his counsel to know whether or not they desired an opportunity to introduce evidence to show the truth of the matters charged in the article aforesaid, and announced the readiness of the state to proceed, at once, with the trial thereof. One of defendant's counsel, Mr. New, stated that as the return denied all the allegations of the information not specially admitted, ²¹⁵ and demanded strict proof of the allegations of the information, his position was that the burden of proof was upon the informant to prove the falsity of the charges, and not upon the defendant to prove the truth of charges. The other counsel for the defendant, Mr. Bradley, stated that, so far as he was concerned, he did not believe the charges were true, and that he did not desire an opportunity to introduce any evidence to show that they were true.

Thereupon, the hearing was proceeded with, the defendant standing upon the defenses set up in his return, with the additional point that the information was not verified. Upon final submission, the court adjudged the defendant guilty of contempt of court, and fixed his punishment at a fine of five hundred dollars and costs, the defendant to stand committed until the same was paid. Thereupon, the fine and costs were paid.

Ordinarily, this would close the case and the incident. But as this is the first case of this character that has ever arisen in this state or court, it was stated at the time of the rendition of the judgment, that a written opinion would be prepared and

promulgated later, in order that the reasons upon which the judgment rested, and the law applicable to such cases, might be known and understood, to the end that well-disposed and good citizens might not innocently offend in such regard, and that all others guilty of like violations of law, should have notice of the consequences.

I.

THE CONTEMPT INVOLVED IN THIS CASE.

At the outset, it is proper to analyze the article in question, so as to clearly understand the character and scope of the charges. The article starts out with an attack upon the attorney general and the governor of the state, in connection with offenses alleged to have been committed by members of the legislative branch ²¹⁶ of the government. Then it alleges that, "as a capsheaf of all this corruption in high places" this court, "at the whiplash of the Missouri Pacific railroad, sold its soul to the corporation." It then refers to the course, on former appeal, of the case of Oglesby against the Missouri Pacific railroad, in this court, and says: "Each election has seen the hoisting of a railroad attorney to the supreme bench." It then charges that the case was reversed and remanded for a new trial, and upon such new trial, the plaintiff again obtained a verdict, and an appeal was again taken; that the railroad needed another man to beat the case, and that the Democratic nominating convention furnished him, and that, "the railroad, backed by four judges on the bench, allowed the case to come up for final hearing," and that the judgment was reversed and the cause not remanded for retrial. The article then charges that "the victory of the railroad has been complete, and the corruption of the supreme court has been thorough. It has reversed and stultified itself in this case until no sane man can have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad. What hope have the ordinary citizens of Missouri for justice and equitable laws in bodies where such open venality is practiced? And how long will they stand it? The corporations have long owned the legislature, now they own the supreme court, and the citizen who applies to either for justice against the corporation gets nothing."

Thus it will be observed that this scandalous article makes the following charges: 1. It charges the attorney general and

the governor with faithlessness in the discharge of their duties. 2. It charges the legislative department with high and grave misdemeanors. 3. It charges the supreme court with having "sold its soul to the corporations"; of being composed of railroad attorneys; of being guilty of corruption; of practicing open venality; of having been ²¹⁷ "bought in the interest of the railroad"; and, like the legislature, of being "owned" by the railroads. 4. It charges the Democratic nominating convention of 1902, with having been dominated by the railroads, and with having nominated a candidate for supreme judge who would favor the railroad in the Oglesby case. In short, the article attacks the honesty, integrity and purity of every branch of the state government, and of the several officers, and then attacks the Democratic nominating convention of 1902.

If these charges are true, the persons who are thus charged should be prosecuted and removed from office. On the other hand, anyone who makes such charges should be prepared to make some sort of a decent showing of their truth.

Instead of standing ready to prove the truth of the charges, the defendant, when called into court, neither asserts the truth of the charges, nor does he accept the challenge of the attorney general to introduce any evidence whatever of their truth. On the contrary, one of his counsel takes the very erroneous position that the burden of proof is upon the informant to show the falsity of the charges, and not upon the defendant to prove the truth of the charges, while his other counsel expressly states that he does not believe the charges are true, and does not desire to introduce any evidence to show that they are true.

In other words, the defendant has grossly, indecently and cruelly villified and scandalized every department of the government under which he lives and which affords him protection for his life, liberty and property, and when challenged to make his words good, he consummates his offending by failing absolutely to produce one word of testimony to show that he told the truth, and instead of making the "amende honorable," by withdrawing the charges and apologizing like a man, he seeks to escape punishment by challenging the jurisdiction of this court to protect itself from insult and to ²¹⁸ maintain the respect and dignity with which the people have invested it, denies that the facts charged are sufficient to constitute a

contempt, and raises other technical and constitutional questions.

As above stated, this is the first case of this kind that has come before this court. It is not, however, the first time that highly improper articles have been published concerning this court and other courts in this state, but it is the first case wherein the character and heinousness of the charges have made it absolutely imperative upon this court to take cognizance of them.

It is by no means, however, the first case of its kind that has arisen. The books are full of cases, both English and American, where other courts have been similarly scandalized, and have punished the villifiers as for a contempt of court.

II.

INHERENT POWER OF COURTS OF RECORD TO PUNISH CONTEMPTS.

The first question raised by the defendant in this case is as to the power and jurisdiction of this court to punish him, summarily, for a criminal contempt.

The power to punish for contempt is as old as the law itself, and has been exercised so often that it would take a volume to refer to the cases. From the earliest dawn of civilization, the power has been conceded to exist. It has been exercised or not, as a matter of public policy, but its existence has never been denied. In England, it has been exercised when the contempt consisted of scandalizing the sovereign or his ministers, the lawmaking power, or the courts. In the American colonies, the same rule obtained and was exercised quite frequently. Since the Revolution, and the adoption of the constitution of the United States, and the establishment of this government of the people, by the people, and for the people, the English rule has been modified, ²¹⁹ so far as the executive department and the ministers of state are concerned, and in some degree, so far as the legislative department is concerned, but has been almost universally preserved so far as the judicial department is concerned. For instance, in England, it was an offense, called sedition, to speak or writ against the character and constitution of the government, or to seek to change it, by any means except those prescribed. There was also an offense known as *scandalum magnatum*, which consisted of scandalizing the sovereign, his ministers, members of parlia-

ment, the courts and the judges, and certain other persons of high rank.

It is interesting to note the difference in policy with reference to the enforcement of the laws of other countries in respect to sedition and scandalum magnatum.

The first case of which there is a report at hand was that wherein Emperor Augustus desired "to punish a historian who passed some stinging jests on him and his family, but Maecenas advised him that the best policy was to let such things pass and be forgotten." Other sovereigns took the same view. "Caesar said that to retaliate was only to contend with impudence and put one's self on the same level. And even Tiberius acted upon the same view. The Theodosian Code also made this the law, and expressly declared that slanderers of majesty should be unpunished, for if this proceeded from levity, it was to be despised; if from madness, it was to be pitied; and if from malice, it was to be forgiven; for all such sayings were to be regarded according to the weight they bore": Paterson on Liberty of the Press, Speech, etc., 87.

But while such was the policy of these Latin countries, exactly the converse has long been the established law among English speaking peoples. As early as the reign of Edward I it was an offense to publish false news or tales, whereby discord might grow between the king and his people: 3 Edward I, c. 34. Construing this act, Lord Ellenborough, C. J., said: "If a person ²²⁰ who admits the wisdom and virtues of his Majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, he was not prepared to say that this tends to degrade his Majesty or to alienate the affections of his subjects. He was not prepared to say this is libelous; but it must be with perfect decency and respect, and without any imputation of bad motives. If the writer were to go one step further and say or insinuate that his Majesty acts from any partial or corrupt view, or with an intention to favor or oppress any individual or class of men, then it must have been most libelous.

In England, it is an offense to libel ministers of state. Holt, C. J., in Tutchin's Case, 14 St. Tr. 1128, said that "to assert that corrupt officers are appointed to administer affairs, is a reflection on the government, and tends to beget an ill-opinion of the administration of the government." Criticisms which make no fair allowance to those public servants as being honestly desirous to do their work well, and imputing corruption

or dishonesty, or any other personal vice incompatible with high sense of duty, are thus treated as libels.

In 1804, one Cobbett published a letter in which he spoke of Lord Hardwicke, lord lieutenant of Ireland, and Lord Redesdale, lord chancellor of Ireland, as "a very eminent sheep-feeder from Cambridgeshire, assisted by a very able and strong-built chancery pleader from Lincoln's Inn." He was prosecuted for libel, and Lord Ellenborough told the jury that "if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime": *Rex v. Corbett*, 29 St. Tr. 49.

In 1786, the "Morning Herald" charged Pitt, the prime minister, with gambling in the funds and fraudulently availing himself of official information to make money on the stock exchange. He sued the publisher ²²¹ for libel, and Lord Mansfield told the jury to remember this was "a very serious question, in which all the public were concerned, namely, whether there should be any protection to the reputation of honorable men in public or private life." The jury returned a verdict for two hundred and fifty pounds: *Paterson on Liberty of the Press*, etc., 95.

The offense of *scandalum magnatum* has not existed in this country since the Revolution, but everyone, of whatever rank or station in life, stands upon the same footing before the law, and is entitled to the same protection for his life, his liberty, his property and his reputation.

In the eye of our constitutions and laws, every man is a sovereign, a ruler and a freeman, and has equal rights with every other man. We have no rank or station, except that of respectability and intelligence as opposed to indecency and ignorance, and the door to this rank stands open to every man to freely enter and abide therein, if he is qualified, and whether he is qualified or not depends upon the life and character and attainments and conduct of each person for himself. Every man may lawfully do what he will, so long as it is not *malum in se* or *malum prohibitum* or does not infringe upon the equally sacred rights of others. Every man may speak or write what he will, so long as he tells the truth, but no man has any more right to-day to bear false witness against his neighbor than he had in the days of Moses.

During the administration of the elder Adams, a sedition law was enacted, making it an offense to libel the government, the Congress or the President of the United States, and four cases were prosecuted under it. But its constitutionality was always disputed by a large part of the citizens, and its impolicy was beyond question. It brought about the very conditions it was intended to repress, and was soon repealed: Cooley's ²²² Constitutional Limitations, 6th ed., 526; Odgers on Libel and Slander, 416.

The only offense of this general character which is known to our law is, attempts "by word, deed or writing, to promote public disorder or to induce riot, rebellion or civil war, which acts are still considered seditious, and may, by overt acts be treason": Odgers on Libel and Slander, 419.

The parliament of England has, at least since as early as the reign of Richard II, claimed an inherent right to punish, summarily, as for a contempt, any breach of its privileges, and the books are full of cases wherein it exercised the power, as many as thirty cases occurring during the seventeenth century. The parliament has always claimed and exercised the right to be the sole judge, without any interference or review by the courts, or otherwise, whether a contempt against its privileges has been committed, and how it shall be punished, and this power has been conceded to it: Paterson on Liberty of the Press, etc., 105 et seq.; Odgers on Libel and Slander, 422.

So jealous and tenacious is parliament of its rights in this regard, that in 1689 it actually cited two judges before it for contempt, for entering a judgment against the sergeant of the house, based upon his act in executing the orders of the house. And although the judges insisted that their act was only an error of judgment, they were adjudged guilty of contempt of the privileges of parliament, and were committed to prison in Newgate, where they remained eight months: Paterson's Liberty of the Press, etc., 201.

The Congress of the United States and the legislatures of the several states have also an inherent power to punish for certain contempts, but this power is not generally admitted to be as broad as that of the parliament of England.

The courts of England have uniformly, from the beginning, exercised the right to punish for contempt, ²²³ and the courts of America have always exercised a like power.

Blackstone, volume 4, page 285, in treating of such contempts, and the power of the court to punish therefor, says:

"Some of these contempts may arise in the face of the court; as by rude and contumelious behavior; by obstinacy, perverseness or prevarication; by breach of the peace, or any willful disturbance whatever; others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; *by speaking or writing contemptuously of the court or judges, acting in their judicial capacity*" [the italics are superadded for the sake of emphasis]; "by printing false accounts (or even true ones without proper permission), of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of their authority (so necessary for the good order of the kingdom) is entirely lost among the people."

Speaking to this subject, Paterson on Liberty of the Press, etc., page 121, aptly says: "Courts of law must, therefore, as in the case of parliament, be credited with sufficient power to vindicate and protect their procedure against attacks, for as courts are the appointed means of adjudicating on all disputes, and for discovering all sufficient materials to that end, their labors would be often futile, if irresponsible volunteers intruded crude opinions and speculations, founded, as they must usually be, on defective data. The first requisite of a court of justice is that its machinery be left undisturbed; and this cannot be effected unless comments be all but excluded till the court has discharged its function. The same power to commit summarily for contempt all persons who intrude into the judicial function, and profess to have better and superior means of knowledge, or ²²⁴ who suggest partial or corrupt conduct, is thus deemed inherent in all courts of record, though the occasion and extent of this summary jurisdiction have given rise to nice distinctions. It is said to be a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of it. This exercise of power is as ancient as any other part of the common law. If the course of justice is obstructed, that obstruction must be violently removed. When men's allegiance to the laws is fundamentally shaken, this is a dangerous obstruction. That the judges should be credited with impartiality is absolutely necessary. Therefore, to libel or slander the administration of the law by imputing misconduct to the judge or jury is an indict-

able offense. Judges are also protected in other ways. To kill a judge in the performance of his duties is no less than high treason. Coke says that to draw a weapon at a judge sitting in court was a great misprision, for which the right hand was cut off and the goods were forfeited. To utter threats or reproaches to a judge, sitting in court, is always an indictable misdemeanor."

Rapalje on Contempts starts his work in section 1, with these statements: "It is conclusively settled by a long line of decisions that at common law, all courts of record have an inherent power to punish contempts committed in *facie curiae*, such power being essential to the very existence of a court as such, and granted as a necessary incident in establishing a tribunal as a court. . . . Each 'superior court' being the judge of its own power to punish contemnors, no other court can question the existence of that power, and the facts constituting the contempt need not be set out in the record. This inherent and necessary power can be exercised by a 'superior court,' independently of statutory authority, and such court may go beyond the powers given by statute, in order to preserve and enforce its constitutional powers, when acts in contempt invade ²²⁵ them. Indeed, the conferment of the power by statute upon a superior court of record, is deemed no more than declaratory of the common law."

In the note to the text, the author has collated decisions establishing this to be the law in Alabama, Arkansas, California, Connecticut, Florida, Indiana, Illinois, Kansas, Kentucky, Massachusetts, Maine, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, West Virginia, and in the United States courts, as well as in England.

In 7 American and English Encyclopedia of Law, second edition, page 30, the rule of law is thus stated: "The right of every superior court of record to punish for contempt of its authority or process is inherent from the very nature of its organization, and essential to its existence and protection and to the due administration of justice." And in the note to the text the writer sets out a multitude of cases from the states and jurisdictions referred to by Rapalje, and shows that such is also the law in Colorado, Georgia, Michigan, Nebraska, Ohio, Oklahoma, South Dakota, Vermont and Virginia.

Judge Cooley in his work on Constitutional Limitations, sixth edition, page 389, note 2, says: "Cases of contempt were

never triable by jury; and the object of the power would be defeated in many cases if they were. The power to punish contempts summarily is incident to courts of record." In support of the law as thus stated, the learned author cites cases from England, the United States courts, Maine, New York, Tennessee, Illinois, Arkansas, Kentucky, North Carolina, Mississippi, New Hampshire, Connecticut, Indiana and Rhode Island.

Best, J., in *Rex v. Davison*, 4 Barn. & Ald. 340, decided in 1821, said: "From the earliest period of our history, this authority has been exercised. The year-books record instances of such commitments." All ²²⁸ the judges in *Miller v. Knox*, 4 Bing. N. C. 574, said it is "an acknowledged principle that the power of summarily punishing for contempt has been inherent in all courts of record from time immemorial."

In fact, so well settled is the law in England in this regard that it is said in 3 *Encyclopedia of the Laws of England*, page 313: "A court of justice, without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, to shield those who are intrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community. . . . Without such protection, courts of justice would soon lose their hold upon public respect, and the maintenance of law and order would be rendered impossible."

Blackstone declares that: "Laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law extend": 4 *Blackstone's Commentaries*, 286.

And the law is as firmly settled in America as it is in England.

In *Ex parte Robinson*, 19 Wall. 505, the supreme court of the United States, speaking through Mr. Justice Field, said: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of courts, and consequently to the due administration of justice. The moment the courts of the United States were

called into existence and invested with jurisdiction over any subject, they became possessed of this power."

In Cartwright's Case, 114 Mass. 238, Gray, C. J., ²²⁷ afterward associate justice of the supreme court of the United States, said: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights."

In Watson v. Williams, 36 Miss. 341, Harris, J., said: "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power to effectually protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against recusant persons before it, would be a disgrace to the legislation, and a stigma upon the age that invented it."

In State v. Frew, 24 W. Va. 416, 49 Am. Rep. 257, Snyder, J., said: "It may be stated as a proposition of law, unquestioned and unquestionable, that by the common law of England, as well as by the uniform decisions of the courts of this country, courts have the inherent power to punish for contempts in a summary manner, and that this power is an essential element and part of the court itself which cannot be taken away without impairing the usefulness of the court, because it is a power necessary to the exercise of all others."

To the like effect are the decisions in the other states of the Union above referred to.

If each court did not possess the power to punish contempts committed against itself, the jury, and its officers, summarily, it would be easy for a contemnor to escape punishment entirely. For if the matter was sent, ²²⁸ to another court or left to be tried by a jury, the contemnor could so insult and abuse such other court or the jury as to render it impossible for them also to try him, and by thus renewing his offense to every court he was called before, make it impossible to punish him at all. It is manifest that if the jury is insulted and treated with contempt, the court must protect them, for they can render no

judgment and are powerless to protect themselves. It would be paradoxical to say the court alone can punish a contempt of the jury, but had no power to protect itself from contempt.

Without further exemplification, therefore, the law must be regarded as settled, that this court has the inherent power and jurisdiction to punish contempts summarily.

III.

WHAT CONTEMPTS MAY BE PUNISHED SUMMARILY.

The next proposition in this case is, What character of contempts this court has the inherent power to punish summarily.

Contempts are classified as civil or criminal, and as direct or constructive. Civil contempts are defined to be such as a private person is affected by; as, for instance, where a party refuses to obey a judgment or order of court, which will benefit such private person. In such instance the case is not punitive but executive, and the punishment is to commit the offender until he complies with the order. Criminal contempts are all acts committed against the majesty of the law or against the court as an agency of government, and in which, therefore, the state and the whole people are concerned. In such instance, the proceeding is punitive and the punishment operates in terrorem, and by that means has a tendency to prevent the repetition of the offense: *Rapalje on Contempts*, sec. 21, adopting the definition of Beatty, J., in *Phillips v. Welch*, 11 Nev. 187. See, also, 7 Am. & Eng. Ency. of Law, 2d ed., 28.

²²⁹ Direct contempts are generally those which are committed in the presence of the court, while in session, or so near as to interrupt its proceedings, but also include any improper conduct tending to defeat or impair the administration of justice; while constructive contempts arise from matters not transpiring in court, and which tend to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the administration of justice. The power to punish is the same in both cases. The difference is only one of procedure. In cases of direct contempts, the court acts spontaneously, *ex mero motu*, and commits the offender summarily. In cases of constructive contempts, the court, upon information furnished by any citizen, and verified by affidavit, or exhibited by the attorney general, *ex officio*, which is supported by his official oath, and therefore needs no other verification, or upon its own information or motion, issues a citation to the offender to show cause why he should not be punished for con-

tempt: 4 Blackstone's Commentaries, 286, 287; Odgers on Libel and Slander, 433, 434; Paterson on Liberty of the Press, etc., 99.

Lord Chancellor Hardwicke, in the case against the printer of the "St. James Evening Post," 2 Atk. 471, defines contempt of court as follows: "There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may likewise be a contempt of this court, in abusing parties who are concerned in cases here. There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

It will be observed that the first kind of contempt spoken of, to wit, scandalizing the court itself, is a matter wherein the state, the people and the court are ²³⁰ vitally interested. It is, therefore, a public matter, and hence is a criminal contempt. The other two kinds of contempts spoken of are such as directly affect a party litigant, and at the same time affect the public generally only in so far as it is of importance "to keep the streams of justice clear and pure."

Blackstone also makes the same distinction and defines contempts, *inter alia*, to consist in "speaking or writing contemptuously of the court or judges, acting in their official capacity": 4 Blackstone's Commentaries, 285.

This distinction has been overruled in some of the adjudicated cases, and hence the error they have fallen into of saying that the contempt must relate to a cause that is still pending, and if the cause is disposed of, that will be no contempt which would have been a contempt if it had occurred while the cause was pending.

The theory of such cases is that the act had a tendency to injuriously affect the rights of a party litigant in a pending litigation, or had a tendency to embarrass, although it might not actually influence, the court in the determination of a pending cause.

It must be obvious to the discriminating mind that such cases fall properly under the second or third classes pointed out by Lord Hardwicke, *supra*, but that they do not cover the whole field, for there is still the first kind of a contempt, to wit, scandalizing the court itself, in which the public is primarily interested, and as to which the injury is just as great whether it

referred to a particular pending case, or only to the court as an instrumentality of government.

This is illustrated by the adjudicated cases. In the case of *In re Charlton*, 2 Mylne & C. 316, decided in 1836, in *Macgill's Case*, 2 Fowl. Ex. Pr. 404, and in *In re Wallace*, L. R. 1 P. C. 283, 1 Privy App. 283, it was held to be a direct contempt of court to send libelous, scandalous or threatening letters to a court or a judge.

Charlton's case, *supra*, is one of the most celebrated ²³¹ of its kind. Lord Cottenham, lord chancellor, said: "It is a contempt of the highest order; and although such a foolish attempt as this cannot be supposed to have any effect, it is obvious that if such cases were not punished, the most serious consequence might follow. If I consulted my own personal feelings upon the subject, I should pass by these letters as a foolish attempt at undue influence; but if I were to adopt that course, I should consider myself guilty of a very great dereliction of my high duty": *Charlton's Case*, 2 Mylne & C. 342.

The limits of this opinion preclude any extensive review of the cases wherein attorneys, citizens and newspaper editors have been punished summarily, as for a criminal contempt for scandalizing the court or a judge. The following are only a few of such cases: *Wraynham* was convicted of saying of Lord Bacon that he had done unjustly and was worse than a murderer: 2 St. Tr. 1071. For saying to Judge Hutton, "I accuse you of high treason," *Harrison* was fined five thousand pounds, and sent to prison, and in addition, the judge recovered ten thousand pounds damages: *Rex v. Harrison*, 3 St. Tr. 1375. Lord George Gordon was convicted and punished for publishing a libel on the judges, in which he said: "How long shall these whited walls of counsel command us to be hanged contrary to law? They make long charges to the juries with a show of justice, and religion. They shed our innocent blood for exorable trespasses."

In *Regina v. Skipworth*, 12 Cox C. C. 371, decided in 1873, *De Castro* had been the claimant of the *Tichborne* estates, had been nonsuited, and was committed for trial upon a charge of perjury. He and *Skipworth* held meetings in various parts of the country to excite sympathy for his cause and to collect funds for his defense. At a meeting in Brighton, *Skipworth* presided, and in his speech, he impugned ²³² the honesty and impartiality of Lord Chief Justice Cockburn, the judge who was to preside at the trial of his friend *De Castro* for perjury.

Some one hissed, and he replied, "Yes, sir, you may hiss, but I hiss at the lord chief justice." De Castro also spoke, and charged the lord chief justice with having denounced him as a rank impostor and therefore of being too prejudiced to try his case. They were cited for contempt, and each fined five hundred pounds, and sent to prison for three months.

In *Rex v. Almon*, Wilm. 243, 8 St. Tr. 53, it was held to be a contempt of court and a libel, punishable by attachment, to publish a pamphlet asserting that judges have no power to issue an attachment for libels upon themselves, and denying that reflections upon individual judges are contempts of court at all.

In *Ex parte Turner*, 3 Mont. D. & De G. 523, a solicitor for the defeated party, after the case was over, published a pamphlet in which he pronounced the judgment, "an elaborate production, wholly beside the merits of the case," and employed other flippant and contumacious observations. He was held guilty of contempt.

Other cases which hold the same doctrine will be referred to hereinafter, in connection with the right of trial by jury in contempt cases, and the liberty of the press, because they also bear upon those questions.

These considerations result in holding that this court has jurisdiction to punish, summarily, civil as well as criminal contempts, and that this power is the same whether the contempt be direct or constructive, there being only a difference of procedure in the two cases.

The contempt in this case is both criminal and civil. It is criminal because it scandalizes the court itself, and, therefore, it is a matter of public concern; and it is civil because it abuses parties to a cause that ²²³ is still pending in this court, and because it seeks to prejudice mankind against parties to such pending litigation. It is also a libel upon a majority of the individuals composing the court, for which such individuals have a private right of action. Such judges, as individuals, may choose to treat the article with contempt, as Lord Chancellor Cottenham did in *Charlton's Case*, 2 Mylne & C. 342, and as the judges of the Colorado court did in *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. 800. But, because, as the supreme court of Colorado said in the *Cooper* case, *supra*: "They are the people's courts, and contemptuous conduct toward the judges in the discharge of their official duties, tending to defeat the due administration of justice, is more than an offense

against the person of the judge—it is an offense against the people's court, the dignity of which the judge should protect, however willing he may be to forego the private injury”; and because, as Lord Chancellor Cottenham said in *Charlton's case*, *supra*: “It is obvious that if such cases were not punished, the most serious consequences might follow,” and because of the contemnor was allowed to escape punishment, the people would have just cause to complain of the judges of this court for not enforcing proper respect for this instrument established by the people for the administration of justice, this court felt constrained to take notice of the contempt in this case.

The ill-disguised effort of the contemnor to make a political issue of the matter is not a proper subject for the court to deal with—the law-abiding, intelligent and patriotic people of this state will effectually settle that matter, if they are given an opportunity to deal with it.

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IV.

POWER OF THE LEGISLATURE TO ABRIDGE THE INHERENT POWER OF THE COURT TO PUNISH CONTEMPT.

The defendant further invokes section 1616 of the Revised Statutes of 1899, and claims that under this section this court has no power to punish this contempt, because it does not fall under any of the offenses which courts are authorized by that section to punish as contempts. The section relied on is as follows:

“Sec. 1616. May Punish Contempts.—Every court of record shall have power to punish as for a criminal contempt, persons guilty of the following acts, and no other: 1. Disorderly, contemptuous or insolent behavior committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; 2. Any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; 3. Willful disobedience of any process or order lawfully issued or made by it; 4. Resistance willfully offered by any person to the lawful order or process of the court; 5. The contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal or proper interrogatory.”

If the legislature had power to abridge or impair the power of this court to punish for contempt, then the defendant in this case could not be held liable. But if the legislature had no

such power, then the section of the statutes quoted is unconstitutional and not binding upon the court.

It has already been pointed out in paragraph II of this opinion, that the power of this court to punish contempts is inherent, and that statutes which attempt to confer such power have always been treated as conferring no new power, but as simply declaratory of the ²³⁵ common-law power that already belonged to every court of record.

The law is well settled, both in England and America, that the legislature has no power to take away, abridge, impair, limit, or regulate the power of courts of record to punish for contempts: *Rapalje on Contempts*, sec. 11; 7 *Am. & Eng. Ency. of Law*, 2d ed., 33; *Arnold v. Commonwealth*, 80 Ky. 300. 44 *Am. Rep.* 480; *Middlebrook v. State*, 43 Conn. 257, 21 *Am. Rep.* 650; *State v. Morrill*, 16 Ark. 384; *People v. Wilson*, 64 Ill. 195, 16 *Am. Rep.* 528; *Ex parte Robinson*, 19 Wall. (U. S.) 505; *Worland v. State*, 82 Ind. 49; *Cheadle v. State*, 110 Ind. 301, 59 *Am. Rep.* 199, 11 N. E. 426; *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Matter of Shortridge*, 99 Cal. 526, 37 *Am. St. Rep.* 78, 34 *Pac.* 227; *People v. Stapleton*, 18 Colo. 568, 33 *Pac.* 167; *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *Hawes v. State*, 46 Neb. 149, 64 N. W. 699; *Hale v. State*, 55 Ohio St. 210, 60 *Am. St. Rep.* 691, 45 N. E. 199.

In *Wyatt v. People*, 17 Colo. 261, 28 *Pac.* 964, the court said: "Though the legislature cannot take away from the courts created by the constitution the power to punish contempts, reasonable regulations by that body touching the exercise of this power will be regarded." But this, it must be observed, leaves it to the courts to decide whether or not the regulations that may be prescribed are reasonable and also proceed upon lines of comity between the courts and the legislature, and not upon any recognition of the absolute right of the legislature to enact such regulations. In addition to this, it is now well-settled law in this, as well as in other states, that the courts have nothing to do with the policy or reasonableness of a law, those being legislative and not judicial questions. So that, if it be conceded that the legislature had any power to regulate the exercise of the inherent power of the court to punish contempts, the court could not refuse to obey the law, because it deemed the regulations unreasonable. However, it is a contradiction of terms to say the power to punish is inherent, but that the legislature may regulate the exercise. As

the supreme court of the United ²³⁶ States said in *Gibbons v. Ogden*, 9 Wheat. 1, the power to "regulate" includes the power to say in what cases the right shall be exercised.

It is worthy of observation that in only the states of Georgia and Louisiana is power given by the constitution of the state to the legislature to limit the power of the court to punish for contempt. In all the other states the better opinion is, that where the court is a creature of the constitution, the inherent power to punish contempt cannot be shorn, abridged, limited or regulated.

This is the only logical view to take; because by the constitution (article 3), the powers of government are distributed between the legislative, executive and judicial departments, and it is further expressly provided that, "No person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." And nowhere in the constitution is the legislature given any power to meddle with the inherent powers of the courts.

It was upon the faith of this provision of the constitution that this court refused to interfere with the prerogatives of the governor in the discharge of his duties, in the case of *State v. Stone*, 120 Mo. 428, 41 Am. St. Rep. 705, 25 S. W. 376, and likewise refused to interfere with the inherent powers of the legislature in *State v. Bolte*, 151 Mo. 362, 74 Am. St. Rep. 537, 52 S. W. 262.

In its dealings with the powers and acts of the co-ordinate branches of government, this court has scrupulously refrained from interfering, and has accorded to such co-ordinate branches the fullest measure of respect, and upon the same principle this court will not tolerate any interference by a co-ordinate branch of the government, or by anyone else, with the powers and duties and prerogatives and dignity of this court. The ²³⁷ people of this state conferred those powers, in trust for themselves upon this court, and this court will sacredly and fearlessly guard and protect them until the people discharge the trust and give the powers to some other tribunal, if they should ever be minded so to do.

It is also well-settled law that the court alone in which a contempt is committed, or whose authority is defied, has power to punish it or to entertain proceedings to that end. No other

court has any jurisdiction or power in such cases: Rapalje on Contempts, sec. 13; 7 Am. & Eng. Ency. of Law, 2d ed., 34, and cases cited in note 1, and from which it appears that this is the rule laid down by the United States courts, and by the courts of Alabama, California, Colorado, Florida, Illinois, Iowa, Kentucky, Louisiana, Mississippi, Nevada, New Hampshire, Tennessee, Texas, Utah and Vermont.

Paterson on Liberty of the Press, etc. 121, says this power must be accorded to all courts, just as it is possessed by parliament.

The law now known as section 1616 of the Revised Statutes 1899, has been on the statute books, in substantially the same form, ever since 1845: Rev. Stats. 1845, p. 338, sec. 61. It was referred to by this court in *Harrison v. State*, 10 Mo. 688, but its constitutionality was not called in question, or discussed or decided.

The same law (then known as Rev. Stats. 1855, sec. 65, p. 542) was referred to by this court in *Matter of Greene County v. Rose*, 38 Mo. 390, where it was said: "When the contempt is committed in the immediate view and presence of the court, it may be punished summarily; in all other cases, the party charged must be notified of the accusation, and have a reasonable time to make his defense." But the power of the legislature to enact the law was not raised or decided.

The same law (then known as Rev. Stats. 1879, sec. 1055), was referred to in *Ex parte Crenshaw*, 80 Mo. 450, and the court was unanimous in holding that it did not ²³⁸ have the effect of taking away the power of courts to punish other kinds of contempts. The constitutionality of the law was not considered by the majority of the court, but Sherwood, J., concurred in the judgment, holding the statute "to be unconstitutional, as an invasion by the legislature of the domain of the judiciary."

It follows that the legislature exceeded its powers when it enacted section 1616 of the Revised Statutes of 1899, and that this court has an inherent and constitutional right to punish contempt summarily, which cannot be taken away, abridged, limited or regulated by the legislature.

For the manner in which this power may be executed, this court is answerable alone to the sovereign people of this state, and to their judgment and wishes, legally expressed, it has always given cheerful and respectful obedience, and it stands ready to do so now and at all times.

V.

RIGHT OF TRIAL BY JURY IN CONTEMPT CASES.

The defendant invokes the protection of section 28 of article 2 of the constitution, which provides that: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate," and demands a trial by jury in this case, and incidentally argues that it is not seemly or fair that he should be tried for contempt by judges of the court that he has scandalized.

The judges of this court would have gladly sent this matter to some other court for trial, and by a jury, too, if such a course had any precedent or justification in law. But as such a course would have been illegal and a shirking of their imperative obligations under the law, they had no option but to deny the request, and to execute the law.

Attention has already been called to the law, as laid down by Judge Cooley in his work on Constitutional ²³⁹ Limitations, sixth edition, page 389, note 2, wherein he says: "Cases of contempt of court were never triable by jury; and the object of the power would be defeated in many cases if they were." Cases from England, Pennsylvania, Maine, New York, Tennessee, Illinois, Arkansas, Kentucky, North Carolina, Mississippi, New Hampshire, Connecticut, and Rhode Island, are cited by the learned author, in support of the rule.

Rapalje on Contempts, section 10, says: "It has been held that the provision in the constitution of the United States that the trial of all crimes shall be by jury does not take away the right of courts to punish contempts in a summary manner. The provision is to be construed to relate only to those crimes which, by our former laws and customs, had been tried by a jury."

The author cites in support of the text the cases of Hollingsworth v. Duane, Wall. C. C. 77, Fed. Cas. No. 6616; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529, and State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

In the case last cited, the supreme court of New Jersey held that the constitutional right of trial by jury was not infringed by the infliction of summary punishment for contempt of court. In that case the contempt consisted of improper conduct toward a juror, not in the presence of the court.

Rapalje on Contempts, section 112, says: "In nearly all of the states, as well as under the practice of the federal courts, the common-law rule denying to one accused of contempt the

right of trial by jury is still in force, the courts holding that the various constitutional guaranties of this right have no application to these proceedings."

In 4 *Encyclopedia of Pleading and Practice*, page 789, the rule of law is thus aptly stated: "Although the question determinable in proceedings to redress contempts is one of fact and not of law, yet, the offense itself being one against the court and the majesty of the law, neither at common law was there any right to a jury trial (*Wells v. Caldwell*, 1 A. K. Marsh. (Ky.) 441; *Eilenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. Rep. 424), nor, according to the current weight of modern authority, except so far as the rule has been modified by local statutes" [the author evidently means constitutions, for the statutes could not confer a right of trial by jury which the constitution did not permit] "does any such right inure to the benefit of the contemnor." The author cites in support of the text the following cases: *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209; *Huntington v. McMahon*, 48 Conn. 174; *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 529; *McDonnell v. Henderson*, 74 Iowa, 619, 38 N. W. 512; *State v. Durein*, 46 Kan. 695, 27 Pac. 148; *Hart v. Robinett*, 5 Mo. 11; *Gandy v. State*, 13 Neb. 445, 14 N. W. 142; *Ludden v. State*, 31 Neb. 429, 48 N. W. 69; *State v. Matthews*, 37 N. H. 450; *Bates' Case*, 55 N. H. 325; *Burke v. Territory* (1894), 9 Okla. 499, 37 Pac. 829; *Crow v. State*, 24 Tex. 12; *King v. Ohio R. R. Co.*, 7 Biss. 529, Fed. Cas. No. 7800.

The author further adds, at the same page: "And it is held that the fact that there is no right to a jury trial does not violate the constitutional provisions which guarantee the same"—citing in support thereof, *State v. Mitchell*, 3 S. Dak. 223, 52 N. W. 1052; *State v. Becht*, 23 Minn. 411, and *Manderschied v. District Court*, 69 Iowa 240, 28 N. W. 551.

The case of *Hart v. Robinett*, 5 Mo. 11, cited, was a rule on a constable to show cause why he had not returned an execution within the time required by law. The trial court submitted the matter to the determination of a jury. This court held that this was error, saying: "The cause was matter to be shown to the court, and not matter to be found by a jury. The proceeding was in the nature of a proceeding for a contempt, and was a matter to be inquired into and adjudicated by the court."

In *Regina v. Skipworth*, 12 Cox C. C. 371, already referred to, De Castro demanded a trial by jury. The following colloquy took place between him and Blackburn, J. De Castro

said: "I am not aware that I have committed any contempt, and if I have done so, it was not my intention; but I submit that ²⁴¹ the charge ought to be tried by a jury; before them, I could prove what I have stated to be true." Blackburn intimated that in a proceeding for contempt the matter was to be tried by the court. De Castro: "Then, you decide that you are to try it yourselves?" Blackburn, J.: "Such is the course." De Castro: "But, you see, I am charged with contempt in complaining of the lord chief justice, and you are his colleagues. It is not fair that you should try it without a jury." Blackburn, J.: "To use any argument upon that point would be without avail. It has long been settled that an attempt to interfere with the course of justice is a contempt of court. It is too late to dispute that." Accordingly, a jury trial was denied him.

In *Respublica v. Oswald*, 1 Dall. (U. S.) 319, the defendant as publisher of the "Independent Gazetteer," published an address to the public concerning a proceeding, then pending in court, wherein he was a party, which tended to prejudice the public with reference to the merits of such pending litigation. He was cited for contempt. It was insisted that the constitution of Pennsylvania guaranteed him a trial by jury, and hence the court could not itself try the case. The supreme court of the state, however, speaking through McKean, C. J., said: "It is certain that the proceeding by attachment is as old as the law itself, and no act of the legislature, or section of the constitution, has interposed to alter or suspend it. Besides the sections which have been already read from the constitution, there is another section which declares that 'trials by jury shall be as heretofore,' and surely it cannot be contended that the offense with which the defendant is now charged was heretofore tried by that tribunal. If a man commits an outrage in the face of the court, what is there to be tried? What further evidence can be necessary to convict him of the offense than the actual view of the judges? A man has been compelled to enter into ²⁴² security for his good behavior, for giving the lie in the presence of the judges in Westminster Hall. On the present occasion, is not the proof, from the inspection of the paper, as full and satisfactory as any that can be offered? And whether the publication amounts to a contempt, or not, is a point of law, which, after all, it is the province of the judges, and not of the jury, to determine. Being a contempt, if it is not punished immediately, how shall the mischief be corrected?

Leave it to the customary forms of a trial by jury, and the cause may be continued long in suspense, while the party perseveres in his misconduct. The injurious consequences might then be justly imputed to the court, for refusing to exercise their legal power in preventing them. For these reasons, we have no doubt of the competency of our jurisdiction; and we think that justice and propriety call upon us to proceed by attachment." Accordingly, the defendant was denied a trial by jury, and was fined one hundred dollars and sent to prison for thirty days. This case will be again referred to in connection with the discussion of the liberty of the press.

The right of trial by jury in contempt cases never existed at common law, and was wholly unknown to the laws of Missouri at the time of the adoption of the constitution of 1820, 1865, and 1875. The guaranty of the constitution of 1875, therefore, that: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate," was not intended to confer such a right in contempt cases, for such a right had never been "heretofore enjoyed," either in this state or in England. There is therefore no merit in the demand of the defendant in this case for a trial by jury.

But even if all this was not true, what is the attitude of the defendant in this case, and what issues of fact has he raised that a jury could pass on? The return made by the defendant raises absolutely no issue of fact whatever. It admits that the defendant is the publisher of the paper and that he published the ²⁴³ article. A verdict of a jury could not settle those facts any more conclusively than the defendant himself has done by his admission. The return does not dare to say that the charges made are true. Neither does it plead any facts in mitigation. What issue of fact is there then for a jury to pass on? Positively none. The return raises only questions of law, and if the case was one wherein a jury could be impaneled, the court would be compelled, under this state of the pleadings, to direct a verdict, for after the court had decided the questions of law, the case would be decided, and there would be no function for the jury to perform.

These considerations are recorded here, not because there is a particle of doubt in the mind of the court that the defendant is not entitled to a trial by jury, but simply for the purpose of showing that even if the defendant was entitled to such a trial, it would do him no good in this case, and the result would

necessarily be the same. It must be remembered that this is a case of contempt and not one of libel.

In libel cases, the jury, under the direction of the court, determines the law as well as the fact: *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457. In contempt cases, the whole matter is for the determination of the court: 6 Am. & Eng. Ency. of Law, 2d ed., 978, and cases cited in note 1.

VI.

DUE PROCESS OF LAW.

The defendant also invokes the protection of section 30 of article 2 of the constitution, which provides "that no person shall be deprived of life, liberty or property without due process of law."

The defendant has been accorded the full benefit of this wise provision of the organic law. He has been regularly charged, brought into court, has appeared in person, and by counsel, has pleaded, and has had a trial ²⁴⁴ according to the practice in such cases. He has had his day in court, and, therefore, he has had the benefit of due process of law: *Cooley's Constitutional Limitations*, 6th ed., 431.

This also disposes of the claim that the defendant has been deprived, in some way, of the benefit of the fourteenth amendment to the constitution of the United States: *Dartmouth College v. Woodward*, 4 Wheat. 519; *Andrus v. Fidelity etc. Ins. Co.*, 168 Mo. 162, 67 S. W. 581.

VII.

LIBERTY OF THE PRESS.

The defendant invokes section 14 of article 2 of the constitution which is as follows: "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

It will be observed that the liberty of the press is not mentioned at all. The freedom of speech is guaranteed to "every person." Of course, the press will be included in the general designation of "every person." But the press has no greater liberty in this regard than any citizen. Newspapers and citi-

zens have the same rights to tell the truth about anybody or any institution. Neither has any right to scandalize anyone or any institution: *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183; *Pratt v. Pioneer Press Co.*, 30 Minn. 41, 14 N. W. 62; *Mallory v. Pioneer Press Co.*, 34 Minn. 521, 26 N. W. 904; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671; *McAllister v. Detroit Free Press*, 76 Mich. 338, 15 Am. St. Rep. 318, 43 N. W. 431; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715.

The first amendment to the constitution of the United States specifically mentions the liberty of the press. It is as follows: "Congress shall make no law ²⁴⁵ respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

It will be noted, however, that though the press is here specifically referred to, it is coupled with the freedom of speech of the citizen, and no special freedom is conferred upon the one that is not likewise conferred upon the other.

It is most important, therefore, to clearly understand what is meant by freedom of speech, or, as it is usually termed when speaking of newspapers, "the liberty of the press."

In 18 *American and English Encyclopedia of Law*, second edition, page 1125, "liberty of the press" is thus defined: "The liberty of the press consists in the right to publish, with impunity, the truth, with good motives and for justifiable ends, whether it respects governments or individuals; the right freely to publish whatever the citizen may please, and to be protected against any responsibility for so doing, except in so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals."

Judge Cooley, in his invaluable work on *Constitutional Limitations*, sixth edition, page 518, says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or,

to state the same thing in somewhat different words, we understand liberty of speech and of the press ²⁴⁶ to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards, we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

Paterson on the Liberty of the Press, etc., page 5, clearly explains the right as follows:

"The restraints which confine the natural liberty of speech will be found ranged under four great heads, of blasphemy, immorality, sedition, and defamation. There are bounds to be set to the expression of thoughts and opinions, and these must rest on the fundamental principles on which all societies are founded. It is assumed that there is a God in whom all citizens in their gravest moods are so interested, that it becomes offensive to all the rest if anyone speaks of Him publicly in scurrilous and contemptuous tone, such as would provoke a breach of the peace. Hence, the first limit to free speech is blasphemy. There are also rules of morality, which are so universal, and so underlie the conscience of every individual, that speeches and writings which treat these rules with public contempt, and sap and mine the simple faith in all that is good, noble, and worthy, are also deemed a species of constructive breach of the peace too irritating to be allowed. Hence another limit to free speech and writing is immorality. Again, there are rules of good conduct founded on the general duty of all citizens to support the government under which they live, and if possible to insure due respect and fair treatment to its leading administrators. Hence, gross contempt of all laws and violent menaces of revolt against such guardians must not be allowed. For these necessarily discompose every citizen, and perplex him with fear of change or fear of public disaster and anarchy. And when ²⁴⁷ this last head is still further examined, it will appear that the great factors of government, consisting of the sovereign, the parliament, the ministers of state, the courts of justice, must all be recognized as holding functions founded on sound principles, and to be defended and treated with an established and well-nigh unalterable respect. Each of these great institutions has peculiar virtues and peculiar weaknesses, but whether at any one time the virtue or the weakness pre-

dominates, there must be a certain standard of decorum reserved for all. Each guarded remonstrance, each fiery invective, each burst of indignation must rest on some basis of respect and deference toward the depository for the time being of every great constitutional function. Hence, another limit of free speech and writing is sedition. And yet within that limit there is ample room and verge enough for the freest use of the tongue and pen in passing strictures on the judgment and conduct of every constituted authority.

"While the restrictions already mentioned, which are founded on blasphemy, immorality, and sedition, show the boundaries of free speech and thought as affecting the public generally, there is a fourth limit on the other side as affecting individuals, known under the head of libel, or the invasion of the reputation of private persons. This last limit involves the necessity of at once tracing the origin of that tendency of the individual to acquire such reputation and the value it possesses in his eyes, for it is here that the exercise of one natural right clashes directly with the exercise of the other, and both are equally natural and equally inevitable."

No better or clearer exposition of this subject has ever been written than what is said by McKean, C. J., of the supreme court of Pennsylvania, in *Respublica v. Oswald*, 1 Dall. (U. S.) 319. He said:

"Assertions and imputations of this kind are certainly calculated to defeat and discredit the administration ²⁴⁸ of justice. . . . And here I must be allowed to observe that libeling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeler, it is more dark and base than that of the assassin, or than he who commits a midnight arson. It is true that I may never discover the wretch who has burned my house or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignomy or reproach. But the attacks of the libeler admit not of this consolation; the injuries which are done to the character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life. To what tribunal can he then resort? How shall he be tried, and by whom shall he be acquitted? It is in vain to object that those who know him will disregard the slander, since the wide circulation of the public prints must render it impracticable to apply the antidote as far as the

poison has been extended. Nor can it be fairly said that the same opportunity is given to vindicate, which has been employed to defame him; for many will read the charge who will never see the answer; and while the object of accusation is publicly pointed at, the malicious and malignant author rests in the dishonorable security of an anonymous signature. Where much has been said, something will be believed; and it is one of the many artifices of the libeler to give to his charges an aspect of general support, by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people? Let every honest man make this appeal to his heart, and understanding, and the answer must be—No!

“What, then, is the meaning of the Bill of Rights and the constitution of Pennsylvania, when they declare ‘that the freedom of the press shall not be restrained,’ ²⁴⁹ and ‘that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government?’

“However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections; they give to every citizen a right of investigating the conduct of those who are intrusted with the public business; and they effectually preclude any attempt to fetter the press by a licenser.

“The same principles were settled in England, so far back as the reign of William III, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there anything in the language of the constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial, and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or, will it be said that the constitutional right to examine the proceedings of government extends to warrant an anticipation of the acts of the legislature, or the judgments of the court? And not only to authorize a candid commentary upon what has been done, but to permit every endeavor to bias and intimidate with respect to matters still in suspense? The futility of any attempt to establish a

construction of this sort must be obvious to every intelligent mind.

"The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame; to the ²⁵⁰ latter description, it is impossible that any good government should afford protection and impunity.

"If, then, the liberty of the press is regulated by any just principle, there can be little doubt that he who attempts to raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them, who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice—willfully seeks to corrupt the source, and to dishonor the administration of justice."

This wholesome and vigorous code of morals and rule of conduct is just as necessary to-day as it was when it was established in the early history of these United States. It accords with the sense of right of all good and patriotic people, and those who live by slander must expect to suffer the just punishments which the law imposes for their crimes.

Among the ten commandments given by God to Moses was, "Thou shalt not bear false witness against thy neighbor": Exodus, 20:16. And when Christ went into Judea, teaching the people, one came unto him and said, "Good master, what good thing shall I do, that I may have eternal life? And He said unto him, Why callest thou me good? There is none good but one, that is God; but if thou wilt enter into life, keep the commandments. He saith unto him, Which? Jesus said, Thou shalt do no murder; Thou shalt not commit adultery; Thou shalt not steal; Thou shalt not bear false witness; Honor thy father and thy mother; and, Thou shalt love thy neighbor as thyself": Matthew, 19:16-19.

These obligations are just as binding to-day as they have always been since they were thus promulgated.

The laws of Moses also provided that if a man slandered his wife, the elders of the city should chastise him, and should amerce him in a hundred shekels of ²⁵¹ silver, which should be given to the wife's father: Deut. 22: 13-19.

"Coke says, libeling and calumny is an offense against the law of God": Paterson on Liberty of Press, etc., 224, 225.

Good people obey the laws, slander no one, and speak the truth. Others must do so, or be punished. Upon no other basis could good government rest, or the rights of the people be protected. A court that failed to enforce these laws would be so cowardly that it would be contemptible and a disgrace.

It is material to investigate the history of the adoption of the constitutional guaranty of free speech, and to understand the evils it was intended to suppress.

Cooley's Constitutional Limitations, sixth edition, page 513, says these constitutional provisions were not intended to confer any new rights, but simply to protect the citizen in those already possessed. It is then said: "At common law, however, it will be found that liberty of the press was neither well protected nor well defined. The art of printing, in the hands of private persons, has, until within a comparatively recent period, been regarded rather an instrument of mischief, than as a power for good, to be fostered and encouraged. Like a vicious beast, it might be made useful if properly harnessed and restrained. The government assumed to itself the right to determine what might or might not be published; and censors were appointed without whose permission it was criminal to publish a book or paper upon any subject."

The learned author then points out that the censorship continued until the revolution of 1688, and it was a criminal offense to publish the proceedings of parliament, or of the courts, or even the current news of the day, without permission. He also shows that the same practice was followed in the American colonies until the Revolution, and that even after the Revolution, "the public bodies of the united nation did not at once invite ²⁶³ publicity to their deliberations. The constitutional convention of 1787 sat with closed doors, and although imperfect reports of the debates have since been published, the injunction of secrecy upon its members was never removed. The Senate for a time followed this example, and the first open debate was had in 1793." The same author, at page 516, then adds: "It must be evident from these historical facts that liberty of the press, as now understood and enjoyed, is of very recent origin; and commentators seem to be agreed in the opinion that the term itself means only that liberty of publication without the previous permission of the government, which was

obtained by the abolition of the censorship. In a strict sense, Mr. Hallam says, it consists merely in exemption from a licenser. A similar view is expressed by De Lolme. 'Liberty of the press,' he says, 'consists in this: That neither courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed.' Blackstone also adopts the same opinion, and it has been followed by American commentators of standard authority [he refers to Story on the Constitution, sec. 1889, 2 Kent's Commentaries, 17 et seq., and Rawle on the Constitution, c. 10] as embodying correctly the idea incorporated in the constitutional law of the country by the provisions of the American Bill of Rights.

"It is conceded on all sides that the common-law rules that subject the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitution. The words of Parker, C. J., of Massachusetts, on this subject, have been frequently quoted, generally recognized as sound in principle, and accepted as authority. 'Nor does our constitution or declaration of rights,' he says, speaking of his own state, 'abrogate the common law in this respect, as some have insisted. The sixteenth article declares that "liberty of the press is essential ²⁵³ to the security of freedom in a state; it ought not therefore to be restrained in this commonwealth." The liberty of the press, not its licentiousness; this is the construction which a just regard to the other parts of that instrument, and to the wisdom of those who founded it, requires. In the eleventh article it is declared that "every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character"; and thus the general declaration in the sixteenth article is qualified. Besides, it is well understood and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots toward enlightening their fellow-subjects upon their rights and the duties of the rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction."

This is the true rule. The liberty of the press means that anyone can publish anything he pleases, but he is liable for the abuse of this liberty. If he does this by scandalizing the courts of his country, he is liable to be punished for contempt. If he slanders his fellow-men he is liable to a criminal prosecution for libel, and to respond, civilly, in damages for the injury he does to the individual. In other words, the abuse of the privilege consists, principally, in not telling the truth.

It is no new claim that newspapers have a greater privilege than the ordinary citizen. This is a grave error.

In *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102, Chancellor Walworth said: "It has been urged upon you that conductors of the public press are entitled to peculiar indulgencies and have special rights and privileges. The ²⁵⁴ law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights, but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood to the injury of others with impunity."

And in *Hotchkiss v. Oliphant*, 2 Hill, 510, Chief Justice Nelson, speaking for the supreme court of New York said: "It is made a point in this case, and was insisted upon in argument, that the editor of a public newspaper is at liberty to copy an item of news from another paper, giving at the same time his authority, without subjecting himself to legal responsibility, however libelous the article may be, unless express malice be shown. It was conceded that the law did not, and ought not, to extend a similar indulgence to any other class of citizens; but counsel said a distinction should be made in favor of editors, on the ground of the peculiarity of their occupation. That their business was to disseminate useful knowledge among the people; to publish such matters relating to the current events of the day happening at home or abroad as fell within the sphere of their observation, and as the public curiosity or taste demanded; and that it was impracticable for them at all times to ascertain the truth or falsehood of the various statements contained in other journals. We are also told that if the law were not thus indulgent, some legislative relief might become necessary for the protection of this class of citizens. Undoubtedly, if it be desirable to pamper a depraved public appetite or taste, if there be any such, by the republication of all the falsehoods and calumnies upon private character that may find their way into the press, to give encouragement to the widest possible

circulation of these vile and defamatory publications, by protecting the retailers of them, some legislative interference will be necessary; for no countenance can be found for the irresponsibility claimed in the ²⁵⁵ common law. That reprobates the libeler, whether author or publisher, and subjects him to both civil and criminal responsibility. His offense is there ranked with that of the receiver of stolen goods, the perjurer and suborner of perjury, the disturber of the peace, the conspirator, and other offenders of like character. . . . The act of publication is an adoption of the original calumny, which must be defended in the same way as if invented by the defendant. The republication assumes and indorses the truth of the charge, and when called on by the aggrieved party, the publisher should be held strictly to the proof. If he chooses to become the indorser and retailer of private scandal, without taking the trouble of inquiring into the truth of what he publishes, there is no ground for complaint, if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but if steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community."

Time was when if any citizen or newspaper insulted or slandered or maligned a citizen, the injured party demanded satisfaction according to the code of honor, and if this was refused, treated the offender as a mad dog is usually dealt with.

It is worthy of notice that in those days everyone was careful to tell the truth about his fellow-men, and equally careful to avoid scandalizing them. But even in those days there were occasional breaches of decency in this regard, which were promptly dealt with. A sentiment, however, grew up that such a method settled nothing—that the innocent party was as liable to be removed or hurt as the guilty, and that the result did not show which told the truth. Thus public sentiment discouraged, if it did not forbid, such a ²⁵⁶ method of settling such grievances, and it was insisted that the remedies afforded by the laws were ample to properly handle all such matters, and hence that anyone aggrieved must not take the law in his own hands but must let the courts settle it. So the old method has become nearly obsolete, but even now it is occasionally resorted

to when the offense is peculiarly aggravated and so indecent that it is impossible for human nature to stand it.

Now it is gravely argued by libelers that the liberty of the press includes a right to scandalize courts, to libel and slander and utter the most flagrant and indecent calumnies about public officers and even private citizens, and to invade the sanctuaries of the churches, the temples of justice, or the sacredness of the home and the private family, and without any good motive or for any public purpose, to publish the most cruel, false and scandalous articles concerning them. And there are newspapers that have so far misconceived their proper functions or been misguided by other considerations, as to indulge in such practices. And there is always a class of moral perverts and degenerates, in every community, who feed their morbid appetite upon such scandals, and rejoice at the injury thus done to those who are so infinitely their superiors that they are not worthy to fasten the lachets of their shoes. But to the credit of the newspaper profession, it is due to here make a record of the fact that the great majority of the members of that profession do not approve or sanction such practices, or such "yellow" journalism, but have a proper appreciation of the rights, and purposes, and functions of a newspaper, and deplore the fact that such unworthy persons are engaged in the profession, as much as lawyers deplore the black sheep that will sometimes creep into the fold. The contrast between the two classes marks the difference between respectability and indecency, between intelligence and ignorance, between ²⁵⁷ the law-abiding, patriotic citizen and the Ishmaelite—the assassin of character for the accumulation of lucre.

The great body of the people condemn such practices and such miscreants, and the courts would deserve condemnation and abolition, if they did not vigorously and fearlessly punish such offenders. Such practices are an abuse of the liberty of the press, and if the slander relates to the courts, it concerns the whole public and is therefore punishable summarily as a criminal contempt, and if it concerns an individual, it is punishable civilly and criminally as for a libel.

There is no species of property, and no class of people that need the protection of the law as much as newspapers and editors, and they would feel the loss of such protection more speedily and more acutely than anyone else. Self-interest should, therefore, induce them not to impair the power or au-

thority of the courts, and not to inculcate a feeling of disrespect or want of confidence in the courts.

Curran called the liberty of the press a "sacred palladium." But without the shield and bulwark of the law and the courts, even the goddess Pallas would be unable to protect the press, or to preserve the rights and safety and peace of the people. Without the law and the courts, chaos and anarchy would prevail. There would be no protection for life, liberty, property or character. He, therefore, who seeks to destroy the authority of the courts, invites anarchy, and sows seed for his own undoing.

It is the liberty of the press that is guaranteed—not the licentiousness. It is the right to speak the truth—not the right to bear false witness against your neighbor. Every citizen has a constitutional right to the enjoyment of his character as well as to the ownership of his property; and this right is as sacred as the liberty of the press. In *King v. Burdett*, 4 Barn. & Ald. 95, it was said: "The liberty of the press cannot impute ²⁵⁸ criminal conduct to others, without violating the right of the character, and that right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. *Where vituperation begins, the liberty of the press ends*" (the italics are added).

It must be clearly understood and always borne in mind that there is a vast difference between criticism or fair comment on the one side, and defamation on the other. Odgers on Libel and Slander, page 35, says: "Every one of the public is entitled to pass an opinion on everything which in anyway invites public attention. Those of the public whose opinion on such matters is best worth having are called critics. From their character, ability, or experience, they can judge with precision (which is the true meaning of the word 'criticise') and their opinion, therefore, is entitled to respect. Their criticism may be commendatory, but it is, perhaps, more generally unfavorable. Still, so long as it continues to be criticism at all, it is not defamatory. Where defamation commences, true criticism ends.

"True criticism differs from defamation in the following particulars: 1. Criticism deals only with such things as invite public attention or call for public comment; 2. Criticism never attacks the individual, but only his work. Such work may be either the policy of a government, the action of a member of parliament, a public entertainment, a book published, or a picture exhibited. In every case, the attack is on a man's acts, or on some thing, and not upon the man himself. A true critic

never indulges in personalities; 3. True criticism never imputes or insinuates dishonorable motives (unless justice absolutely requires it, and then only on the clearest proofs); 4. The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public ²⁵⁹ interest, and the judicious guidance of the public taste."

The same author quotes with approval the language of Huddleston, B., in *Whistler v. Ruskin*, "London Times," Nov. 27, 1878, where he says: "A critic must confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the love of exercising his power of denunciation."

And the author adds, page 38: "But all comments must be fair and honest; matters of public interest must be discussed temperately. *Wicked and corrupt motives should never be wantonly assigned*" (the italics are added). "And it will be no defense that the writer, at the time he wrote, honestly believed in the truth of the charges he was making, if such charges be made recklessly, unreasonably and without any foundation in fact. Some people are very credulous, especially in politics; and can readily believe any evil of their opponents. There must therefore be some foundation in fact for the charges made; the writer must bring to his task some degree of moderation and judgment."

The author also quotes with approval the language of Cockburn, C. J., in *Campbell v. Spottiswoode*, 32 L. J. Q. B. 199: "A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation."

Paterson on the Liberty of Press, etc., page 131, says: "While, therefore, it is lawful for anyone to publish a report of a proceeding in a court of justice, still this must be a fair and authentic report of what happened. If the report is mixed up with comments showing an animus against a party, and giving an unfair impression, ²⁶⁰ the publisher then ceases to have the benefit of this absolute right of publication"—the author is discussing the liberty of the press.

The courts of other states have held that it is libelous to charge an officer with having taken a bribe, or with corruption or want of integrity. In such cases, the publisher must stand ready to prove the truth of his charges, or he will not go unwhipped of justice: *Hamilton v. Eno*, 81 N. Y. 116; *Wilson v. Noonan*, 35 Wis. 321; *Gove v. Blethen*, 21 Minn. 80, 18 Am. Rep. 380; *Russell v. Anthony*, 21 Kan. 450, 20 Am. Rep. 436; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Dole v. Van Rennselaer*, 1 Johns. Cas. 330; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Neeb v. Hope*, 111 Pa. St. 145, 2 Atl. 568.

It is pertinent and profitable to set out a few of the cases wherein the courts of other jurisdictions have summarily punished persons as for a criminal contempt, on account of publications which were calculated to bring public odium upon the court.

The case of *Respublica v. Oswald*, 1 Dall. (U. S.) 319, has already been referred to. In *Respublica v. Passmore*, 3 Yeates, 441, 2 Am. Dec. 388, the defendant was fined fifty dollars and sent to jail for thirty days, for publishing an article reflecting upon one of the parties to a pending cause, which tended to interfere with the course of justice.

In *People v. Freer*, 1 Caines, 518, the defendant published, in the "Ulster Gazette," certain comments concerning a trial that had occurred in court, that were calculated to prejudice and influence the public mind against the court, and to intimidate and influence the court in deciding a motion for a new trial that was then pending. He was punished for contempt. The court said: "Publications scandalizing the court, or intending unduly to influence, or overawe their deliberations, are attempts which they are authorized to punish by attachment; and, indeed, it is essential to their dignity of character, their utility and independence, that they should possess and exercise this authority."

²⁸¹ In *Tenney's Case*, 23 N. H. 162, the defendant, who had no interest in a pending action, except that his son had sued one of the defendants and had lost, caused copies of the petition in the pending action, which contained serious charges against the defendants, to be published and circulated among persons with whom the defendants had business relations, in which he said he could stop the suit if the defendants would pay him one thousand dollars—that being the amount he said he had lost by his son's unsuccessful suit against the defendants. It was held that "such conduct tended to obstruct the free course of

justice, and was a contempt of court," and a rule in attachment was granted.

For publishing an account of a trial for treason, when the court had forbidden any publication of it, because like cases were pending against other persons, whose rights might be affected, the defendant, as editor of the "Observer," was fined five hundred pounds by the court of king's bench in England, in 1821: *King v. Clement*, 4 Barn. & Ald. 218.

In *Sturoc's Case*, 48 N. H. 428, 97 Am. Dec. 626, the defendant, a member of the bar, was punished as for a criminal contempt, for publishing a communication in a newspaper, respecting a prosecution under the liquor laws of that state, which tended to prejudice the minds of the people against the case.

In *State v. Morrill*, 16 Ark. 384, the defendant, as editor of the "Des Arc Citizen," published an article in which, by implication, he charged the judges of the supreme court of Arkansas with having been bribed to render a certain decision in a habeas corpus case, that had been finally decided by that court. Upon the publication being called to the attention of the court, by a communication addressed to one of the judges of the court, by a member of the bar, the court issued a rule to show cause. The defendant pleaded the statute of that state prescribing that in certain instances, and no others, the court could punish for contempt. It was ²⁶² admitted that the act complained of did not fall within the terms of the statute, and it was claimed that the court had no power to punish for any other kind of a contempt than that specified in the statute. The statute was, in ipsissimis verbis, exactly like section 1616 of the Revised Statutes of Missouri of 1899.

It will be observed that the charge was practically the same in that case as in the case at bar, and that the statute relied on in that case is exactly like our statute. The court held the statute to be beyond the power of the legislature to enact, and that the power to punish, as for a criminal contempt, was inherent in the court.

The court also held, as stated in the headnote, that: "Any citizen has a right to comment upon the proceedings and decisions of this court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right, under the seventh section of the Bill of Rights, to attempt, by libelous publications, to degrade the

tribunal, etc.—such publications are an abuse of the liberty of the press, for which he is responsible.”

It was also objected that it was not a contempt of court, because it did not relate to a case then pending, and therefore the rights of no party litigant were affected by it. But the court referred to the adjudications, particularly *Commonwealth v. Dandridge*, 2 Va. Cas. 409, presently to be cited, and said: “The cases above cited (and many more might be cited if deemed at all necessary) abundantly show that, by the common law, courts possessed the power to punish, as for contempt, libelous publications, of the character of the one under consideration, upon their proceedings pending or past, upon the ground that they tended to degrade the tribunals, destroy that public confidence and respect for their good judgments and decrees so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice.”

203 Accordingly, the defendant was punished, summarily, as for a criminal contempt.

In *Commonwealth v. Dandridge*, 2 Va. Cas. 409, the court, at a prior term, had decided a case against the defendant. He met the judge at the door of the courthouse, before the opening of court for the next term, and grossly insulted him, charging him with corruption and cowardice in the decision of his case. He was cited for contempt, and it was objected that the act did not relate to a pending cause. The case was transferred to the general court of the state, and that court, speaking to this point, said: “Upon this part of the subject, and in reference to cases which have an indirect bearing on the present question, a distinction is attempted, for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective conduct of the judge, but not for such as touch his past conduct. In reason, I see but one pretense for this distinction: Threats and menaces of insult, or injury to a judge, in case he shall render a certain judgment, may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. One says of a judge, ‘If he render a certain judgment against me, I will insult or beat him.’ For this he may be attached. But if (the judgment having been rendered) the insult be actually offered, an attachment no longer lies; be-

cause the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to original principles, the only true test, by demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal."

In the case of *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747, the court ²⁶⁴ finally decided a case, and the attorney for the losing party wrote a letter to the judge, saying the decision "is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe. . . . It is my desire that no such decisions or orders shall stand unreversed in any court I practice in." The court held that it was a criminal contempt, fined him fifty dollars and suspended him from practice until the fine was paid, and the supreme court affirmed the judgment.

In the case of *In re Woolley*, 11 Bush (Ky.), 95, the defendant, as attorney for the losing party, filed a motion for rehearing in which, in a supercilious and dogmatic style, he charged "that the court had overlooked the facts of the case; that it had assumed facts having no place in the proof, and ignored others which stood out on every page of the record; that it was careless and indifferent to the rights of a litigant, and that the result of this carelessness and indifference was a ruinous, disastrous and unjust judgment against a party wholly innocent of all offense." The court pronounced the offense to be "of a nature too grave to be silently overlooked." The defendant was cited for contempt and disclaimed, under oath, any intention to commit a contempt, and in consideration of this condition, his fine was assessed at the nominal sum of thirty dollars.

In *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528, the defendant, the editor of the "Chicago Evening Journal," published, in 1872, an article with reference to a case then pending in the supreme court, in which he reflected on the action of the court in that case, impeached its integrity, and sought to intimidate the action of the court by threat of popular clamor. He was cited for criminal contempt and fined one hundred dollars.

In this case, the court adopted the rule laid down by Bishop's, *Criminal Law*, section 216, wherein it is said: "According to the general doctrine, any publication, ²⁶⁵ whether by parties or strangers, which concerns a case pending in court, and has

a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses or the counsel, may be visited as a contempt."

In the case of *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071, the defendant, as attorney for the losing party, in a case that had been decided by the supreme court of Michigan, wrote and published in 1896 an article in the "Port Huron News," criticising the decree, and in it charged the judge with unfairness and improper conduct. The supreme court of Michigan held it to be a contempt of court, and that the power to punish for contempt existed as well after a case was finally disposed of as where it was still pending. The attachment was issued in this case upon a petition of the members of the bar, informing the court of the contempt.

In *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088, the defendant as editor of the "Terre Haute Express," published, in 1892, a certain article reflecting upon the grand jury, the judge of the circuit court, the prosecuting attorney, and the city engineer, and casting doubt upon their integrity and honesty, with respect to the investigation and punishment of certain street improvement contractors. The defendant denied any intention to commit a contempt. It was held that where a matter was libelous per se, the denial of the defendant that he intended to commit a contempt would not avail him, but if the article was not per se libelous, but could be made so only by innuendo, the defendant would be discharged upon showing that he intended no contempt.

In *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, William Stapleton and Kemp G. Cooper, editors of the "Denver Republican," were cited for contempt in publishing in 1893, an article in the paper, "implying that the supreme court has been induced, by improper influences, to delay rendering a decision," ²⁰⁶ in a certain cause. The court said of the article: "It is not merely a private wrong against the rights of litigants, and against the judges. It is a public wrong, a crime against the state, to undertake, by libel or slander, to impair confidence in the administration of justice. That a party does not succeed in such undertaking lessens his offense only in degree." The court also held that the power of the court to punish for contempt was not limited by the provision of the code which attempted to define the cases in which the court could punish for contempt; and also held that the liberty of the

press was not in any way impaired by the court punishing as for a contempt the abuse of such liberty.

In *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. 790, the defendant as editor of the "Denver Republican," published, in 1889, an article reflecting upon the manner in which a certain pending case was being tried by the court. He was cited for contempt. He also demanded a trial by jury and pleaded the liberty of the press. A jury trial was denied him. And touching his other plea, the court said: "We would not for a moment sanction any contraction of the freedom of the press. Universal experience has shown that such freedom is necessary to the perpetuation of our system of government in its integrity; but this freedom does not license unrestrained scandal. By a subsequent clause of the same sentence of our state constitution in which the liberty of the press is guaranteed, the responsibility for its abuse is fixed. With us the judiciary is elective, and every citizen may fully and freely discuss the fitness or unfitness of all candidates for the positions to which they aspire; criticise freely all decisions rendered, and by legitimate argument establish their soundness or unsoundness; comment on the fidelity or infidelity with which judicial officers discharge their duties—but the right to attempt, by wanton defamation, to prejudice the rights of litigants in a pending cause, degrade the tribunal, and impede, embarrass or corrupt that due ²⁰⁷ administration of justice which is so essential to good government, cannot be sanctioned": *Cooper v. People*, 13 Colo. 337, 22 Pac. 799.

Burke v. Territory of Oklahoma, 2 Okla. 499, 37 Pac. 829, was an attachment for contempt against the defendant, for publishing, in 1894, in the "Oklahoma Times-Journal," an article respecting a report of the grand jury, where the question was whether it should be received by the court or returned to the grand jury, and in which article it was said that the judge's actions indicated that he intended to withhold the report, and adding that if the judge persisted in carrying out such intention, it might be characterized as a flagrant violation of the people's rights, and that the action of the court "is an effort to browbeat the grand jury, an effort to bend the grand jury to the will of the court, and a serious matter."

It was held to be a criminal contempt, and the punishment fixed at a fine of two hundred and fifty dollars, and imprisonment for ten days.

It was also held that the legislature had no power to limit or regulate the inherent power of a court to punish contempt, and that in contempt cases the defendant was not entitled to a trial by jury.

In *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224, decided in 1883, it was held that the power of the courts to punish for contempt is inherent, and cannot be prevented or abridged by legislative action; and that an attempt to create the belief that a juror or officer of court can be bribed, is a contempt of court: See, also, *Hawkins v. State*, 125 Ind. 570, 25 N. E. 818.

Other instances where public officers have resorted to a private action of libel, to remedy the wrong, can be found in the following cases: *Neeb v. Hope*, 111 Pa. St. 145, 2 Atl. 568; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Dole v. Van Rensselaer*, 1 Johns. Cas. 330; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Russell v. Anthony*, 21 Kan. 450, 30 Am. Rep. 436; *Gove v. Blethen*, 21 Minn. 80, 18 Am. Rep. 380; *Wilson v. Noonan*, 35 Wis. 321; *Hamilton v. Eno*, 81 N. Y. 116.

Thus at great pains and tedious length, the cases ²⁶⁸ bearing upon the matters involved in this case, have been collected and digested, with the purpose and to the end that the people may know the grounds upon which the judgment in this case rests, and so that all others may know the law, and avoid being guilty of like offenses, or else offend knowingly, and hence invite inevitable punishment.

There was nothing in the case to which the article in this case referred, to call for any such scandalizing of the court. The case arose prior to the fellow-servant law. It was a case wherein a brakeman was injured by a wreck of the train on which he was working. He based his right to recover upon the ground that the master had failed to furnish safe appliances with which to do the work, in consequence of which the injury was received. The unsafe appliance was alleged to be a freight-car that had unsafe sills, which were so rotten that the car broke down from its own infirmity, while still on the track. The defense was that the wreck was caused by the fore wheels of the alleged unsafe car jumping the track, and that the car was whole when it left the track, and broke afterward, and hence that the injury was caused by a risk which the plaintiff assumed when he entered the master's service, and not by any negligence of the master in furnishing the servant unsafe appliances. A majority of the court was of the opinion that there was absolutely no evidence whatever to support the plaintiff's case, while

the minority of the court was of opinion that there was such evidence, or at least enough thereof to take the case to the jury. No one believed or dared to charge another with dishonesty of opinion or action, and there was no foundation in fact and in truth for any such charge.

There was, therefore, no legal justification or excuse for the article that was published by the defendant. He did not dare attempt to prove or claim that it was true, but stood mute as to that, and sought to escape punishment on other grounds, which were untenable. ²⁶⁹ He was therefore guilty of malice. He abused the liberty of the press and made himself liable therefor. Let the honest, fair-minded, patriotic people of this state say whether or not it was not the duty of the court to punish him.

The courts of this state have been conservative in the extreme, and forbearing to a fault. They have overlooked remarks concerning their acts from lawyers and laymen, that were improper and outside of the pale of the law, preferring, if possible, to attribute the offense to the zeal of counsel or the excitement of the laymen, incident to disappointment of personal hopes and ambitions. They have been considerate of the feelings and character of others, and have, many times, abstained from the use of strong language, under trying provocation, in deciding cases. And it was proper to do so. But the protection and safety of life, liberty, property and character, the peace of society, the proper administration of justice, and even the perpetuity of our institutions and form of government, imperatively demand that everyone, lawyer, layman, citizen, stranger, newspaperman, friend or foe, shall treat the courts with proper respect, shall not attempt to degrade them, or impair the respect of the people, or destroy the faith of the people, in them. When the temples of justice become polluted or are not kept pure and clean, the foundations of free government are undermined and the institution itself threatened. The people have no fear of their courts abusing their power to punish for contempt or in any other respect.

Alexander Hamilton, in advocating the adoption of the provisions of the federal constitution relating to the judiciary, said: "Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity ²⁷⁰ to annoy or injure them. The executive not only dispenses

the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of society; and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty": *Federalist*, p. 355. This view is indorsed by Judge Story in his treatise on the constitution, volume 2, fourth edition, page 401.

It may well be said that courts depend for their existence, usefulness and efficacy upon the consent of the people. They must depend, first, upon the loyalty, the intelligence and the counsel of the bar to the people; second, upon the faithful communication by the highminded, intelligent and truthful members of the newspaper profession to the reading public, of their acts and conduct and judgments; and third, upon the wisdom, the honesty and the patriotism and sense of justice and fair play, of the great body of the people, who have established these institutions, clothed them with dignity and power, elected the judges to serve them as their judicial agents, and who have never failed, in the long run, to distinguish between right and wrong, between the true and the false, between the faithful and the faithless servants, and who have no patience with slanders, or those who live by or feed upon slanders.

To be a judge over such people is the highest honor that can be conferred upon mortal man. To be a judge without such powers as a judge were to be a kicking-post for every madman, a butt for every idiot or knave, and, withal, an object of contempt of all men.

Unfortunately, there must always be a losing as well as a winning party to every suit, and courts must ²⁷¹ needs inflict pain as well as impart joy by every judgment rendered. But the loser to-day may be the winner in another case to-morrow. And so if every loser was privileged to go to the tavern and "cuss the court" to-day, he would necessarily have to retract his reproaches and praise the court to-morrow when he is a winner.

So it is in life. It is nearly always true that one man's loss is another man's gain. But life is not a failure, and business is not a fraud and to be condemned, for such reasons.

"Do unto others as ye would others should do unto you"; do not bear false witness against your neighbor; keep the commandments; obey the laws; tell the truth; be honest to yourself as well as to your fellow-man; bear no malice, but judge all men with charity, and life will be sweeter and more profitable, and the world will be better, and your neighbor's faults will not appear quite so unpardonable.

In this spirit, the judgment in this case was entered, and in his spirit, let it be judged.

What is herein said in no matter whatever conflicts with what was said in *Marx & Haas etc. Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, 67 S. W. 391. That was a suit in equity to enjoin a boycott, and it was held that injunction would not lie to restrain the utterance of a libel or slander or to restrain free speech. It was held there, as it is here, that everyone may speak, write or publish what he will, but is responsible for the abuse of the privilege: *Marx & Haas etc. Clothing Co. v. Watson*, 168 Mo. 150, 90 Am. St. Rep. 440, 67 S. W. 391. That case, as well as this, holds that the courts cannot prevent a man telling an untruth about another, but their power is limited to punishing him if he does so.

For these reasons, the defendant in this case was adjudged guilty of contempt.

Robinson, C. J., Brace, Gantt, Burgess, Valliant and Fox, JJ., concur.

Contempts are of Two Kinds—direct and constructive. Direct contempt is committed in the presence of the court while sitting judicially, and constructive contempt is that which tends to obstruct or embarrass the court though not committed in its presence: *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Ex parte Lake*, 37 Tex. Cr. Rep. 656, 66 Am. St. Rep. 848, 40 S. W. 727. Contempts are also divided into civil and criminal contempts: *Ex parte Robertson*, 27 Tex. App. 628, 11 Am. St. Rep. 207, 11 S. W. 669; *State v. Circuit Court*, 97 Wis. 1, 65 Am. St. Rep. 90, 72 N. W. 193; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 39 N. E. 1091; *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004.

Contempts by Libelous Newspaper publications are discussed in the monographic note to *Percival v. State*, 50 Am. St. Rep. 572-585, and the subsequent cases of *Field v. Thornell*, 106 Iowa, 7, 68 Am. St. Rep. 281, 75 N. W. 685; *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 70 Am. St. Rep. 280, 52 N. E. 445; *State v. Bee Pub. Co.*, 60 Neb. 282, 83 Am. St. Rep. 531, 83 N. W. 204. Newspaper comments on the action of a judge in cases finally decided prior to their publication cannot be considered criminal contempts: *State v. Circuit Court*, 97 Wis. 1, 65 Am. St. Rep. 90, 72 N. W. 193. See, too, *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158.

The Power to Punish for Contempt is the subject of a monographic note to *Clark v. People* 12 Am. Dec. 178-186. Courts have inherent power summarily to punish for contempt: *Puterbaugh v. Smith*, 131 Ill. 199, 19 Am. St. Rep. 30, 33 N. E. 428; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153. As to whether the legislature is competent to regulate or abridge this power, see *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157, 36 S. E. 630; *State v. Circuit Court*, 97 Wis. 1, 65 Am. St. Rep. 90, 72 N. W. 193; *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691, 45 N. E. 199; *In re Robinson*, 117 N. C. 533, 53 Am. St. Rep. 596, 23 S. E. 453; *In re Shortridge*, 99 Cal. 526, 87 Am. St. Rep. 78, 34 Pac. 227. Summary punishment for contempt is not prohibited by the constitutional provision that the right of trial by jury shall remain inviolate: *State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671; *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 529; *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

LEWIS v. HYAMS.

[26 Nev. 68, 63 Pac. 126, 64 Pac. 817.]

CONFLICT OF LAWS—Limitation of Actions.—If a partnership note is executed in one state by a partner resident therein, while another partner is a resident of another state, a right of action, in default of payment, as against the latter, accrues in the state of his residence, and if the right of action becomes barred in such state by the statute of limitations, such bar is effective and conclusive against the holder of the note in a third state. (p. 680.)

LIMITATION OF ACTIONS—Construction of Statute.—The words "when a cause of action has arisen," as used in a statute of limitations, should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked, or, in other words, when the plaintiff has the right to sue upon the particular cause of action, without regard to the place where it had its origin. (p. 682.)

CONFLICT OF LAWS—Statute of Limitations.—If the maker and payee of a note reside out of the state when the note becomes due, and the cause of action accrues in another state while the maker continues to reside in another state, until, by the laws thereof, an action on the note is barred by limitation, such action is also barred in a state whose statute provides that "when a cause of action has arisen in any other state, and by the laws thereof, an action there cannot be maintained by reason of lapse of time, no action shall be maintained in this state." (p. 683.)

CONFLICT OF LAWS—Limitations of Actions.—Under the statute of a state providing that when an action arising in another state is barred therein by limitation, no action thereon shall be brought in this state except by a citizen thereof who has held the cause of action from the time it accrued, a citizen of such state who holds a note on which a right of action has been so barred, but who has not held it from the time the cause of action accrued, is precluded from maintaining an action thereon. (p. 683.)

T. Coffin, M. S. Eisner, F. M. Huffaker and W. D. Jones, for the appellant.

W. E. F. Deal, E. Tauszky and L. H. Jacobs, for the respondent.

⁷⁸ BONNIFIELD, C. J. This action was commenced on December 31, 1897, in the district court of the first judicial district in and for Storey county, against Edward Hyams and William Hyams upon a promissory note executed in the state of California, of which the following is a copy, to wit:

"\$5,000.00

San Francisco, March 1st, 1882.

"Three months after date, without grace, we promise to pay to ourselves or order the sum of five thousand dollars, payable only in gold coin of the government of the United States, for value received, with interest in like gold coin at the rate of one (1) per cent per month from — until paid.

"HYAM BROS."

Indorsed: "Hyam Bros."

The case was tried by the court sitting with a jury. The trial resulted in a judgment in favor of the plaintiff against defendant William Hyams for the sum of fourteen thousand four hundred and seventy-five dollars, together with interest on the sum of five thousand dollars thereof from the seventeenth day ⁷⁹ of May, 1899, till paid, at the rate of one per cent per month, together with the further sum of one thousand and twenty-one dollars and fifty cents taxed as costs. This appeal is taken by William Hyams from said judgment, and from the order of the trial court denying his motion for a new trial.

It appears that the plaintiff and Edward Hyams were, at the time of the execution of said promissory note, ever since have been, and now are, residents of the state of California; that said Edward has not been absent from the state of California, the place where the note was executed, altogether more than eighteen months since the execution of said note.

It also appears that William Hyams was at the time of the execution of said note, ever since has been, and now is, a resident of the state of New York, and that he has not been absent from said state of New York altogether more than eighteen months since the execution of said note.

It appears that at the time of the execution of said note Edward Hyams and William Hyams were copartners, and for a number of years prior thereto had been copartners, under

the firm name of Hyams Brothers, carrying on business as wholesale manufacturers and dealers in clothing, both at the city of San Francisco, state of California, and at the city of New York, state of New York. The manufacturing of clothing for the firm was carried on in the city of New York, and the business there was conducted by William Hyams, and the business of the sale of the clothing by Hyams Brothers was carried on in San Francisco, California, and conducted by Edward Hyams; and that Edward Hyams made, executed, and indorsed said note, and delivered the same to the plaintiff, for and in the name of said firm of Hyams Brothers. In 1884 said co-partnership was dissolved.

Among other defenses, the defendants pleaded sections 32 and 33 of the statute of limitations of this state. Section 32 limits the time in which an action may be commenced on a contract, etc., made out of the state, to two years after a cause of action has accrued: Comp. Laws, 3735.

Section 33 provides: "When the cause of action has arisen in any other state or territory of the United States, or in a foreign country, and by the laws thereof an action there cannot ^{so} be maintained against a person by reason of the lapse of time, no action shall be maintained against him in this state": Comp. Laws, 3736.

The defendants also pleaded certain laws of the state of California, in connection with said section 33 of the Nevada statute, by which the period is limited to four years for commencing an action after it has accrued upon any contract, obligation, or liability founded upon an instrument in writing executed in that state, and also the laws of the state of New York, which limits the time to six years for commencing an action upon a contract, obligation, or liability, express or implied, except a judgment or sealed instrument.

It is contended by counsel for appellant that an action upon said note was barred as against him, long before the commencement of this action, by the laws of the state of New York, and that, therefore, by reason of the provisions of said section 33 of our statute, no action can be maintained against him in this state. It is admitted by respondent's counsel that if the cause of action against appellant arose in New York, this action cannot be maintained, provided said section 33 has not been repealed.

Counsel in their brief say: "We admit that if respondent's cause of action against appellant arose in New York, and if sec-

tion 33 of our statute has not been repealed, appellant's motion for a nonsuit should have been granted."

Appellant's motion for nonsuit was granted as to Edward Hyams, it appearing that the cause of action against him arose in California, and by the laws of that state an action thereon had been barred there. It is contended on the part of respondent that the cause of action against both of the defendants arose in the state of California, and that by reason of the nonresidence of William Hyams, and his absence from that state, an action against him was not barred there, the place where the cause of action arose, and that, therefore, it is not barred here, under said section 33.

Appellant's counsel contend that the cause of action against him arose in New York, and, an action thereon having been barred in that state, no action can be maintained against him in this state, as it is barred by said section 33.

A "cause of action" is defined by Bouvier to be a right to ^{s1} bring an action. The cause of action is a claim which may be enforced: *Bucklin v. Ford*, 5 Barb. 393; *Halsey v. Reid*, 4 Hun, 777. It is the right which a party has to institute and carry through an action: *Meyer v. Van Collem*, 28 Barb. 230. The right to prosecute an action with effect: *Douglas v. Forrest*, 4 Bing. 704, 15 Eng. Com. L. 120. The term "cause of action" is synonymous with "right of action": *Am. & Eng. Ency. of Law*, 46, note. The phrase in said section 33, "when the cause of action has arisen," is the same, in the sense of the statute, as if the following expression had been used in its stead, "when a cause of action has accrued."

Did the right to bring an action on said note accrue in California against the appellant, a nonresident of that state, and absent therefrom? Could the claim of the respondent have been enforced in that state through the process issued by any court of that state? Did the respondent have the right to institute and carry through an action against the appellant in California? Could he have prosecuted an action against the appellant with effect in that state? We answer "No" to each of the above questions. No court in California could have acquired jurisdiction of the person of the appellant by any process it could have issued.

But the right to bring an action on said note by respondent against the appellant accrued in the state of New York, his place of residence—the place where any competent court of New York could, by its process, have acquired jurisdiction

of his person; the place where the respondent's claim against the appellant could have been enforced; the place where the respondent had the right to institute and carry through an action against the appellant; and the place where the respondent could have prosecuted the action against the appellant with effect. We are of opinion that, when default was made in the payment of said note, the cause of action thereon against the appellant arose or accrued in the state of New York; that in such case as this the cause of action accrues in any state against the defendant where he may be found.

We are of opinion that section 9 of the statute of 1867, ^{as} which amends section 33 of the statute of 1861 and incorporates it or makes it a part of the statute of 1867 is not repealed. But if it was repealed it would not avail the respondent. Section 508 of the civil practice act which was enacted in 1869 (Comp. Laws, 3603) provides: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of a citizen thereof who has held the cause of action from the time it accrued." The respondent is not a citizen of this state.

The appellant offered to prove the laws of New York to show that by said laws an action on said promissory note cannot be maintained there against the appellant by reason of the lapse of time. The court refused the offer, but from the admissions of respondent above given, we take it that he admits that the laws of that state are as appellant claims them to be.

We do not deem it necessary to pass upon the contention of the respective counsel with respect to the proper construction of section 21 of our statute of limitations, for, if we are correct in our conclusion that the cause of action arose or accrued against the appellant in the state of New York, and we think we are, then an action thereon was barred there by reason of the lapse of time and it is, therefore, barred here.

The judgment and order appealed from are reversed.

UPON PETITION FOR REHEARING.

MASSEY, C. J. The petition for a rehearing herein involves the same question passed upon by the court relating to the construction of our statute of limitations. We have given the matter an exhaustive and careful re-examination, and are unable to reach a conclusion different from the one announced.

The question must be determined by the construction to be placed upon the words, "when a cause of action has arisen," used in section 33 of our statute of limitations: Comp. Laws, 3736.

The state of Illinois has a statute in substance, and almost ⁸³ in language similar to our section 33. The supreme court of that state, in construing the precise words, "when a cause of action has arisen," found in the section of their statute, gave to them the meaning we have placed upon them, as used in our statute.

In the case of *Hyman v. McVeigh*, reported in 10 Chic. L. N. 157, the court of that state say that "the words, 'when a cause of action has arisen,' as they occur in the statute pleaded, should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin."

The same construction was placed upon the words by that court in the case of *Hyman v. Bayne*, 83 Ill. 256, and is cited by the court in *Hyman v. McVeigh*, as authority for the doctrine. This construction was subsequently adopted by the appellate court of that state in *Humphrey v. Cole*, 14 Bradw. 56; and while the same court in *Story v. Thompson*, 36 Ill. App. 370, disapproves of *Humphrey v. Cole*, it bases its disapproval upon the application of the statute to the facts of the case when construed with the provisions of section 18 of their statute. This is manifest from the language used by the court in *Story v. Thompson*. It does not attempt to disapprove of *Hyman v. Bayne* and *Hyman v. McVeigh*, but makes a distinction between those cases and the case of *Humphrey v. Cole*.

In making the distinction the court say (speaking of *Hyman v. Bayne* and *Hyman v. McVeigh*): "Both the maker of the note and the payee resided outside the state of Illinois when the cause of action accrued, and till after the bar in the other state was established. The expressions of the supreme court in that case, and quoted in 14 Illinois, *supra*, were made with reference to the facts in that case, but have no application here. The decision in *Humphrey v. Cole*, 14 Bradw. 56, must have been made under a mistaken idea of what was really decided in *Hyman v. McVeigh*, 87 Ill. 708."

⁸⁴ It will also be noted that the case from which we have quoted turned upon the rights of a resident creditor under another provision of the statute.

As late as 1892, in the case of *Wooley v. Yarnell*, 142 Ill. 449, 32 N. E. 891, the supreme court of that state, in express terms, approved the doctrine laid down in *Hyman v. Bayne* and *Hyman v. McVeigh*. "Where the maker of a promissory note and the payee," say the court, "reside out of this state when the note becomes due, and the cause of action accrues in another state, and the maker continues to reside out of the state and in another state, until, by the laws of such state, an action on the note is barred, the section of the limitation law, supra, when pleaded to an action brought on such note in this state, may constitute a bar to such action. This is the doctrine of *Hyman v. Bayne*, 83 Ill. 256, and also of *Hyman v. McVeigh*, unreported, but mentioned in 87 Ill. 708. In each of these cases, as will be found upon an examination of the record, the maker and payee both resided out of this state at the maturity of the cause of action sued on, and when the cause of action accrued, and so remained until an action was barred in and by the laws of a foreign state where the domicile existed."

Our position also seems to be fortified by the subsequent enactment of section 508 of the civil practice act (Comp. Laws, 3603), in which the legislature created an exception in favor of a citizen of this state who has held such cause of action from the time it accrued.

The claim of citizenship in this state, made by the respondent in his petition for a rehearing, is, as we believe upon the showing made in his own deposition, without merit; but, if that claim were well taken, he still fails to come within the section 508, supra, in that he has not held the note from the time the cause of action accrued thereon.

The petition is denied.

Limitations of Actions as affected by absence from the state are discussed in *Fisher v. Hartley*, 48 W. Va. 339, 37 S. E. 578, 86 Am. St. Rep. 39, and cases cited in the cross-reference note thereto: *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127. The clause "when a cause of action has arisen" should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action: *Freundt v. Hahn*, 24 Wash. 8, 85 Am. St. Rep. 939, 63 Pac. 1107. In this case it is held that a statute providing that "when a cause of action has arisen in another state between nonresidents of this

state, and by the laws of the state where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state," does not apply to an action on a note by a resident of the latter state against a nonresident, if, at the time of the execution of the note, both parties were nonresidents and the payee had taken up his residence in the state prior to the maturity of the note.

FOULKES ACCELERATING AIR MOTOR COMPANY v.
THIES.

[26 Nev. 158, 65 Pac. 373.]

CORPORATIONS—Fraud in Obtaining Stock Subscriptions.—If a person files an application for a patent and appoints attorneys to prosecute it, with authority to alter or amend his specifications, and the application for a patent is granted after the specifications have been amended, and such person, knowing that some amendments have been offered, represents, for the purpose of securing a stock subscription, that a patent according to his original specifications has been granted, such representations are a fraud in law, and avoid the stock subscription thus secured, although he did not know that his representations were false, believed them to be true and did not make them with intent to deceive. (p. 686.)

FRAUD—Representations—Knowledge of Truth or Falsity of. One who, without knowledge of the truth or falsity of a material representation made with intent that another shall act thereon which he does, is guilty of fraud, in legal contemplation if the representation turns out to be false, as much as if he knew it was untrue when he made it. (p. 686.)

FRAUD—False Representations.—If a person makes a material representation in relation to a matter susceptible of knowledge, in such manner as to impart positive knowledge of its truth, with intent that another shall rely upon such representation, this is sufficient to establish against him a legal fraud, if the other does rely upon it and it proves untrue. (p. 687.)

F. H. Norcross and Torreyson & Summerfield, for the appellant.

Curler & Curler, G. H. Foulkes, W. E. F. Deal and E. Tauszky, for the respondent.

173 BELKNAP, J. Action to collect a call upon a subscription to plaintiff's stock. In his answer defendant, among other things, sets up, as an equitable defense to the action, that during the month of February, 1893, and prior to the twenty-fifth day of March, John P. Foulkes falsely represented to the defendant and others that he was the inventor and the owner of a certain patent for an improvement in windmills.

the letters patent of which had not been issued, but would shortly be issued, and when issued would cover all the mechanical features described in the answer in this case; that defendant, relying upon said representations, subscribed for a certain number of shares of the capital stock of the plaintiff; that defendant first learned upon the dates mentioned in the answer that the letters patent issued to Foulks, and subsequently assigned to plaintiff, did not embrace the mechanical principles claimed for it by Foulks in his representations or in his application for a patent.

At the trial the district court found that upon March 9, 1892, Mr. Foulks filed his application for a patent for an improvement in air motors, and appointed Dewey & Co., of San Francisco, California, and A. H. Evans & Co., of Washington, D. C., his attorneys to prosecute the same, and to alter or amend his specifications, to receive the letters patent when issued, and to transact all business in the patent office connected therewith; that upon December 27, 1892, the attorneys of Mr. Foulks transmitted to him a copy of a notice from the patent office to the effect that his application for a patent had been examined and allowed; that while his application was pending several amendments were made by his attorneys, but no reference thereto was made by the notice, ¹⁷⁴ and Mr. Foulks was not informed of the particulars in which his application had been amended until after the patent was granted.

It was also found that until subsequent to July 15, 1893, Mr. Foulks believed, and did not have any reason for not believing, that his application for patent had not been allowed by the patent office as originally made and filed; that he believed his representations to the defendant as to the scope of the patent were true, and without any knowledge that they were untrue and without intent to deceive. It was also found that the contents of the patent materially differed from the representations made concerning it by Mr. Foulks. Upon these facts, the question is whether or not the representations were fraudulent in law.

The notification to Mr. Foulks that his application had been approved should be considered in connection with his authorization of Dewey & Co., of San Francisco, and A. H. Evans & Co., of Washington, to alter or amend the specifications. Under the authority given his attorneys, no one could have known, prior to final action by the patent office, the extent to which the specifications had been altered or amended. He knew that

amendments had been made. That fact may well have excited his inquiry, and investigation would have readily revealed the fact that the patent office had determined that Mr. Foulks' application infringed upon the Kirkwood patent, and that his attorneys had disclaimed all rights conflicting with it. Instead of making the inquiry which the circumstances suggested, he made no effort to inform himself further. Afterward, when a patent was allowed, instead of ascertaining the extent to which his specifications had been altered or amended by his attorneys under his authority, he represented to defendant and others that a patent, according to the original specifications, had been granted. Manifestly, he did not know whether his statement were true or false, and he, or his successor in interest, is liable if he asserted them to be true not knowing whether they were true or false.

In *Bennett v. Judson*, 21 N. Y. 238, the question was whether representations could be deemed fraudulent unless they were known to be false. It was held that one who, without knowledge ¹⁷⁵ of its truth or falsity, makes a material representation, is guilty of fraud, in legal contemplation, as much as if he knew it to be untrue.

The decision in *Bennett v. Judson*, 21 N. Y. 238, was subsequently qualified by the case of *Wakeman v. Dalley*, 51 N. Y. 35, 10 Am. Rep. 551, to the extent that the injured party is not compelled to prove that the person making the representations knew them to be false. If he assume or intend to convey the impression that he has actual knowledge of their truth, when conscious that he has not such knowledge, it is enough: *Railroad Co. v. Tyng*, 2 Hun, 321; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551.

Judge Story states the rule applicable to this class of cases as follows: "Whether a party misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false, and, even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party": *Story's Equity Jurisprudence*, 193.

"Accordingly," says Judge Cooley in his work on Torts (page 498), "when either of the two parties to a negotiation for the purchase of property makes material representations

of matters which he avers or assumes to be within his own knowledge, with intent that the other party shall act upon them, and these representations are actually relied upon by the other party in completing the negotiation, and they prove to be false, to his injury, a court of equity will treat the case as one of fraud, and give the proper relief, although the party making the representations was not aware at the time of their falsity."

Again, at page 501: "There are numerous cases in which it has been held that if a person makes a material representation in relation to a matter susceptible of knowledge, in such a manner as to import positive knowledge of its truth or falsity, with intent that another should rely upon such representation, this is sufficient to establish against him a legal fraud, if the other does rely upon it and it proves untrue. The fraud here consists in the reckless assertion that that is ¹⁷⁶ true of which the party knows nothing, and deceiving the other party thereby; and even the actual belief of the party in the truth of what he asserts is immaterial, unless he had some apparently good reason for his belief, such, for example, as the positive statements of others in whom he confided, and was innocent of any attempt to mislead, or unless his representations related to matters of opinion": See cases cited on page 501; 8 Am. & Eng. Ency. of Law, 642.

Judgment reversed, and cause remanded for new trial.

Fitzgerald, J., concurred in the judgment.

Massey, C. J., being disqualified, did not participate.

By the Court. Rehearing denied.

One Who Makes a Representation without knowing whether it is true or false, may be as blamable as though he made it knowing it to be false. If, therefore, a person states as of his own knowledge, material facts susceptible of knowledge which are false, he is guilty of fraud: See the monographic note to *Cottrill v. Krum*, 18 Am. St. Rep. 580. For this principle considered in relation to the sale of corporate stock, see *Kountze v. Kennedy*, 147 N. Y. 124, 49 Am. St. Rep. 651, 41 N. E. 414; *Prewitt v. Trimble*, 92 Ky. 176, 36 Am. St. Rep. 586, 17 S. W. 356. And for the distinction between it and mere expressions of opinion, see *Crocker v. Manley*, 164 Ill. 282, 56 Am. St. Rep. 196, 45 N. E. 577; *Hecht v. Metzler*, 14 Utah, 408, 60 Am. St. Rep. 906, 48 Pac. 37; *Ansley v. Bank of Piedmont*, 113 Ala. 467, 59 Am. St. Rep. 122, 21 South. 59.

STATE v. DOUGLAS.

[26 Nev. 196, 65 Pac. 802.]

LARCENY, Whether Joint or Several Crime.—The Stealing of the Property of Different Persons at the same time and place, and by the same act, may be prosecuted, at the pleasure of the state, as one offense or several distinct offenses. (p. 689.)

LARCENY.—An indictment charging the defendant, at the same time and place, with having stolen the property of different persons, charges but one larceny, one act or offense, and is sufficient, and not open to attack as being duplicitous, requiring the state to elect on which count it will prosecute. (p. 690.)

CRIMINAL LAW—Accomplice.—A deputy sheriff who does not participate in the criminal act, nor suggest or plan it, and who, at the suggestion of the real perpetrator, consents to join in the offense, but instead keeps the sheriff fully informed as to what is transpiring, is neither a co-conspirator nor an accomplice. (p. 690.)

WITNESSES—Accomplice.—Under the statute an accomplice is not incompetent as a witness, but the weight to be given to his testimony is a question for the jury, and a conviction cannot be had upon his uncorroborated testimony. (p. 690.)

TRIAL—Instructions.—It is not error to refuse instructions if there is no evidence before the jury making them applicable, even though they contain correct statements of the principles of the law. (p. 691.)

TRIAL.—Instructions not Embodied in the bill of exceptions are no part of the record and cannot be considered on appeal. (p. 692.)

Torreyson & Summerfield and G. D. Pyne, for the appellant.

W. Woodburn, attorney general, E. T. Dupuis and F. M. Huffaker, for the respondent.

202 MASSEY, C. J. The appellant was charged with the crime of grand larceny, was tried and convicted thereof, and sentenced to imprisonment in the state prison for a term of ten years. He appeals from the judgment and the order denying his motion for a new trial.

1. He complains that the court erred in overruling his demurrer to the indictment. The specific objection made by the demurrer is that the indictment charges four distinct larcenies. At the proper time he asked the court that the state be directed to elect as to which of the offenses charged he should be placed upon his trial. This request was refused, and the refusal of the court is assigned as error. As the action of the court in overruling the demurrer and in refusing to direct the state to elect involves the same question, the assignments may be properly considered together.

The indictment charges that appellant, on or about the twenty-sixth day of May, 1900, at the county of Churchill, state of Nevada, unlawfully and feloniously did steal, take, and drive away a particularly described steer, of certain alleged value, the property of Henry Thelan; certain other particularly described cattle, of certain alleged value, the property of Lee Wightman; certain other particularly described cattle, of certain alleged value, the property of W. F. Kaiser; and certain other particularly described cattle, of certain alleged value, the property of J. M. Douglass.

If the language used in this indictment charges four distinct larcenies, then, under the provisions of our criminal practice act (Comp. Laws, 4203), appellant's contention is tenable, and the demurrer should have been sustained, and the request for the election should have been granted.

This court has intimated that the stealing of property of different persons at the same time and place, and by the same act, may be prosecuted, at the pleasure of the state, as one ~~one~~ offense or several distinct offenses: State v. Lambert, 9 Nev. 324.

While the authorities bearing upon the rule that such larceny may be prosecuted as one offense are not uniform, yet we are of the opinion that the weight of authority, considered with reference to reason and with the statute defining larceny, is against the claim of appellant.

In a strong and well-reasoned case, in which a large number of authorities are collected and cited against appellant's contention, the supreme court of Indiana uses the following language, which we quote with approval: "We recognize no good reason to depart from what may be considered the great current of authority, and hold the pleading in question bad, when it can reasonably be said that it discloses that the larceny complained of was but a single act or transaction in violation of the law against larceny, although the property which was the subject of the crime belonged to several different persons. The particular ownership, as charged in the pleading, of the money stolen, did not give character to the act of stealing, but was merely a part of the description of the particular crime charged to have been committed. The information, *prima facie*, under the circumstances, can be said to charge but one offense against the state, and is not open to the objection that it is bad for duplicity": Furnace v. State, 153 Ind. 93, 54 N. E. 441.

This is a later case than *Joslyn v. State*, 128 Ind. 160, 25 Am. St. Rep. 425, 27 N. E. 492, cited by appellant, and overrules that case.

It seems to us that the language used in the indictment in the case at bar, charging the defendant, at the same time and place, with having stolen the property of different persons, charges but one offense, one act or transaction in violation of law, and fills the measure required by the sixth subdivision of section 243 of the criminal practice act (Comp. Laws, 4208), by which an indictment is declared sufficient when the act charged is clearly and distinctly set forth in ordinary and concise language without repetition, and in such manner as to enable a person of common understanding to know what is intended. Not only does the indictment sufficiently charge one act of larceny by which the property of different persons was taken, but the evidence submitted to the jury shows that ²⁰⁴ there was but one offense committed. The witness King, to whom appellant made his confession while still in possession of part of the stolen property, testified that appellant stated to him that he rode down in the night and sorted out of a band of cattle the eighteen head, and drove them away.

2. During the progress of the trial one Joe King was called as a witness, and testified to a confession made to him by appellant. The appellant asked the court to strike the testimony given by King from the record, for the reason that it appeared that King was a co-conspirator in the commission of the crime charged. The refusal of the court to strike out is assigned as error. The record does not show that the witness was a "co-conspirator," within the meaning of that term. He did not participate in the criminal act, and did not suggest or plan it. It does show that the appellant planned and committed the crime. It further shows that he suggested the commission of the crime to the witness, who had, in anticipation of some such suggestion, been appointed a deputy sheriff by the sheriff of Lyon county, and was acting as such, without the knowledge of the appellant, when appellant invited him to join in the commission of the crime of larceny; that the witness consented to join in the offense, but did not, and kept his principal, the sheriff, fully informed as to what was transpiring between him and appellant.

It also shows that all that was done or said by the witness was without criminal purpose or intent. He was not, under the facts shown, either a co-conspirator or accomplice, and

his evidence should not be treated as such: *Campbell v. Commonwealth*, 84 Pa. St. 187; *Wright v. State*, 7 Tex. App. 574, 32 Am. Rep. 599; *People v. Farrell*, 30 Cal. 316.

But if it were even shown or admitted that the witness King was an accomplice, that fact does not render him incompetent to give testimony under our statute: *Comp. Laws*, 4667.

The weight to be given to his testimony is a question for the jury, under proper instructions, subject, however, to the statutory restriction (*Comp. Laws*, 4330) that a conviction cannot be had upon the uncorroborated testimony of such accomplice. It was not error, therefore, to refuse to strike out the testimony of King.

²⁰⁵ 3. The appellant requested the court to instruct the jury that the officers of the law should never encourage and assist parties to commit crime, in order to arrest and have them punished for so doing; that it is their duty to prevent crime, instead of lending aid and encouragement in carrying it out, and in this case the officers of the law, instead of laying a plan to have defendant commit the crime as charged, if the jury believed from the evidence that they did lay such plan, should have taken all steps in their power to prevent the commission of the offense. The refusal of the court to give this instruction is assigned as error.

It is settled by the decisions of this court that it is not error to refuse instructions, if there is no evidence before the jury making them applicable, even though such instructions contained correct statements of the principles of the law: *State v. Waterman*, 1 Nev. 543; *State v. Squaires*, 2 Nev. 226; *State v. Ah Loi*, 5 Nev. 99.

It is sufficient, without passing upon the correctness of the rule of law contained in the instruction asked, to say that this instruction was not applicable to the facts of the case at bar.

We believe the evidence shows conclusively that neither the sheriff nor his deputy suggested the commission of the crime. It further shows that neither of these officers assisted in the commission of the crime, and that whatever plan was laid for the commission of the theft was solely and exclusively the plan of the appellant, and by him alone carried into effect.

4. Whether or not there is any merit in the claim that the court erred in refusing to give the instruction relating to the testimony of detectives is not before us. It appears from the action of the court in refusing to give the instruction that it would have been given in substance, and the record fails to affirma-

tively show that such was not the fact. Whatever instructions were given by the court are not properly brought here, and under the rule announced in *State v. Maher*, 25 Nev. 465, 62 Pac. 236, there is nothing for us to consider.

5. We cannot consider the objections to instructions given by the court. These instructions, not having been embodied in the bill of exceptions, are no part of the record: *State v. Forsha*, 8 Nev. 137; *State v. Burns*, 8 Nev. 251; *State v. Rover*, 11 Nev. 343; *State v. Maher*, 25 Nev. 465, 62 Pac. 236.

206 No error having been shown, the judgment and order will be affirmed.

The Crime of Larceny is the subject of a monographic note to *People v. Miller*, 88 Am. St. Rep. 559-608. The theft of several articles at one and the same time and place constitutes but one offense, though they belong to different persons; it is otherwise, however, if the theft is at different and distinct times and places on the same expedition, from the same or different owners: *State v. Emery*, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432; *State v. Maggard*, 160 Mo. 469, 83 Am. St. Rep. 484, 61 S. W. 184.

The Sufficiency of Accomplice Testimony to sustain a conviction is considered in the monographic note to *Stone v. State*, 98 Am. St. Rep. 158-180.

WALSH v. WALLACE.

[26 Nev. 299, 67 Pac. 914.]

STIPULATIONS—Construction.—A stipulation that within forty days appellant may make application for additional findings, file and serve notice of intention to move for a new trial, and file and serve statement on motion therefor, allows performance of any of the acts mentioned within the forty days, notwithstanding the statute provides that the statement on motion for a new trial must be filed within five days after notice of intention to move therefor. (p. 694.)

RIPARIAN RIGHTS.—The Doctrine of Riparian rights does not prevail in Nevada. (p. 699.)

WATER—Appropriation of.—To constitute a valid appropriation of water there must be an actual diversion thereof, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time. (p. 699.)

WATERS—Appropriation—Cutting Grass—Grazing Land.—A settlement upon land along a river, having it surveyed, or marking its boundaries and cutting wild grass therefrom, produced by the overflow of such river, and grazing the land, does not constitute an appropriation of any part of the water of the river. (p. 700.)

JUDGMENTS—Indefinite.—If all appropriators of water are before the court asking that their respective rights be determined, and such rights are capable of ascertainment, a decree, based upon

indefinite findings, which does not determine the essential rights of all the parties, and leaves a material part of the controversy undetermined, cannot be upheld on appeal. (p. 703.)

P. M. Bowler, Jr., and Bigelow & Dorsey, for the appellants.

H. Mayenbaum and J. B. Egan, for the respondents.

²²⁰ MASSEY, C. J. The preliminary motion to strike out the statement, interposed by respondents in the district court and renewed in this court, involves the construction of a stipulation between the parties entered into on the day the findings were filed and the judgment rendered.

The stipulation, *inter alia*, provides that all proceedings in the action shall be stayed until the thirtieth day of November, 1900, and that within forty days thereafter the appellants may make application for additional findings, file and serve notice of intention to move for a new trial, and file and serve the statement on motion for a new trial.

The notice of intention was filed and served on the twenty-sixth day of October, 1900, and the proposed statement on motion for new trial was filed and served on the fifth day of January, 1901.

²²¹ It is claimed by the respondents that, while under the stipulation, the notice of intention may be filed at any time before the expiration of the forty days, the relative time for filing the statement on motion for a new trial provided by the civil practice act (Comp. Laws, 3292), after the filing of the notice of intention, was not changed by the stipulation, and therefore, the statement not having been filed within five days after filing and serving the notice of intention, it should be disregarded and stricken out.

It is a general rule that stipulations between parties should receive a fair and liberal construction, in harmony with the apparent intention of the parties and the spirit of justice, and in the furtherance of fair trials upon the merits, rather than a narrow and technical one, calculated to defeat the purposes of their execution, and, in all cases of doubt, that construction should be adopted which is favorable to the party in whose favor it is made: *O'Neale v. Cleaveland*, 3 Nev. 485; *Insurance Co. v. Harris*, 97 U. S. 331; *Sweeney v. Great Falls etc. Ry. Co.*, 11 Mont. 523, 29 Pac. 15; 20 Ency. of Pl. & Pr. 657 *et seq.*

Under this rule it is clear to us that the construction contended for by respondents is too narrow and technical. The

appellants were not bound to perform any one or all of the acts covered by the stipulation at any specified time. They could, we believe, under a liberal construction in the order named, perform any or all of the acts at any date within the time limited. To hold as contended by respondents would, it seems to us, necessitate the interpolation of language not found in the stipulation; and, if such had been the intention of the parties, it was useless and absurd to have included in the stipulation any matter relating to the time of filing and serving the statement on motion for a new trial. The intention of the parties, manifest from the language used, was that the stipulation should stand in lieu of the provisions of the statute regulating these matters.

The case of *State v. Cheney*, 24 Nev. 222, 52 Pac. 12, cited by respondents in support of their contention, is not in point, and the reading of the facts of that case is sufficient to distinguish it from the case at bar, without discussion. The motion to strike out will, therefore, be denied.

The respondents brought this action against appellants for ³²² the restitution of the waters of Reese river, and to restrain and enjoin them from diverting any of the waters thereof, and from preventing the usual natural flow of the waters thereof, or any portion thereof, from flowing to the lands of respondents. The complaint also contains a general prayer for equitable relief.

Omitting all formal parts of the complaint, the matters pertinent to the question considered on this appeal, as alleged, are that the respondent Walsh and his predecessors in interest were, and had been since the fifteenth day of March, 1863, the owners and in the possession of certain tracts of land containing fourteen hundred acres; that the respondent A. P. Maestretti and his predecessors in interest were, and had been since said date, the owners and in possession of certain tracts of land containing four hundred and eighty acres; that the respondents James and Margaret Ryan and their predecessors in interest were, and had been since said date, the owners and in the possession of certain tracts of land containing four hundred acres; that the respondent L. F. Maestretti and his predecessors in interest were, and had been since said date, the owners and in the possession of certain tracts of land containing eight hundred acres; that the respondent Mrs. Bircham and her predecessors in interest were, and had been since said date, the owners and in possession of certain tracts of land containing four hundred

acres—all of which lands are situated upon Reese river, Lander county, Nevada; that said lands have been used during all said times for agricultural purposes; that Reese river has from time immemorial, until the diversions by the appellants in 1897, flowed over, through, and across said lands; that from the fifteenth day of March, 1863, until the diversions made by appellants aforesaid, respondents and their predecessors in interest appropriated and used the waters of the river for irrigating and flowing over and through said lands, thereby raising crops of grass, hay, and vegetables; that the appellants claim and assert rights to the waters of the river, which claims and assertions are alleged to be subordinate and subject to the rights of the respondents; that the diversions of the water by appellants since 1897 have been wrongful; and that appellants threaten to continue the same.

The answer denied the material averments; set up prior ³²³ rights to all the water of Reese river by appropriation, and other matters not material to the questions considered and determined on this appeal. The findings and decisions were for the respondents. A motion for a new trial was interposed and denied, and this appeal is taken from the order denying the motion.

The court found, among other matters, that Reese river had from time immemorial, and until the diversions by appellants, flowed over, through, and across the lands of respondents; that on the fifteenth day of March, 1863, the respondents and their predecessors in interest had appropriated and used the waters of Reese river "in sufficient quantity" for irrigating and flowing over part of their land. The court did not find the quantity of water appropriated by any or all of the respondents, or that respondents had appropriated all the waters of the river. The decision followed the findings, and a decree was entered perpetually enjoining the appellants, and each of them, their agents, etc., "from diverting any of the water of Reese river, and from in any way interfering with said water in such manner as to prevent said water from flowing on the lands of respondents in sufficient quantity to irrigate the same."

From a large mass of matter contained in a voluminous record we glean the following established facts, which appear not to be controverted, and which must control the questions which are clearly presented under a part of the assignments considered by the court:

Reese river has its source in the mountains of Nye county, and flows northerly into Lander county. The lands mentioned in this proceeding lie along, upon, or in the vicinity of said river. The quantity of water flowing in the river is variable, dependent upon the amount of snow and rain falling upon its watershed at its head and along its course, and the watersheds of its tributaries, during the various seasons.

The evidence does not show the quantity of water usually flowing in this stream, further than at some periods there was sufficient for all the parties claiming rights thereto in this proceeding, and at other times the quantity was insufficient to meet the claims of all.

Several miles above respondents' lands the river divides ³²⁴ into two forks, called the east and west forks. The respondents' lands lie along or upon the east and west forks of the river, and the lands of the appellants are several miles south and above the lands of respondents, and along the channel of the river above and near where it divides into two forks.

The appellants and their predecessors in interest settled upon the lands mentioned in their complaint in 1862 and 1863. The predecessors in interest of some of the respondents settled on lands along the river a little later, but about the same time that the lands of appellants were settled. The settlers upon the lands claimed by respondents had their several holdings surveyed, marked the boundaries thereof, and protected the same to some extent by making so-called ditch fences.

The ditches thus made were not for the purpose of irrigation, and were not so used for many years after and until other rights of both respondents and appellants had been acquired to the waters. The settlers upon respondents' land found wild grasses growing thereon at the time of their settlement, suitable for hay and grazing, and cut and grazed the same for a number of years. Up to 1869 whatever hay and grass grew upon these lands was produced by the natural overflow of the waters of Reese river, and waters flowing from springs upon part of the holdings.

No attempt was made to divert any of the waters of Reese river for the purpose of irrigation until 1869, when the ditch marked on respondents' map by the figures 1, 2, and 3, taken from the so-called west fork, above the lands now held by Ryan and Maestretti, was commenced. This ditch was not completed until many years after its commencement, and it appears from

the evidence that no water has run through a part of this ditch since 1891.

As to the Walsh lands, it appears from the testimony of the respondent, Walsh, that no diversions were either made or attempted until 1870, and that the diversions made for the purposes of irrigating his lands cover the period from 1870 to 1884. It is shown by his testimony that he helped make the ditch marked "E to F" on respondents' map in 1870; the ditch marked "J to K" on the same map, it appears, was ~~also~~ commenced and made about the same time; the ditch marked on the same map "L to N" was commenced in 1874 or 1875; and the ditch marked "G to H" was made in 1884; and, according to his statement, the last-named ditch was made principally for the purpose of drainage, and used afterward for the purpose of drainage and irrigation.

It nowhere appears in the testimony what the size of any one of these ditches was, or what is or was the carrying capacity of any one.

As to diversions of water for the purpose of irrigating the Ryan and Maestretti land, other than the attempted diversion by the ditch marked "1, 2, and 3," above referred to, it appears that a dam at a point marked "7" on the map was constructed in 1869, and a ditch taken from the dam to a point marked "8" thereafter.

It also appears that some dams were also placed in what is called the "Sampson slough," running through these lands. It also appears that in the '70's one part of the ditch made to mark the boundary of the west line of the Ryan place was used to irrigate part of the land.

The facts regarding the first diversion of water for the purpose of irrigating the Maestretti land, formerly held by Bircham and Wallace, is of the most meager character.

It appears that S. B. Wallace, the former owner of this tract, after he and Bircham had divided their holdings, in 1869, constructed two dams and turned water onto his meadow land, but it is uncertain whether this water had its source in the river or in certain springs. The date of the first diversion upon the Bircham land is left by the evidence to be conjectured.

Some time between 1863 and 1869 it appears that a dam was constructed in the so-called west fork of Reese river, above the Bircham house.

Whether the diversion so made was continued or abandoned is a matter, also, of doubt, as it appears from the testimony

of the witness Campbell that, for a period of twenty years or more before the trial of this action, water to irrigate the Bircham land was diverted by a dam in the river about twelve miles above the Bircham ranch.

It is not necessary to fully state the facts as to the diversions ³²⁶ made by the various appellants, but only such facts as illustrate the question discussed and decided need be stated. The appellant Daniel T. Wallace purchased the so-called McQuitty place, above respondents' lands, in 1870, and by means of dams and ditches diverted water for irrigation. Whether these dams and ditches had been made and so used before his purchase of the land is uncertain.

In 1873 Wallace located another ranch higher up on the river, and started to construct a ditch for the purpose of irrigating this ranch. In 1877 he transferred his diversion of water, under the advice of counsel, from the McQuitty place to his upper ranch, as it appears that the amount of water used on the McQuitty ranch would irrigate much more land upon the upper ranch.

Fred Ahlers, whose administrator is one of the appellants, settled upon Reese river in 1864, and commenced farming that year. He made diversions of the water of the river for the purpose of irrigation, but the dates of such diversions and the amounts of water so diverted are not shown by the testimony. The appellants Charles Ahlers and Hess claim rights through Fred Ahlers, deceased. McMahon started farming on Reese river in 1864, and that year put under cultivation eight acres, but the dates and amounts of diversions made by him are not shown by the testimony.

The above facts are sufficient, as above stated, to illustrate the question considered and determined by this court, and furnish a sufficient basis for its conclusion. It is well to note here that the record does not disclose the quantity of water diverted at any time, by any means, by any one or all of the parties to this action. Neither does it show the quantity sufficient or necessary to irrigate the lands, or any part of the lands, of respondents, as found by the court. Neither is there any showing in the record from which these facts, or any one of these facts, could be ascertained by any known process.

Counsel, under the many assignments made, have discussed in their briefs nearly the entire subject matter of the law of irrigation prevailing in the arid and semi-arid states; but, as we view the matter, it is necessary to consider only such ques-

tions as are plainly and sharply made under the assignment ³²⁷ that the findings and decision of the court are contrary to, and not supported by, the evidence, and contrary to law. The other questions, for various reasons appearing in the record, the presentation of which would unnecessarily lengthen this opinion, have been considered, but will not be determined.

It is evident from the facts recited that the finding of the court fixing the date of the appropriation of respondents on the fifteenth day of March, 1863, is contrary to both the law and the evidence.

This conclusion involves directly the question as to what constitutes an appropriation of water, as used in the decisions of this court and the laws of this state as they have existed and now exist.

Under two rules of the law may rights to use of water flowing in a natural stream be acquired—under the rule of riparian rights and under the rule of appropriation.

It is conceded by counsel in this action, and it has been held by this court, that the doctrine of riparian rights is so unsuited to the conditions existing in the state of Nevada, and is so repugnant in its operation to the doctrine of appropriation, that it is not a part of the law, and does not prevail here.

In order, therefore, to constitute a valid appropriation of water, within the meaning of that term as understood by the decisions of this court and the laws of the state, and, as we believe, by the decisions of the courts and laws of other states in the arid region, there must be an actual diversion of the same, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time: *McDonald v. Bear River Min. Co.*, 13 Cal. 220; *Larimer Co. R. Co. v. People*, 8 Colo. 614, 9 Pac. 794; *Fort Morgan Land etc. Co. v. South Platte Ditch Co.*, 18 Colo. 1, 36 Am. St. Rep. 259, 30 Pac. 1032; *Lowe v. Rizor*, 25 Or. 551, 37 Pac. 82; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809; *Farmers' etc. Reservoir Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1030; *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; *Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171.

While this court has never been required in its decisions to thus formally state the rule, yet an examination of the various cases which have been before it, and the large number of legislative acts, state and territorial, shows an actual diversion

²²⁸ of water to be one of the essential elements of an appropriation, within the meaning of that term.

Under the rule announced above, the rights of the respondents to the use of the waters of Reese river did not have their inception on the fifteenth day of March, 1863. Their rights were not initiated by settlement upon the land, by having the same surveyed, or by marking the boundaries thereof. No actual diversion was made on that date, or attempted on that date, and for a period of several years after, as appears from the facts stated. Cutting wild grass produced by the overflow of the river, or, as expressed by the witnesses, by the water of Reese river coming down and spreading over the land, was not an appropriation of that water, within the meaning of that term.

Neither was the grazing of the land an appropriation of the water, under the facts. The established facts as to the use of the waters of the river by respondents from 1863 to 1869, under the averments of paragraphs 14 and 15, as to the flowing of Reese river, and its appropriation and use, is the mere assertion and proof of riparian rights, if anything; and all parties concede that that rule does not prevail in Nevada.

If these facts should be held to constitute a valid appropriation of water, within the meaning of that term, then, under the contention of counsel that Reese river is a well-defined stream, with banks, bed, and channel, flowing over, through and upon respondents' land, would the channel have to run full of water before respondents could obtain the quantity of their appropriation, and before subsequent appropriators could acquire rights thereto, thus entailing a wasteful use of that which is so essential and necessary to the welfare and development of the state?

This leads up to another important question presented by the assignments, involving the award of the injunction under the findings and facts. It appears that the inception of the rights of the respondents to the waters of the Reese river was not of the same date, but at different dates. It appears that the rights of the respondent Walsh and the appellant Wallace were initiated at or about the same time. The first diversion by Walsh was made by his predecessor, ²²⁹ Crowley, in 1870. Other diversions made by himself and Crowley after his purchase of Crowley's rights, if he purchased those rights, were made at intervals from 1870 to 1884.

As early as 1870 the appellant D. T. Wallace appropriated water from Reese river on the McQuitty place, if McQuitty had not made the appropriation before Wallace became his vendee. In 1873 Wallace made a further appropriation on his upper place, and at a subsequent date transferred his diversion from the McQuitty ranch to the upper ranch. Under the settled rule of the law, it is not claimed by respondents that this transfer by Wallace was not authorized and proper.

Without further reference to the facts of the case, it will be seen that in part, and to some extent, the rights of the respondent Walsh and the appellant Wallace were initiated at the same time, and that the claim of priority as between them, so far as this record shows, could not be maintained by either.

The facts as to the appropriation of waters made by other respondents and appellants are not the same, in many respects, as those recited in reference to the appropriations made by Walsh and Wallace; but the above sufficiently illustrates the conclusion that the findings of the court as to the priority of rights, and its decision thereon, are contrary to both the law and the evidence.

Again, conceding, for the purpose of the argument, that the findings and decision of the court as to the priority of right of the respondents are supported by the evidence and the law, such findings are not sufficient to base a decision and decree of the court.

This is an equitable action to determine conflicting claims of right to the use of water by appropriation.

The respondents did not claim by their complaint that they had appropriated all the waters of the river, and the court did not find, expressly or impliedly, that they had.

It did find that they had appropriated sufficient water to irrigate certain portions of their land—much less than they claimed in their complaint.

320 The appellants asserted by their answer rights to the water by appropriation, and denied the rights of the respondents. If respondents' rights were prior, whatever surplus water flowed in the stream after they had taken the quantity to which they were entitled became subject to appropriation, under the decisions of this court.

It is conclusively shown, and not denied, that for many years appellants and their predecessors in interest have done all those things necessary under the law to constitute a valid

appropriation of whatever surplus might remain after respondents had taken the amount to which they were entitled.

All the parties, under the pleadings and proof, were claiming and asserting rights to the use of the water of Reese river by appropriation; and all had acquired rights therein, and were asking that those rights be determined.

The court, by its findings and decision, determined but one issue. It did not determine all the rights of either of the respondents, or any of the rights of the appellants. It left undetermined the quantity of water sufficient to irrigate respondents' lands, and to that extent it left undetermined respondents' rights, and thereby all the rights of the appellants. It cannot be ascertained from the findings or the decision when the respondents have taken the quantity of water sufficient to irrigate their land, or whether respondents can take subordinate to appellants' rights at any time any of the waters by virtue of their appropriation.

So far as the findings, express or implied, are concerned, based upon the pleadings and the evidence, the quantity appropriated is left to mere conjecture—is left to be determined by future litigation between the parties.

The parties have no right to determine what is sufficient or what is not sufficient to irrigate their land.

The judgment and decree in this respect should be certain and definite, and, unless the decree is certain and definite in this respect, it cannot be upheld, except, under the circumstances of the case, the indefinite and uncertain quantity given by the decree is capable of ascertainment: *In re Huntley*, 29 C. C. A. 468, 85 Fed. 889; *Dougherty v. Haggin*, 56 Cal. 522; *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811; *Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Riverside Water Co. v. Sargent*, 112 Cal. 230, 44 Pac. 560; ³⁸¹ *Wallace v. Ditch Co.*, 130 Cal. 578, 62 Pac. 1078; *Drake v. Earhart*, 2 Idaho (750), 716, 23 Pac. 541; *Johnson v. Bielenberg*, 14 Mont. 56, 37 Pac. 12; *Smith v. Phillips*, 6 Utah, 376, 23 Pac. 932; *Holman v. Pleasant Grove City*, 8 Utah, 78, 30 Pac. 72; *Irrigation Co. v. Jenkins*, 8 Utah, 369, 31 Pac. 986; *Irrigation Co. v. Vickers*, 15 Utah, 374, 49 Pac. 301; *Authors v. Bryant*, 22 Nev. 245, 38 Pac. 439.

A decree should be based upon definite findings, and the findings can be no more definite or certain than the evidence justifies; and where, as in the case at bar (an equitable action to determine conflicting claims of right to the use of water,

with the parties before the court), there is nothing whatever in the record upon which to base findings or decision of those rights, either expressly or impliedly, and the findings and decision leave a material part of the controversy undetermined, or to be determined by piecemeal by future litigation, the action of the court in leaving undetermined essential rights of all the parties cannot be upheld, and is contrary to law: *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; *People v. Gold Run Min. Co.*, 66 Cal. 155, 4 Pac. 1150; *Quint v. McMullin*, 103 Cal. 381, 37 Pac. 381; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838; *Feeney v. Chester*, 7 Idaho, 324, 63 Pac. 192.

For the reasons given, the order denying the motion for a new trial will be reversed, and the cause remanded for further action in accordance herewith.

Belknap, J., concurred.

Fitzgerald, J., being disqualified, did not participate.

An Appropriation of Water can be made only by an actual diversion, followed by an application thereof within a reasonable time to some beneficial use: *Cache v. La Poudre Water etc. Co.*, 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331; *Moyer v. Preston*, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258; *Hague v. Nephi Irr. Co.*, 16 Utah, 421, 67 Am. St. Rep. 634, 52 Pac. 765. See the monographic note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 799-817, on what constitutes an appropriation of water.

WEDEKIND v. BELL.

[26 Nev. 395, 69 Pac. 612.]

ACTIONS—Settlement of—Dismissal of Appeal.—If, pending an appeal, the plaintiff conveys all his interest in the subject matter of the action to a third person, who in turn settles the contention with the defendant under an agreement between them that such settlement shall not be affected by the judgment on appeal, such transactions constitute a settlement of the entire matter in litigation, and the appeal will be dismissed. (p. 706.)

ACTIONS—Settlement of—Dismissal of Appeal.—If, after an appeal has been taken, the parties thereto settle the matter in litigation between themselves, the appeal will be dismissed, although the case has been argued and submitted to the supreme court. (p. 707.)

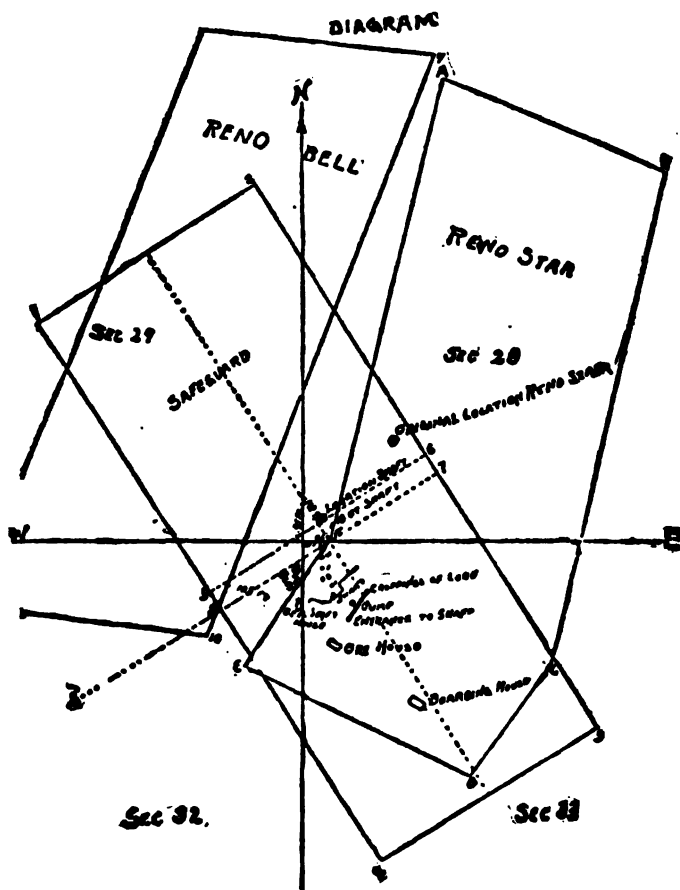
T. S. Ford, B. Curler, W. A. Sleep and W. E. F. Deal, for the appellants.

Bigelow & Dorsey and T. Wren, for the respondent.

410 FITZGERALD, J. This case was argued and submitted, but before judgment was rendered the justices of the court were informed that the controversy between the plaintiff and the defendants had been settled. We subsequently had citation served on each of the counsel for the respective parties to the suit, that they appear before the court on a day named, and show cause why the case should not be dismissed for the reason that all controversy between the parties plaintiff and defendant as to the matter in litigation had ceased. On the day named, counsel representing each side of the case appeared before the court, and stated that all controversy between the parties had not ceased, but that only a part had been settled, and a part remained unsettled, and requested the court to take the case on to a judgment. Counsel then stated to the court exactly what had been done in the way of settlement between the parties plaintiff and defendant. On the facts stated, two questions arise: 1. Is all controversy between the plaintiff and defendants as to the property in suit settled? And 2. If settled, what disposition of this case should be made by this court?

Under the facts as stated to the court, we think all controversy between the parties as to the property in suit has been settled. Referring to the accompanying diagram, which is in all essential respects a copy of an exhibit in the case, to wit: Plaintiff's Map "A," with the Reno Bell claim added, showing its easterly sideline, line 9 (10 on the diagram)—one can understand the matter.

411 Plaintiff claimed under his Safeguard mining location, laid, as can be seen by inspection of the diagram, on four kinds of land, to wit: 1. Unpatented lands of the United States in section 28; 2. Unpatented railroad lands in section 29 belong-



ing to plaintiff or under his control; 3. Patented railroad land in section 33 belonging to plaintiff; and 4. Lands patented, under desert land applications, in section 32, belonging to defendants. That matter in dispute ⁴¹² was the ore bodies under

the surface of defendant's land in section 32. The plaintiff alleged that the said ore bodies had their "apex" on his land in section 33, and on his Safeguard mining location, partly lying on his said land in said section 33.

Plaintiff in his prayer for relief asked the judgment of the court that said ore bodies were his by reason of their "apex" being on his said land and claim; and also that defendants be perpetually restrained from interfering therewith.

On the hearing of the citation, it appeared that the plaintiff had conveyed to a third party, Mr. John Sparks, all of plaintiff's rights, title, and interest to the lands and ore bodies lying to the eastward of the easterly side line of the Reno Bell claim. Said easterly side line ran about one hundred and thirty-five feet to the west of the ore bodies in dispute, said ore bodies being near the spot marked on the diagram "Bell Shaft House"; northwesterly much further than the Safeguard location extended; and southeasterly considerably further than said ore bodies were shown to extend.

It further appeared that Mr. Sparks and the defendants had settled all of their contention; that it had been agreed that all suits between the parties except this suit in this court should be dismissed; and that whatever judgment this court might render in this case should have no effect on the said settlement, but that said settlement should in all respects stand, the judgment of this court to the contrary notwithstanding.

To us it seems clear: 1. That the plaintiff, Mr. Wedekind, has conveyed all of his right, title, and interest in the matter in controversy to a third party, Mr. Sparks; for the controversy was as to land and ore bodies lying to the eastward of said Reno Bell easterly side line, and nothing to the westward thereof was in controversy; and 2. That Mr. Sparks and the defendants have settled all of their dispute as to the matter in controversy, the defendants having conveyed all of their interest to Mr. Sparks. Of course, under the state of facts above mentioned, Mr. Sparks has become dominus litis on each side of the case; and, under the decisions of courts and in sound legal reason, the case should proceed no further for the want of dominus litis on each side thereof.

⁴¹³ The following authorities support this doctrine: *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. Rep. 620; *Henkin v. Guerss*, 12 East, 247; *Smith v. Junction Ry. Co.*, 29 Ind. 546; *Board of Chosen Freeholders of Essex Co. v. Board of Chosen Freeholders of Union Co.*, 44 N. J. L. 438; *McConnell v.*

Shields, 1 Scam. 582; Livingston v. D'Orgenoy, 1 Mart., O. S., 96; Meeker v. Straat, 38 Mo. App. 239; Judson v. Flushing Jockey Club, 14 Misc. Rep. 350, 36 N. Y. Supp. 126; Haley v. Eureka Co. Bank, 21 Nev. 127, 26 Pac. 64; State v. McCullough, 20 Nev. 154, 18 Pac. 756.

On the hearing of the citation to show cause, the question was raised whether, after a case had been argued and submitted to the court for its decision and judgment, it could be disposed of without decision and judgment for the reason that the parties to the suit had settled it between themselves. We think it can, and should be.

In Judson v. Flushing Jockey Club, 14 Misc. Rep. 350, 36 N. Y. Supp. 126, cited above, and Dudley v. Flushing Jockey Club, 14 Misc. Rep. 562, 36 N. Y. Supp. 128, a case had not only been argued and submitted to the court for its decision, but the court had also rendered its judgment and decision, and the same had been entered of record; and yet, when the court obtained knowledge that the suit was fictitious, that there was not a dominus litis on each side thereof, it ordered its judgment and decision to be withdrawn from the files of the court.

In the first of the last two cases, on page 127 of 36 N. Y. Supp., the court says: "Courts of judicature are organized only to decide real controversies between actual litigants. When, therefore, it appears, no matter how nor at what stage, that a pretended action is not a genuine litigation over a contested right between opposing parties, but is merely the proffer of a simulated issue by a person dominating both sides of the record, the court, from a sense of its own dignity, as well as from regard to the public interests, will decline a determination of the fabricated case so fraudulently imposed upon it: Lord v. Veazie, 8 How. 255; Cleveland v. Chamberlain, 1 Black, 426; Wood-Paper Co. v. Heft, 8 Wall. 333; Bartemeyer v. Iowa, 18 Wall. 134, 135; San Mateo Co. v. Southern Pac. R. Co., 116 U. S. 138; Washington Market Co. v. District of Columbia, 137 U. S. 62, 11 Sup. Ct. Rep. 4; South Spring Hill Gold Min. Co. v. Amador Medean Gold ⁴¹⁴ Min. Co., 145 U. S. 300, 12 Sup. Ct. Rep. 921; Manufacturing Co. v. Wright, 141 U. S. 696, 700, 12 Sup. Ct. Rep. 103; California v. San Pablo etc. R. Co., 149 U. S. 308, 314, 13 Sup. Ct. Rep. 876; Hoskins v. Lord Berkeley, 4 Term Rep. 402; In re Elsam, 3 Barn. & C. 597; Wood v. Nesbitt, 19 N. Y. Supp. 423, 64 Hun, 639."

And in both cases, on the page following (page 128 of 36 N. Y. Supp.), the court says: "The report of the referee shows

that the controversy before the court was fictitious; that the transaction out of which it was supposed to grow—a horserace for stakes—was a pretended contest, arranged so as to form the basis of suits at law in which, without real adversaries before the court, an adjudication might be procured to use for other purposes than the enforcement of the right involved in the pretended suits. Upon the intervention of third parties having interests that might be affected by a decision in those proceedings, we ordered a reference to ascertain the facts (36 N. Y. Supp. 126); and, the report of the referee bearing out the contention of such parties, it only remains for us to dismiss the proceedings in this court growing out of the pretended and collusive transactions referred to. In addition to the cases already cited by us on the question of the right of third parties to intervene, we refer to the case of *Haley v. Bank*, 21 Nev. 127, 26 Pac. 64, in the supreme court of Nevada on March 10, 1891, reported also in 12 L. R. A. 815, with note, in which it was held that an attorney, as *amicus curiæ*, may move to dismiss an action as collusive, and it is his duty to do so if he knows, or has reason to believe, that the action is fictitious. We shall, therefore, enter an order dismissing the appeal from the district court in the case of *Judson v. Flushing Jockey Club*, and the appeal and the action in this court in *Dudley v. Flushing Jockey Club*, and direct that the opinions of this court in those cases be withdrawn from the files, and that the costs of the reference be paid by the parties to those appeals. All concur."

We deem it proper to say here that the case before us is not in any objectionable or bad sense "fictitious." On the contrary, up to the time of the settlement thereof there was between the parties a very real contest, and the contest was very earnestly carried on. There is no possible blame attachable to any persons connected with the case. The settlement ⁴¹⁸ of disputes amicably out of court instead of at arm's length in court is certainly commendable, and not blamable. But, as stated above, when the controversy between the parties litigant ceases, then the proceedings in court should follow its lead, and also cease.

It is ordered and adjudged that the case in this court is dismissed.

An Appeal will not be heard, as a rule, unless an actual controversy exists. Appellate courts will not ordinarily entertain an appeal in a fictitious case, nor consider hypothetical or abstract questions when no practical result can flow from their determinations:

McConnell v. Shields, 2 Ill. 582; Murphy v. Boston etc. Co., 110 Mass. 465; Bank of Port Gibson v. Dickson, 12 Miss. 689; Hazen v. Concord R. R., 63 N. H. 390; People v. Troy, 82 N. Y. 575; Blake v. Askew, 76 N. C. 325; Berks County v. Jones, 21 Pa. St. 413; Welch v. Wilmington etc. R. R. Co., 40 S. C. 465, 19 S. E. 72; Paris etc. Ry. Co. v. Martin (Tex. Civ. App.), 31 S. W. 243; Fletcher v. Peck, 10 U. S. (6 Cranch) 87; Pelham v. Rose, 76 U. S. (9 Wall.) 103. If no real controversy exists, an appeal will be dismissed: Chicago etc. Ry. Co. v. Dey, 76 Iowa, 278, 41 N. W. 17; Lord v. Veazie, 49 U. S. (8 How.) 251; as where one party to the action sells out to the other: East Tennessee etc. R. R. Co. v. Southern Tel. Co., 125 U. S. 695, 8 Sup. Ct. Rep. 1391. Compare Gross v. Shaffer, 29 Kan. 442, and see Panko v. Irwin, 14 Neb. 419, 16 N. W. 436; Russell v. Campbell, 112 N. C. 404, 17 S. E. 149; Cleveland v. Chamberlain, 66 U. S. (1 Black.) 419; South Spring Hill Gold Min. Co. v. Amador etc. Min. Co., 145 U. S. 300, 12 Sup. Ct. Rep. 921.

CASES

IN THE

SUPREME COURT

OF

OREGON.

SCOTT v. ASTORIA RAILROAD COMPANY.

[43 Or. 26, 72 Pac. 594.]

JURY TRIAL.—In Construing Language Employed by Court in Jury Trials a liberal policy should be pursued. In construing a single instruction, the entire charge must be viewed, and, unless it appears that the jury were, or might have been, misled, mere verbal inaccuracies are not sufficient to justify a reversal. (p. 714.)

JURY TRIAL.—Instructions, Error in One, When not Cured by the Whole Charge.—Though the court in an action against a railway corporation, in its charge as a whole, correctly informs the jury of the degree of care required of the defendant, yet if in one of the instructions it assumes that negligence can be predicated upon the defendant's original location of its road, and this assumption is not maintainable, as a legal proposition, such instruction may mislead the jury, and therefore warrants a reversal. (p. 714.)

RAILWAY CORPORATIONS.—The Question of Negligence in the Location of a Railway can never become a question proper for submission to a jury. So many elements are to be considered in locating a railway as factors in its construction and operation that its permanent establishment must necessarily be left to its builders. (p. 714.)

NEGLIGENCE.—The Question to be Determined by the Jury in an Action Against a Railway Corporation to Recover for Injuries Claimed to be Due to Its Negligence is whether it exercised the degree of care that the law enjoins, which is measured by the extent of danger incident to the building and operating of its road on the line selected, and not by considering whether a safer location might not have been made elsewhere. (pp. 714, 715.)

TRIAL.—An Exception to the Charge is Sufficient when it distinctly points out the particular parts to which it is directed, where counsel, at the conclusion of the charge, quotes from it the language complained of. (p. 716.)

EVIDENCE.—A Book Kept by a Person Employed in Signal Service of the United States, whose duty it is to read truthfully the facts therein stated, is admissible in evidence to prove such facts. (p. 716.)

EVIDENCE, SECONDARY, When Inadmissible.—The best obtainable evidence should be adduced to prove every disputed fact, the presumption being if inferior evidence is offered that the higher evidence would be adverse. (p. 717.)

EVIDENCE—Signal Service Record, Testimony of Contents of, when Admissible.—If it appears that a witness has before him the records of the signal service for a specified station, and that they contain so many entries that an examination of each would occasion great loss of time to the court, the witness may be permitted to testify that he has examined them, and what they show the rainfall to have been to a date specified, and that it was less than the average daily rainfall. Nor is it material that such records were not kept by him. (p. 717.)

WITNESS—Expert Who Has no Personal Knowledge.—A graduate who, has taken a course of civil engineering, including the science of railroad construction, and has practiced civil engineering fourteen years, though he has never been actually engaged in railroad building, may be permitted to testify that he is acquainted with the approved methods of civil engineers in relation to the construction of railroads and embankments and what are the standard slopes applicable to all kinds of known earth, and to detail the degrees of inclination recommended by the majority of such engineers, and to give names of authors whose works on civil engineering coincide with the opinion of the witness. (p. 720.)

WITNESS.—An Expert is a person who is so qualified either by actual experience or by such careful study as to enable him to form a definite opinion of his own respecting any division of science, branch of art, or department of trade about which persons having no particular training or special study are incapable of forming accurate opinions or deducing correct conclusions. (p. 720.)

EVIDENCE—Reference by Witness to Works on Civil Engineering.—If it be conceded that works on civil engineering are not admissible in evidence, still a witness who is a civil engineer may, as an expert, give his opinion and state that it is in harmony with certain standard works on civil engineering which he mentions, giving the names of their authors. (p. 723.)

Fulton Brothers, for the appellant.

George Noland and Bennett & Sinnott, for the respondent.

27 MOORE, C. J. This is an action by Ella Scott, as administratrix of the estate of W. M. Scott, deceased, to recover damages for his death, which occurred January 12, 1901, while in the employ of the Astoria and Columbia River Railroad Company as a locomotive engineer, and is alleged to have been caused by its negligence in constructing its railroad too near a hillside, without adopting any means to prevent a slide, and in not properly watching its track, so as to discover the danger therefrom, and to warn the deceased thereof. The answer, after denying the material allegations of the complaint, alleges that the day the accident occurred was unusually stormy, the rainfall along the line of the defendant's railway being the heaviest

of the season; that for more than two years prior thereto Scott had been in its employ as such engineer, was acquainted with the road and the construction thereof, and knew the nature, formation, and character of the country through which it extended, and the effect of rains thereon; that at the point where he lost his life no slide had ever occurred, but the road was necessarily constructed through a mountainous region, where slides frequently happen in the rainy season, against which it is impossible to guard, which fact he well ^{as} knew; that, during all the time he was so employed, defendant kept a competent track-walker to examine the line before every train passed over it, who immediately preceded the train operated by Scott, examined the track, and found no obstruction thereon; that it was Scott's duty to exercise great care in running the engine, and on the night of January 12, 1901, he was informed that slides might possibly occur, in consequence of the heavy rainfall, and notified to proceed with caution, but, not heeding the direction, he ran the engine at a higher rate of speed than usual, and in such a careless manner that he could not stop it in time to avoid the disaster. For a second defense, it is alleged that Scott, knowing the character of the road and the effect of heavy rains thereon, assumed the danger incident thereto. The reply having denied the material allegations of new matter in the answer, a trial was had, resulting in a judgment for plaintiff in the sum of four thousand dollars, and the defendant appeals.

It is contended by defendant's counsel that the court erred in instructing the jury as follows: "The railroad company has a right to locate its road, in a general way, upon any route it may deem fit, but in making a specific location at any particular point it should use due care to provide a safe place for its employes to work; and if it construct its road in a place that is manifestly dangerous, when, with reasonable care and slight expense, it could just as well be constructed in a perfectly safe place, a few feet to one side, that may be negligence ^{as} which you would have a right to consider in determining the degree of diligence and care defendant should have exercised in watching, inspecting, and protecting its road, and its employes thereon."

To render the application of this part of the charge intelligible, a brief statement of the facts involved is deemed essential. The bill of exceptions discloses that plaintiff introduced testimony tending to show that the defendant constructed a

railway from Goble to Astoria, and operates trains thereon, and also over the line of the Northern Pacific Railway Company from Goble to Portland. The defendant's road near Bugby, for about half a mile, is built along the south bank of the Columbia river, about ninety feet from a cliff of basaltic rock, the disintegration of which, and the debris carried over the precipice by surface water, formed a slope of about forty-five degrees, extending from the face of the crag to a line parallel with, and about six feet from, the track. This incline was originally covered with brush and trees, which were cut down when the railroad was built, and their stumps and roots had rotted. In the rainy season, considerable water flows over the precipice at this point; but, there being no ditch to carry it off, the earth and debris composing the acclivity become saturated therewith. Slides have occurred in the immediate vicinity prior and subsequent to the building of the road, but the defendant made no attempt to carry away the material of the slope, or to build retaining walls. The track-walker, whose duty it was to inspect the line near Bugby, was obliged to examine a section of eight miles, and, to avoid being run down, was compelled to start on his velocipede thirty minutes before train time, according to schedule; and as the train was half an hour late on the evening of January 12, 1901, no watchman had passed over the track at that point within an hour of the train's arrival. Some time after the track-walker passed Bugby, ^{so} a slide occurred, the rocks and earth lodging upon the track; and at about 10 o'clock that night the locomotive driven by Scott, and drawing a passenger train, ran into the obstruction, throwing the engine into the river whereby he was drowned.

It is argued by defendant's counsel that the court, in the instruction complained of, told the jury, in effect, that if the defendant could have located its road "in a perfectly safe place," but neglected to do so, a higher degree of care in operating it was demanded than in case they should find that such place could not have been discovered "a few feet to one side"; that, though the defendant might select the location of its road, it exercised the right to do so at its peril, and if a safer route than that chosen could have been discovered, but was not found, a different measure of care was required "in watching, inspecting, and protecting its road and employes"; that the degree of care imposed upon the defendant depended upon the wisdom exercised in locating its road; and that a jury, and not a rail-

road company, are the judges of where a line of railway shall be specifically located. Plaintiff's counsel maintain, however, that the exceptions taken to the instructions were general, and did not point out any particular part thereof of which the defendant complained, and that the charge should be considered in its entirety, and, when so construed, any seeming inconsistency therein is rendered harmless.

1. In construing the language employed by courts in charging juries in this state, a very liberal policy has been pursued; the rule being that, in considering a single instruction, the entire charge must be viewed, and, unless it appears that the jury were or might have been misled, mere verbal inaccuracies will not be sufficient cause for reversal: *Matlock v. Wheeler*, 29 Or. 64, 40 Pac. 5, 43 Pac. 867; *Smitson v. Southern Pac. Co.*, 37 Or. 74, 60 Pac. 907; ³¹ *Farmers' Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520.

2. The court, in other parts of its charge, correctly instructed the jury that it was incumbent upon the defendant to exercise only reasonable and ordinary care, saying in one instance: "It is sufficient to defeat the right of the plaintiff to recover in this case that you should find from the evidence that defendant exercised such care as is common and usual under like circumstances and conditions, under prudent management." We think that notwithstanding the charge, as a whole, correctly informed the jury of the degree of care required of the defendant in operating its road, the instruction complained of might have misled them, for it seems to assume that negligence could be predicated upon the defendant's original location of the road. So many elements are to be considered in locating a railway, as factors in its construction and operation, that its permanent establishment must necessarily be left to its builders. To shorten distance, to increase speed, and to cheapen the cost of transportation of passengers and freight, railroad companies must occasionally cut long tunnels, build high trestles, and erect massive bridges, which might possibly be avoided in many instances by pursuing more circuitous routes. The demands of commerce necessitate the construction of railways in the places and manner indicated, and their location can never become a question to be submitted to a jury, for, if they could find that a certain line should have been deflected a "few feet to one side" of that determined upon by a railway company, where would be the limit to their power? The question to be determined by the jury was whether the defendant had exercised

the degree of care that the law enjoins, which is measured by the extent of danger incident to the building and operating of its road on the line selected, and not by considering whether a ²² safer location might possibly have been made elsewhere. We think the instruction complained of is manifestly erroneous, and might have misled the jury, by permitting them to consider as negligence the location of the road in the particular place in which it was built, though the court, in other parts of its charge, correctly instructed them as to the degree of care which it was necessary for the defendant to exercise.

3. The remaining question, on this branch of the case, is whether the exception is sufficient to bring up for review the error relied upon. The bill of exceptions shows that, at the conclusion of the charge to the jury, defendant's counsel excepted to the part thereof hereinbefore quoted, particularly setting out the language complained of. An exception to a charge is sufficient when it distinctly points out the particular parts to which it is directed: *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *McAlister v. Long*, 33 Or. 368, 54 Pac. 194. Under the rule announced in those cases, we think the exception adequate to challenge that part of the charge of which the defendant complains.

In view of a new trial, it is deemed proper at this time to consider other alleged errors which it is claimed by defendant's counsel the court committed.

4. At the trial, plaintiff's counsel, desiring to show that the rainfall on the day Scott lost his life was not unusual, but such as might reasonably have been anticipated, and the effects thereof guarded against by the defendant when building its road, called B. Johnson, who, as agent at Astoria of the Weather Bureau, testified that it was incumbent upon him to keep a record of the rainfall in that city; and, producing a book containing such record, he stated that on January 12, 1901, two and seventy-two one-hundredths inches of water fell in the twenty-four hours ending at 5 o'clock P. M. of that day, which was the greatest daily rainfall that winter. He was then permitted to state, over defendant's objection ²³ and exception, that such quantity was less than the average excessive daily precipitation, which was three and thirty one-hundredths inches; giving the date and quantity of water that had fallen on the day of the greatest rainfall during ten years, and also the average annual rainfall for eighteen years preceding 1901.

The witness, upon cross-examination, having stated that the book to which he referred was kept, prior to March, 1897, by his predecessors, defendant's counsel thereupon moved to strike out those parts of his testimony that related to the average rainfall and to the entries made in the record prior to his assuming charge of the office, on the ground that they were hearsay and not based upon his personal knowledge. Johnson having been permitted further to testify, in answer to questions asked by plaintiff's counsel, that the book to which he referred was an official government record, compiled from smaller books in his office, the motion was denied, and an exception allowed. The book kept by the agents of the Weather Bureau at Astoria not having been offered in evidence, it could only have been used to refresh the memory of the witness by an examination of entries made therein by him, or by another under his direction; and, this being so, could he testify concerning any memoranda made prior to his taking charge of the office? The rule is well settled that a record kept by a person employed in the signal service of the United States, whose public duty it is to record truly the facts therein stated, is admissible in evidence to prove such facts: *Knott v. Raleigh etc. Ry. Co.*, 98 N. C. 73, 2 Am. St. Rep. 321, 3 S. E. 735; *Chicago etc. Ry. Co. v. Traves*, 17 Ill. App. 136; *Moore v. Gaus & S. Mfg. Co.*, 113 Mo. 98, 20 S. W. 975; *Evanston v. Gunn*, 99 U. S. 660. So, too, the record of the weather, kept for a number of years at a state public institution, is admissible to prove the meteorological condition of the atmosphere: *De Armond* ²⁴ *v. Neasmith*, 32 Mich. 231; *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174. In *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487, an agent of the Weather Bureau was permitted to testify concerning the direction and velocity of the wind, from a record made in his office by an automatic register. So, too, in *State v. McDaniel*, 39 Or. 161, 65 Pac. 520, it was held that the testimony of an officer of the city fire department that the fire bell did not ring on a certain night before 12 o'clock, basing his knowledge on the fact that the automatic indicator of the department did not register a ringing of the bell, was competent. It is possible, however, that the record made by automatic registers may have consisted in hieroglyphics, which, if offered in evidence, could have not been understood by the jury; thereby rendering the testimony of the officers, who possessed a knowledge of the symbols used, necessary to explain their meaning. If this be so, the decisions in the last two cases are not controlling in the case at bar, and

the legal principle involved must be considered in the nature of *res nova*.

5. The adjudicated cases sustain the rule that the best obtainable evidence should be adduced to prove every disputed fact (*Mooney v. Holcomb*, 15 Or. 639, 16 Pac. 716); the presumption being that higher evidence would be adverse, from inferior being produced: B. & C. Comp., sec. 788, subd. 6. The rule rejecting secondary evidence of a writing is subject, among others, to the exception that when the originals consist of numerous accounts, or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole, oral evidence thereof is admissible: B. & C. Comp., sec. 703, subd. 5. It will be remembered that the witness had with him a book showing the quantity of rain that had fallen at Astoria each day for eighteen years; and, courts being obliged to take judicial notice of the laws of nature (B. & C. Comp., sec. 720), it requires no proof to show that such a record, in this state, would contain so many entries that an examination of each would have occasioned great loss of time to the court; and, as only the general result of the whole was desired, we believe that the testimony objected to was admissible, under the exception mentioned. The record of the meteorological observations at Astoria, prior to March, 1897, was made by Johnson's predecessors; but, as official duty is presumed to have been regularly performed, the entries noted in the book produced by the witness must be treated as *prima facie* correct. In *Evanston v. Gunn*, 99 U. S. 660, Mr. Justice Strong, commenting upon this subject, says: "Extreme accuracy in all such observations, and in recording them, is demanded by the rules of the signal service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure." In view of the public character of the entries, and the presumption of their verity, the witness was undoubtedly competent to state the general result of the whole record from an inspection thereof for the time embraced in the questions asked, though all such entries were not made during his term, for, as he was an expert in the manner of keeping the book produced, he was qualified, and could therefore testify as to the result of his examination and investigation: *State v. Reinhart*, 26 Or. 466, 38 Pac. 822; *Salem*

Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675, 8 Mun. Corp. Cas. 701.

6. W. J. Roberts, as plaintiff's witness, having testified that he was a graduate of the University of Oregon, and also of the Massachusetts Institute of Technology, where he ³⁶ took a course in civil engineering, which branch, including the science of railroad construction, he was engaged in teaching at the Agricultural College and School of Science at Pullman, Washington; that he had practiced civil engineering fourteen years, and, though he had never been actively engaged in railroad building, he had constructed roads, irrigating ditches, canals, and other works requiring the construction of slopes; that he was acquainted with the approved methods of civil engineers in relation to the construction of railroads and embankments; that, having visited the place where Scott lost his life, he measured the slope from its foot, at a point six feet from the track, to the bluff, and found it to be one hundred and five feet, and its angle, where the surface was undisturbed by the slide, forty-six degrees—was permitted, over defendant's objection and exception, to state that there are certain standard slopes, approved by civil engineers, that are applicable to all kinds of known earth; to detail the degrees of inclination recommended by a majority of such engineers for the construction of slopes in shallow or deep cuts, and in cohesive or immiscible soils; and to give the names of several authors whose works on civil engineering coincided with his opinion. The admission of the testimony so objected to presents the question whether a witness who has no actual experience in railroad building, and whose knowledge thereof is derived from the study of works on civil engineering, is competent to express an opinion upon the degree of inclination of earthwork; and, if so, can he properly refer to the authors whose works on the subject corroborate his opinion?

In Boyle v. State, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827, one Dr. Cody, in answer to a hypothetical question, was permitted, over objection and exception, to state that in his opinion a certain person had died from asphyxia; saying, however, that his conclusion was based ³⁷ upon information derived from the perusal of medical books; that he had never seen a case of death from strangulation, and did not know, from experience, its post-mortem indications. He was also permitted to be interrogated as follows: "Do you know, from books or otherwise, whether death is ever produced from strangulation

without leaving marks upon the throat; that is, your own personal observation?" to which he replied: "In Taylor's Jurisprudence such cases are recorded. Q. In standard medical works? A. Yes, sir." In that case, the defendant having been convicted, the judgment on appeal was reversed, the court holding that an error was committed in permitting an expert to testify as to statements contained in medical books, Mr. Justice Taylor saying: "The palpable error in permitting Dr. Cody [to answer the questions hereinbefore detailed] is apparent from the fact that he testified on the stand that he had no personal knowledge of the subject he was testifying about." A new trial having been granted, the defendant was reconvicted, and appealed; and, in affirming the judgment, Mr. Chief Justice Cole, referring to the examination of medical witnesses, says: "They testified as to facts within their personal knowledge; also, probably, to matters derived from professional study and experience. We suppose they could give their opinion as to the cause of the death of the deceased. . . . When this case was here before, we did not intend to lay down any new rule as to expert testimony, and certainly did not, as an examination of the opinion of Mr. Justice Taylor will show": *Boyle v. State*, 61 Wis. 440, 21 N. W. 289.

In *Soquet v. State*, 72 Wis. 659, 40 N. W. 391, it was held, however, that a physician could not testify as an expert as to symptoms of arsenical poisoning, if his knowledge of the subject had been obtained wholly from medical or scientific books or medical instruction, and not from personal ³⁸ observation or experience. Mr. Justice Orton, referring to the admission of the testimony of physicians whose knowledge of the symptoms of arsenical poisoning was derived solely from medical or scientific books and from medical instruction, says: "In receiving their testimony, the court committed and repeated the very error by reason of which the judgment in the case of *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827, was reversed": See, also, *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778. In *State v. Simonis*, 39 Or. 111, 65 Pac. 595, Mr. Chief Justice Bean calls attention to the rule adopted in Wisconsin, and says: "But in an equally well considered opinion by the supreme court of Michigan (*People v. Thacker*, 108 Mich. 652, 66 N. W. 562), it is held that a practicing physician, who is a graduate of a reputable medical college, and who has sufficiently qualified himself to have a definite opinion of his own, may testify as an expert on the subject of poisoning, though

it is not shown that he has had any experience in such cases." We believe the Michigan rule is founded upon better reason and supported by a greater weight of authority than that announced by the supreme court of Wisconsin: See, upon this subject, Gillette on Indirect and Collateral Evidence, sec. 209; Rogers on Expert Testimony, 2d ed., sec. 1; Citizens' Gaslight Co. v. O'Brien, 118 Ill. 174, 8 N. E. 310; Carter v. State, 2 Ind. 617; City of Fort Wayne v. Coombs, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; State v. Terrell, 12 Rich. 321. An expert is a person who is so qualified, either by actual experience or by such careful study, as to enable him to form a definite opinion of his own respecting any division of science, branch of art, or department of trade, about which persons having no particular training or special study are incapable of forming accurate opinions or of deducing correct conclusions: State v. Anderson, 10 Or. 448; Farmers' Bank v. Woodell, 38 Or. 294, 61 Pac. 837, 65 Pac. 520; State v. Simonis, 39 Or. 111, 65 Pac. 595. ³⁹ Though Roberts had no acquaintance with railroad building, his knowledge of the subject, derived from study of works on civil engineering, and his experience in constructing roads, irrigating ditches, and canals, undoubtedly qualified him to express an opinion respecting the "approved" slope of an embankment: Central Ry. Co. v. Mitchell, 63 Ga. 173.

7. Whatever the rule may have been, it is now almost universally conceded that medical books cannot, over the objection of the adverse party, be introduced in evidence to prove any statement contained therein: City of Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 679; Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Burg v. Chicago etc. Ry. Co., 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; Link v. Sheldon, 18 N. Y. Supp. 815, 64 Hun, 632; Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091. The reasons usually assigned for the rejection of such a work are that the statements which it contains lack the solemnity of a judicial oath; that the author, not being present, cannot be cross-examined; that, if he could be called upon to state the grounds of the opinions so announced, he might change or modify them; that several recognized "schools" of medicine exist, that materially differ in theory and practice; that the language used in medical books is technical, and not capable of being understood by ordinary persons, and that the practice of medicine and surgery is changing, so that what was formerly regarded by the profession as settled has become in many instances obsolete, or superior methods or

more efficacious remedies have been substituted therefor: *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Gallagher v. Market St. Ry. Co.*, 67 Cal. 13, 6 Pac. 869, 56 Am. Rep. 713. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and ⁴⁰ interest: B. & C. Comp., sec. 770. There are certain facts constituting a species of evidence (B. & C. Comp., sec. 680), of such general notoriety that they are assumed to be already known to the court, and no evidence thereof need be produced: B. & C. Comp., sec. 719. In all cases in which judicial notice of facts may be taken by the court, if it is not sufficiently advised thereon, it may resort for its aid to appropriate books or documents for reference (B. & C. Comp., sec. 720), and declare its knowledge to the jury, who are bound to accept it as conclusive: B. & C. Comp., sec. 136; *State v. Magers*, 35 Or. 520, 57 Pac. 197. Though a court must take judicial notice of the laws of nature (B. & C. Comp., sec. 720), the probability of a landslide is not such a fact as a resort to appropriate books would enable the court to declare as conclusive to the jury. In determining the angle of repose of an embankment, the possibility of a slide depends upon the character of the material, the climatic influences thereon, and so many other elements that it cannot be said, as a matter of law, to be a fact of "general notoriety and interest," so as to render books on civil engineering primary evidence thereof: B. & C. Comp., sec. 770; *Gallagher v. Market St. Ry. Co.*, 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869.

8. These books not being admissible upon either of the grounds stated, the question to be considered is whether the court erred in permitting the witness to refer to them as tending to corroborate his opinion. In *Collier v. Simpson*, 5 Car. & P. *73, decided at nisi prius in 1831, it was held by Mr. Chief Justice Tindal that, though medical books which were stated by expert witnesses to be standard authority in that profession could not be offered in evidence to prove any facts therein stated, such witnesses might be asked their judgment, and the grounds thereof, which might in some degree be founded on such books, as a part of their general knowledge. In *Central Ry. Co. v. ⁴¹ Mitchell*, 63 Ga. 173, an engineer, having been injured in a slide of earth upon a railroad track, instituted an action to recover the damages sustained, and called a civil engineer, who testified in relation to the character of the cut where the slide

occurred, the effect of water upon the material, as tending to disturb it, and gave the angle of the steepest slope for which he knew any authority, saying: "The rules for construction of cuts, etc., which I have given, are found in books on engineering. I give these rules solely from what I recollect of the books. These rules are found in Mahan, Gillespie, and Gilmore, and many others." The plaintiff having secured a judgment, Mr. Justice Jackson, speaking for the court, in affirming it, says, concerning the testimony of the civil engineer: "The expert was competent to testify. Every expert derives much of his knowledge from books as well as from experience, and can give his opinion based upon the knowledge acquired from both sources." In *Western Assur. Co. v. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, upon an issue as to whether a building in which insured property was confined fell before a conflagration, or as a result of the fire, it was held that a civil engineer, testifying as an expert, may read in support of his opinion excerpts from engineering books recognized as standard authorities, giving the tabulated results of tests made to determine the strength and resisting power of timbers of the kind used in the construction of the building, the court saying: "The general proposition that scientific books are not to be read in evidence is a familiar one, and many citations from text-writers and reported cases are found in the brief of the plaintiff in error. Nearly all the reported cases deal with medical works, and most excellent reasons for the application of the general rule in such cases may be found therein. But the rule is not of universal application. It would be a reproach to the administration ⁴⁹ of the law if it were so. Records of observations are undoubtedly secondary evidence, but, if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself unable to obtain information which was open to every individual in the community. It has been held repeatedly that standard life and annuity tables, showing at any age the probable duration of life, are competent evidence (*Railroad Co. v. Putnam*, 118 U. S. 554, 7 Sup. Ct. Rep. 1); and yet these tables show merely the deductions from records of past transactions, when neither the record of the transactions nor the individual who has worked out the deductions is called to testify to the accuracy of his work, or to the conditions under which it was performed. So, too, almanacs, astronomical calculations, tables of logarithms,

interest tables, weather reports, tables of the rise and fall of the tide, have been admitted in evidence."

A text-writer, discussing this subject, says: "Even by those courts who have been most resolute in excluding such works when offered substantively, it is agreed that an expert may show that his views are sustained by standard authorities in his profession": Wharton on Evidence, sec. 438. This author further says: "It has, indeed, been held that an expert, when called to state the sense of his profession on a particular topic, may cite authorities as agreeing with him": Wharton on Evidence, sec. 666. Professor Lawson, in his work on Expert and Opinion Evidence (second edition, page 176), says: "Notwithstanding the inadmissibility of the books, the opinions contained in them may go to the jury through the mouth of a witness—an expert." It will be generally admitted that standard works on civil engineering are treatises that relate more nearly to matters of an exact science than do medical books; but whether excerpts from the former can be read to corroborate the opinion of an expert witness, it is not necessary to inquire, for the question ⁴³ is not involved herein. Though the weight of current authority prevents the reading of scientific books to contradict a witness generally, yet, when he bases his opinion upon the work of a particular author, such book may be read in evidence for that purpose: Connecticut Mut. Life Ins. Co. v. Ellis, 89 Ill. 516; City of Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 679; Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; Huffman v. Click, 77 N. C. 55; City of Ripon v. Bittel, 30 Wis. 614. Plaintiff's counsel, by securing from Roberts a statement of the authors whose works on civil engineering supported the opinion of the witness, thereby invited his cross-examination, in which case the books to which he referred could have been read in evidence to contradict him. True, it may be possible that a pretended expert might give an opinion upon a material fact, and fortify it by referring to the work of some fictitious author upon the subject; and, the adverse party being unable to secure the book mentioned, the reference of the witness might add to his false testimony a weight to which it was not entitled. In the case at bar, however, no danger from the course of practice so assumed could have been possible, for Roberts was unquestionably a reputable witness, and thoroughly qualified to express an opinion upon the matter to which his attention was directed; and, in our opinion, it was proper to permit him to name the authors

whose works on civil engineering coincided with his views. But for the error committed in giving the instruction complained of, the judgment is reversed, and a new trial ordered.

The Records of the Weather Bureau are admissible as evidence to show the state of the weather at a certain time and place: *Mears v. New York etc. R. R. Co.*, 75 Conn. 171, 96 Am. St. Rep. 192, 52 Atl. 610; *People v. Dow*, 64 Mich. 717, 8 Am. St. Rep. 873, 31 N. W. 597; *Knott v. Raleigh etc. R. R. Co.*, 98 N. C. 73, 2 Am. St. Rep. 321, 3 S. E. 735.

A Witness may Qualify as an Expert by knowledge derived exclusively from books and study, without actual personal experience: See the monographic note to *Hammond v. Woodman*, 66 Am. Dec. 232. If a witness exhibits such knowledge, gained from experiments, observation, standard books, or other reliable sources, as to make it appear that his opinion is of some value, he is entitled to testify, leaving to the court, in its discretion, to say when such knowledge is shown, and to the jury what the opinion is worth: *Isehour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40.

As to the Discretion of a Corporation in choosing the route for its line of railroad or telegraph, see *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84; *Postal Telegraph etc. Co. v. Oregon Short Line R. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *Union Pac. R. R. Co. v. Colorado Postal Tel. etc. Co.*, 30 Colo. 133, 97 Am. St. Rep. 106, 69 Pac. 564.

MOORE v. HALLIDAY.

[43 Or. 243, 72 Pac. 801.]

INJUNCTIONS Against Trespass on Real Property are sparingly granted, and when granted are based on the theory of irreparable injury resulting from the peculiar character of the property affected, from the frequency of the acts complained of amounting to a continuing trespass, or from the insolvency of the tort-feasor, so that an action at law for the recovery of damages would be inadequate. (p. 727.)

INJUNCTION, Against What Trespasses will not be Granted.

A complaint stating that defendant at divers times, too numerous to mention, opened the inclosure surrounding plaintiff's land, cut and removed hay and grain therefrom, and threatens to continue such acts, and claims the right so to do, and that defendant is impecunious and unable to respond in damages, does not disclose a cause sufficient to warrant the issuing of an injunction against the repetition of such trespass. (pp. 727, 728.)

INJUNCTION Against Trespass on Real Property.—The Insolvency of the Defendant will not justify the issuing of an injunction against trespasses on real property where the acts complained of do not constitute irreparable injuries. (p. 728.)

PLEADING—Defects in Complaint not Cured by Failure to Demur.—The failure to demur to a complaint does not waive the

right to object to it on the ground that it does not state facts sufficient to constitute a cause of action. (p. 729.)

PUBLIC LANDS, Quieting Title to.—One who has made a homestead entry upon public lands, the title to which remains in the United States, and who has a mere inchoate right which may ripen into title when he complies with the requirements of law in respect to settlement, culture, and proof thereof within the time allowed, cannot maintain a suit to quiet his title against another claimant of the same lands. (p. 731.)

William Miller and John H. Rand, for the appellant.

Will R. King, for the respondent.

245 MOORE, C. J. This is a suit to quiet the title to certain real property, and to enjoin a threatened continuance of trespasses thereon. It is alleged in the complaint, in substance, that on July 5, 1902, plaintiff, having made a homestead entry upon one hundred and sixty acres of land (particularly describing it) in Malheur county, Oregon, thereafter, and prior to September 26, 1902, when this suit was begun, established his residence thereon, entered into full possession, and is now the owner in fee thereof, subject to the paramount title of the United States; that defendant, as the administrator of the estate of J. H. Chandler, deceased, unlawfully claims an interest therein, asserting that such estate is the owner in fee of said premises, but that defendant has no right thereto, nor any title or interest therein, nor is he in the actual possession thereof. For a second cause of suit, plaintiff, after alleging that he made a homestead filing upon said land, and is in the sole possession thereof, as hereinbefore stated, avers that, without his consent, defendant, at divers times, too numerous to mention, opened the inclosure surrounding said premises, cut and removed hay and grain therefrom, turned cattle and horses thereon, and, claiming the right at all times so to do, threatens to continue such acts, against plaintiff's protest; that his conduct in this respect has caused, and, unless restrained, will result in, the destruction of the crops and shrubbery, to the irreparable injury and damage of said land; that defendant is impecunious and unable to respond in damages; and that plaintiff has no plain, speedy, or adequate remedy at law. A demurrer to the complaint, interposed on the ground that the two causes of suit were improperly joined and that the second cause did not state facts sufficient to warrant injunctive relief, having been sustained, and plaintiff declining to amend or further plead, the suit was dismissed, and he appeals.

It is contended by plaintiff's counsel that the causes of suit ²⁴⁶ set forth in the complaint arose out of the same transaction, and were therefore properly joined, and that if the second cause failed to state facts sufficient to entitle their client to the relief prayed for, and was for that reason demurrable, only one cause was stated, and, this being so, the court erred in dismissing the suit.

Considering the second cause of suit, the question to be determined is whether a court of equity should enjoin a threatened commission of the acts complained of, upon the facts stated. The jurisdiction of a court of equity to restrain trespasses on real property is undoubtedly an outgrowth of its interference to prevent waste. At common law, waste, when threatened by a tenant in dower, or by the curtesy, or guardian in chivalry, was prevented by a writ of prohibition issued by a court of chancery, which, if unavailing, was followed by an original writ, emanating from the same source, and made returnable, usually, in the court of common pleas. Upon the appearance of the defendant, and after issue joined, he was tried, and, if found guilty, the plaintiff recovered single damages for the waste committed. Though the writ of prohibition at common law was limited to the class of tenants mentioned, it was afterward extended to other persons by statute, in speaking of which Lord Chief Justice Eyre, in *Jefferson v. Bishop of Durham*, 1 Bos. & P. 105, says: "That which these statutes gave by way of remedy was not so properly the introduction of a new law, as the extension of an old one to a new description of persons. The course of proceeding remained the same as before these statutes were made. The first act which introduced anything substantially new was that which gave a writ of waste or estrepement pending the suit. It follows, of course, that this was a judicial writ, and was to issue out of the courts of common law; but, except for the purpose of staying proceedings pending a suit, there is no intimation in any of our ²⁴⁷ text-writers that any prohibition could issue from those courts." The method thus adopted to prevent the spoil or destruction of lands, houses, gardens, trees, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder (2 Blackstone's Commentaries, 281), proving cumbersome, equity intervened, and by injunction prevented the commission of waste; the jurisdiction being founded upon the necessity of preventing irremediable injury, and allowable only in cases where a privity of title existed between the parties;

1 High on Injunctions, 3d ed., sec. 697; *Bolster v. Catterlin*, 10 Ind. 117; *Wiggins v. Williams*, 36 Fla. 637, 18 South. 859. The commission of waste having been so successfully thwarted in these cases by the intervention of a court of equity, its jurisdiction was soon thereafter invoked to prevent injuries to real property by persons having no privity of title, the tort being denominated a "trespass": *Mitchell v. Dors*, 6 Ves. Jr. 147. The relief by injunction in such cases has been sparingly granted, and, when bestowed, is based upon the theory of irreparable injury, resulting from the peculiar character of the property affected thereby, from the frequency of the acts complained of, amounting to a continuing trespass, or from the insolvency of the tort-feasor, so that an action at law for the recovery of damages would be inadequate, thereby justifying a resort to a court of equity: 2 Story's Equity Jurisprudence, 13th ed., sec. 928; *Smith v. Gardner*, 12 Or. 221, 53 Am. Rep. 342, 6 Pac. 771; *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38, 39 Pac. 399; *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *City of Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628; *Roebeling v. First Nat. Bank (D. C.)*, 30 Fed. 744; *Carney v. Hadley*, 32 Fla. 344, 37 Am. St. Rep. 101, 14 South. 4.

1. An injunction has been issued in this state to prevent the cutting of timber (*Kitcherside v. Myers*, 10 Or. 245 21; *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38, 39 Pac. 399), and the removal of ore (*Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675; *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936; *Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428), but in each instance the right to the relief granted was based upon the destruction of the estate. In *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675, Mr. Chief Justice Lord, in speaking of equitable interference to prevent the commission of trespass to real property, says: "The general rule that a court of equity will refuse to take jurisdiction and award even a temporary injunction in cases of mere trespass is conceded; but there is an established exception in cases of mines, timber and the like, in which an injunction will be granted to restrain the commission of acts by which the substance of an estate is injured, destroyed, or carried away. In such case, the injury being irreparable, or difficult of ascertainment in damages, the remedy at law is inadequate." It is difficult to understand how the opening of plaintiff's inclosure, cutting and removing hay and grain therefrom, or turning cattle and horses therein, can ever amount to a destruction of the substance of the estate. The opening of the inclosure may have been accomplished by

a mere removal of bars or the unfastening of a gate, that would not amount to a permanent injury to the fence, conceding that to be a part of the realty. The hay and grain grown upon the premises are crops, the removal of which does not constitute such an injury as cannot be adequately compensated in damages; nor can the cutting of these annual products seriously affect the land, for, if they were not severed, they would inevitably decay during the winter, and, though their destruction by the elements might enrich the soil, by giving back to it some of the ingredients extracted by their growth, resulting in a potential benefit, the cutting of such crops cannot be a very serious injury to the land. In the absence of an ²⁴⁹ averment in the complaint that the animals turned upon the premises destroyed its substance by so trampling the soil as to damage it irremediably, it must be inferred that the only injury sustained was the eating of the grass, which, like the removal of the hay and grain, is not irreparable. It will be remembered that the complaint states that, unless defendant is enjoined from executing his threat to continue the acts complained of, the shrubbery on the land will be destroyed. There is no allegation in the complaint that any shrubbery is growing on the premises, unless the legal conclusion to that effect may be considered as such; but since the character of the shrubbery is not specified, and may consist of sagebrush, its destruction does not necessarily imply an irreparable injury to the estate, thus showing that the acts complained of constitute only mere trespasses.

2. The only averment, therefore, that tends in any manner to authorize the intervention of a court of equity to restrain the threatened commission of trespasses that would not be attended with irreparable injury is the alleged insolvency of the defendant, and it remains to be seen whether this is sufficient for that purpose. In *Centreville etc. Turnpike Co. v. Barnett*, 2 Ind. 536, the acts complained of were mere trespasses, not constituting irreparable injury, and the only averment upon which equitable interference could be based was the alleged insolvency of the defendant; and it was held that this was insufficient, the court saying: "The fact that a trespasser is insolvent will not give chancery jurisdiction to enjoin his acts, where the other circumstances of the case preclude it." In *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703, a suit having been instituted to restrain the threatened continuance of certain acts that did not result in irreparable injury, it was held that, under the circumstances, an allegation of the defendant's insol-

gency did not warrant an exercise of injunctive ²⁵⁰ relief, the court saying: "Nor will equity interpose to restrain a trespasser simply because he is a trespasser and is insolvent. Other facts and circumstances must be shown before the extraordinary remedy of injunction can be invoked." In the case at bar, no other facts having been alleged, and as in cases of this character an injunction is sparingly granted (*Smith v. Gardner*, 12 Or. 211, 53 Am. Rep. 342; 6 Pac. 771), we think the second cause of suit set up in the complaint does not state facts sufficient to warrant the exercise of equitable interference, and for this reason no error was committed by the court below in sustaining the demurrer thereto interposed on that ground.

3. The first cause of suit was not challenged by the demurrer, except for misjoinder; but, if this part of the complaint does not state facts sufficient to constitute a cause of suit, the failure in that respect is not waived, and the want of necessary averment may be insisted upon in this court to defeat plaintiff's right: *B. & C. Comp.*, sec. 72; *Evarts v. Steger*, 5 Or. 147.

4. It will be remembered that the complaint states that on July 5, 1902, plaintiff, having made a homestead entry upon the land in question, thereafter, and prior to September 26, 1902, established his residence thereon, entered into full possession, and, subject to the paramount title of the United States, is the owner in fee thereof; that defendant unlawfully claims an interest therein, but that he has no such right, title, or interest, nor is he in the actual possession thereof. The plaintiff not having made his homestead entry upon the land until July 5, 1902, could not have commuted his filing or made final proof in support of his entry September 26th of that year; and hence he was not the owner in fee of the land, as alleged, but had an inchoate right thereto, that might ripen into a title, if he complied with the requirements prescribed by the laws of the United States in respect to settlement, cultivation, ²⁵¹ and proof thereof, within the time allowed. The material matter of each separate cause of suit stated in a pleading must be complete within itself: 5 *Ency. of Pl. & Pr.* 320; *Gardner v. McWilliams*, 42 Or. 14, 69 Pac. 915.

5. This being so, the plaintiff's right to the premises being incomplete, but his possession undisturbed, will a court of equity, when the title is in the United States, compel the defendant to set up his claim to the land, that it may be decreed invalid? In *Kitcherside v. Myers*, 10 Or. 21, it was held that where a tract of public land is subject to be taken under the

homestead acts, and a party has taken the initial steps to homestead it, he has a right to the possession thereof for the purpose of doing the required acts to secure his title, and, if he is prevented from taking possession by one without legal title or equal equitable claim, he may ask a court of equity to put him in possession of his rights. Mr. Chief Justice Lord, speaking for the court, in deciding the case, says: "In 1878 the plaintiff, after filing the necessary affidavits and paying the requisite fee, received his certificate therefor, and entered upon the tract of land described in the complaint as a homestead, the east half of which is the land in dispute, and in the actual possession of the defendant, and proceeded to do the necessary acts of residence and cultivation in order to comply with the terms of the homestead acts, and to perfect his title to the land. But it is clear from the evidence that the defendant was, and now is in the actual possession of the east half of the whole tract which the plaintiff has taken as a homestead, and that he prevented and forcibly resisted the plaintiff from taking possession of the land in controversy, and was cutting down the timber, to the irreparable injury of the rights of the plaintiff in the same. It appears, then, that the plaintiff has never had possession of the land in question, although it is included in his entry, and so stated in the ~~253~~ certificate of the officer of the land office, and that the legal title as to the plaintiff is in the United States. So, as to both of these parties the legal title to the land in controversy is in the United States, and whatever right either party has to the land, not being legal, must be equitable, if anything, and the question to be decided must necessarily be, Who has the superior equity, or the better right to the possession of the land?"

In *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847, the plaintiff having filed a pre-emption declaratory statement, claiming certain land under the land laws of the United States, was prevented by the defendant from taking possession of a part of the premises, and, in a suit to enjoin such interference, it was held that a court of equity would protect the plaintiff's right of possession so long as his entry remained uncanceled. The principle thus established has been followed, and parties entitled to the possession of land, the title to which is in the United States, have been protected therein, when their right thereto has been disturbed, in the following cases: *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675; *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936; *Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428. In each of these

cases, however, the equitable intervention was based upon the defendant's interference with the plaintiff's right to possession, and, as the title to the land was in the United States, the court did not attempt to quiet it, but only to determine who had the superior right of possession. When the successful party in a contest before the local land officers for a tract of land belonging to the United States is permitted to make an entry or to file thereon, and receives a certificate evidencing his right to the possession thereof, a state court, upon proper allegation and proof, will restrain the defeated party from disturbing such possession while the certificate remains uncanceled, upon the theory that an inchoate right to the land is initiated ²⁵³ which will be protected by invoking the maxim that equity will not suffer a wrong without a remedy: *Pacific Livestock Co. v. Gentry*, 38 Or. 275, 61 Pac. 422, 65 Pac. 597. But if, after such certificate has been issued, the defeated party is to be enjoined from asserting any claim to the land, it would seem necessarily to follow, if the decree is of any binding force, that he would be deprived of his right of appeal from the action of the officers issuing such certificate to their superior officers in the land department of the general government. Until the title to public land has passed from the United States, as evidenced by a patent or by a grant in praesenti, all questions affecting such title must be tried in the federal courts: *Wilcox v. McConnell*, 13 Pet. 498. In the case at bar it is apparent from an inspection of the complaint that the title to the land embraced in plaintiff's homestead entry had not passed to him, and for this reason the first cause of suit did not state facts sufficient to authorize the court to quiet such title; and, as the plaintiff's possession is not alleged to have been disturbed in that cause of suit, the defendant cannot be enjoined as an incident to the relief sought.

Neither cause of suit having stated facts sufficient to entitle plaintiff to equitable intervention, it is unnecessary to consider the question of joinder, and hence the decree is affirmed.

INJUNCTIONS AGAINST TRESPASS ON REALTY.

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III. Instances of the Exercise of the Jurisdiction.

- a. Making Excavations and Putting up Structures.
 - 1. Making Excavations.
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- b. Removal of Structures and Property.
 - 1. In General.
 - 2. Interference with Fences and Gates.
- c. Removal of Earth, Rock, Mineral, and Oil.
 - 1. Of Earth and Rock.
 - 2. Of Mineral, Oil, and Gas.
- d. Cutting, Removing, and Interfering with Trees.
 - 1. Cutting and Removing Trees and Timber.
 - 2. Working Trees for Turpentine.
- e. Injuring, Harvesting, and Removing Crops.
- f. Pasturing, Grazing, and Roaming of Animals.
- g. Hunting, Fishing and Boating.
- h. Interfering with Churches and Cemeteries.
- i. Miscellaneous Trespasses.

I. Jurisdiction of Equity Over Trespasses.

a. *Its Origin and Development.*—The jurisdiction of a court of equity to enjoin the commission of trespasses on real estate, while now firmly established, is of comparatively modern origin. The remedy by injunction was at one time confined to cases of waste, but it was gradually extended, with considerable reluctance, to ordinary trespasses for whose redress the remedy at law was inadequate; so that the distinction between trespass technically called waste and trespass in the case of persons having no privity of title, has come to be disregarded, and there is now no hesitation on the part of courts to restrain the commission of a trespass as between strangers or persons claiming adversely whenever equitable considerations demand such action: *Lyon v. Hunt*, 11 Ala. 295, 46 Am. Dec. 216; *Boulo v. New Orleans etc. R. R. Co.*, 55 Ala. 480; *Merced Mtn. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; *Moore v. Ferrel*, 1 Ga. 7; *Shipley v. Bitter*, 7 Md. 408, 61 Am. Dec. 371; *Scudder v. Treaton Delaware Falls Co.*, 1 N. J. Eq. 604, 23 Am. Dec. 756; *Hart v. Mayor of Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Gause v. Perkins*, 3 Jones Eq. 177, 69 Am. Dec. 728; *Chapman v. Toy Long*, 4 Saw. 28, Fed. Cas. No. 2610.

b. *Its General Grounds and Foundation.*—This extension of the doctrine was natural, and should have been easy, for it is the nature of the injury and the inadequacy of purely legal remedies, which give courts of equity jurisdiction whether the injury be one of waste or trespass. The ultimate ground upon which equitable intervention

in cases of trespass rests is the inadequacy of legal remedies for the injury, which is the broad foundation of all remedial jurisdiction in equity. The injury may be without adequate remedy at law for a number of reasons: 1. It may be destructive of the very substance of the estate; 2. It may not be susceptible of estimation in terms of money; 3. It may be so continuous and permanent that there is no instant of time when it can be said to be complete so that its extent may be computed; 4. It may be vexatiously repeated and persisted in; 5. It may be committed by one who is wholly irresponsible, so that a verdict against him for damages would be entirely valueless; 6. It may be committed against one who is legally incapacitated from a beneficial use of the remedy at law. Generally, however, when equitable relief is granted, the injury will be found to include several of these features: See the monographic note to *Jerome v. Ross*, 11 Am. Dec. 501; *Deegan v. Neville*, 127 Ala. 471, 85 Am. St. Rep. 137, 29 South. 173; *Indian River Steamboat Co. v. East Coast Transportation Co.*, 28 Fla. 387, 29 Am. St. Rep. 258, 10 South. 480; *Woodford v. Alexander*, 35 Fla. 333, 17 South. 658; *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371; *Mayor etc. of Frederick v. Greshon*, 30 Md. 436, 96 Am. Dec. 591; *Burnley v. Cook*, 13 Tex. 586, 65 Am. Dec. 79; *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091; *Bracken v. Preston*, 1 Pinn. 584, 44 Am. Dec. 412.

And no actual invasion of the premises is necessary in order to warrant the intervention of a court of chancery; it is enough that acts are threatened and impending which will cause irreparable injury to the complaining party: *Lyon v. Hunt*, 11 Ala. 295, 46 Am. Dec. 216; *Mora v. Massini*, 32 Cal. 592; *Union Mill etc. Co. v. Warren*, 32 Fed. 522. When the acts have already been done, and the wrong has spent its force, there is no occasion for an injunction: *Ewing v. Bourke*, 14 Or. 514, 13 Pac. 483.

But to justify the issuance of an injunction, there must be present some one of the foregoing equitable features, such as irreparable injury, destruction of the property as it has been held and enjoyed, necessity of a multiplicity of suits to redress the wrong, insolvency of the trespasser, or other equitable considerations which, in the discretion of the court, render the interposition of the writ necessary and proper. The commission of a mere naked trespass will not ordinarily be enjoined, because the law is supposed to afford ample means for compensating the wrong: *High v. Whitefield*, 130 Ala. 444, 30 South. 449; *Ex parte Foster*, 1 Ark. 304; *Stein v. Coleman*, 73 Conn. 524, 48 Atl. 206; *Justices v. West Point Plank Road Co.*, 11 Ga. 246; *Seymour v. Morgan*, 45 Ga. 201; *Lings v. Harris*, 74 Ga. 368; *Putney v. Bright*, 106 Ga. 199, 32 S. E. 107; *Waters v. Lewis*, 106 Ga. 758, 32 S. E. 854; *Ocmulgee Lumber Co. v. Mitchell*, 112 Ga. 528, 37 S. E. 749; *Rogers v. Brand (Ga.)*, 45 S. E. 305; *Goodell v.*

Lassen, 69 Ill. 145; Barn v. Bragg, 70 Ill. 283; Commissioners of Highways v. Green, 156 Ill. 504, 41 N. E. 154; Taylor v. Pearce, 71 Ill. App. 525; Smith v. Weldon, 73 Ind. 454; Anthony v. Sturgis, 86 Ind. 479; Duvall v. Waters, 1 Bland Ch. 569, 18 Am. Dec. 350; Cherry v. Stein, 11 Md. 1; Pfeltz v. Pfeltz, 14 Md. 376; Nicodemus v. Nicodemus, 41 Md. 529; Washburn v. Miller, 117 Mass. 376; Schurmeier v. St. Paul etc. R. R. Co., 8 Minn. 113, 83 Am. Dec. 770; Nevitt v. Gillespie, 1 How. (Miss.) 108, 26 Am. Dec. 696; James v. Dixon, 20 Mo. 79; Weigel v. Walsh, 45 Mo. 560; Anderson v. St. Louis, 47 Mo. 479; Leash v. Harbough (Neb.), 91 N. W. 521; Fisher v. Carpenter, 67 N. H. 560, 39 Atl. 1018; Quackenbush v. Van Riper, 2 Green Ch. 350, 29 Am. Dec. 716; Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484; Howell v. Howell, 40 N. C. (5 Ired. Eq.) 258; German v. Clark, 71 N. C. 417; Ross v. Page, 6 Ohio, 166; Mechanics' etc. Bank v. Debolt, 1 Ohio St. 591; Lining v. Geddes, 1 McCord Ch. 304, 16 Am. Dec. 606; McMillan v. Ferrell, 7 W. Va. 223; Western Min. etc. Co. v. Virginia etc. Coal Co., 10 W. Va. 250; Lazzett v. Garlow, 44 W. Va. 466, 30 S. E. 171; Burns v. Mearns, 44 W. Va. 744, 30 S. E. 112; Kennedy v. Elliott, 85 Fed. 832.

c. *Its Modern Scope and Extent.*—In the early cases the right to an injunction seems to have been confined to such trespasses as were in the nature of waste, and went to the destruction of the freehold; but courts, acting on the simple truth that it is better to prevent than to compensate a wrong, and recognizing that it is in theory only that an action for damages is an adequate remedy, have gradually drifted away from this position; so that now it may be said, in a general way, that the commission of a trespass will be enjoined whenever full and adequate redress cannot be had by an action at law: Camp v. Dixon, 112 Ga. 872, 38 S. E. 71; Whitefield v. Rogers, 26 Miss. 84, 59 Am. Dec. 244; King v. Stuart, 84 Fed. 546; "Adequacy of Legal Remedies," post. This should be qualified by the further statement that, notwithstanding the injury is susceptible of pecuniary compensation in an action at law, still, if the existence or integrity of the estate is jeopardized, the trespass will, nevertheless, be restrained: Lemmon v. Guthrie Center, 113 Iowa, 36, 86 Am. St. Rep. 361, 84 N. W. 986; Rakes v. Rustin Land etc. Co. (Va.), 22 S. E. 498. It is not a little remarkable that courts should not sooner have come to a recognition of principles at once so plain and just; and so doubtless they would, had they been less bent on blindly following the decisions and dicta of the early chancellors, who, were they on the bench to-day, would be the last, as they were in their own time, to be bound by precedents which, however liberal and sufficient for the days when they were established, were never calculated to meet the requirements of an advanced civilization, nor intended to be followed when, as conditions changed with the evolution of society, the demands of justice should require a more liberal policy.

II. Circumstances Affecting the Jurisdiction.

a. Nature and Extent of the Injury.

1. **Irreparable, Destructive, and Permanent Injuries.**—A trespass which will cause permanent and lasting injury to real estate will be restrained by injunction: *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Echelkamp v. Schrader*, 45 Mo. 505; *Miller v. Lynch*, 149 Pa. St. 460, 24 Atl. 80; so will a trespass which will result in the destruction of the property in the character of its use and enjoyment: *Peterson v. Hopewell*, 55 Neb. 670, 76 N. W. 451; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; and, in general, the commission of a trespass calculated to work irreparable mischief will be enjoined: *Newlin v. Prevo*, 81 Ill. App. 75. What constitutes an irreparable injury has engaged our attention in an earlier note in this series of reports: See the note to *Dudley v. Hurst*, 1 Am. St. Rep. 374-379. A reference to this note will show that the best criterion for determining whether or not an injury is irreparable is this: Can complete compensation for it be had by a recovery of damages in an action at law? An injury which cannot adequately be compensated by a verdict for damages is generally regarded as irreparable, while an injury which can fully be compensated by damages at law is ordinarily not regarded as irreparable.

An irreparable injury, it is said in *Gause v. Perkins*, 56 N. C. 179, 69 Am. Dec. 728, is one "of a peculiar nature," so that compensation in money cannot atone for it. "This definition," says Justice Cobb, in *Camp v. Dixon*, 112 Ga. 872, 38 S. E. 71, "is fairly deducible from the earlier cases, but it is entirely too narrow to meet the decisions of modern times. The tendency of the courts at the beginning was to grant injunctions very sparingly in cases of trespass, but the lapse of a few years has done much to break down the barriers of this conservatism, and pave the way for the exercise of greater liberality in this direction. In the light of modern decisions, an irreparable injury may be said to be one which, either from its nature or the circumstances surrounding the person injured, or the financial condition of the person committing the injury, cannot be readily, adequately, and completely compensated for with money."

But it must be borne in mind that when the trespass permanently diminishes the substance of the estate in that which constitutes its chief value, it will be enjoined without reference to the fact that the value may be measured in money, because the owner is entitled to have the identity and integrity of his estate preserved: *Lemmon v. Guthrie Center*, 113 Iowa, 36, 86 Am. St. Rep. 361, 84 N. W. 986; *Rakes v. Rustin Land etc. Co.* (Va.), 22 S. E. 498.

2. **Trivial Injuries and Nominal Damages.**—It is a general rule of equity jurisprudence that an injunction will not issue to prevent trivial injuries and nominal damages. "Equity does not stoop to

pick up pins": *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *Newby v. Highway Commra.*, 21 Ill. App. 245; *Woodbury v. Portland Marine Soc.*, 90 Me. 18, 37 Atl. 323; *Thorne v. Sweeney*, 13 Nev. 415. See, too, *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243; *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557. And this rule is applicable to the case of trespasses on real property: *Castle v. Bell Telephone Co.*, 61 N. Y. Supp. 743, 30 Misc. Rep. 38; *O'Reilly v. New York Elevated R. R. Co.*, 148 N. Y. 347, 353, 42 N. E. 1063; *Frink v. Stewart*, 94 N. C. 484; note to *Jerome v. Ross*, 11 Am. Dec. 505. Thus, the trimming of shade trees by an electrical corporation which will not materially injure them, will not be enjoined: *Hunting v. Hartford St. Ry. Co.*, 73 Conn. 179, 46 Atl. 824; nor will the laying of a pipe line in comparatively worthless land, the damages caused, if any, being merely nominal: *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244. In such cases the injury or inconvenience which would result to the trespasser if his acts should be restrained is an important factor in determining the decision of the court—a phase of our subject which presently will be given attention. And closely related to the question of trespasses of a trivial character are continued and repeated trespasses, for a trespass of little moment may, by vexatious repetition, command the attention of a court of equity. "Irreparable injury authorizing the interference of a court of chancery by injunction, need not always be such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury or great damage; but is that species of injury, great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and is of constant and frequent recurrence, so that no fair or reasonable redress can be had therefor in a court of law": *Stroup v. Chalcraft*, 52 Ill. App. 608, 615.

3. **Repeated and Continuous Injuries.**—Trespasses on real property which if committed singly would not be enjoined because the remedy at law would be efficacious, may, by reason of being repeated or continued, assume a magnitude or character which will induce a court of equity to restrain them by injunction. Equity intervenes in such a case because legal remedies are inadequate. The damages are impossible or exceedingly difficult of estimation, and their attempted recovery from time to time as sustained would result in costly and vexatious litigation. It is to prevent this multiplicity of suits, which are so burdensome to the public, vexatious to the parties, and withal so inefficacious to the complainant, that equity assumes jurisdiction: *Terry v. Rosell*, 32 Ark. 478; *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 Pac. 431; *Peoria v. Johnston*, 56 Ill. 45; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178; *Mills v. Hamilton*, 49 Iowa, 105; *Thomas v. Robinson (Iowa)*, 92 N. W. 70; *Webster v. Cooke*,

23 Kan. 637; Gilbert v. Arnold, 30 Md. 29; Blondell v. Consolidated Gas Co., 82 Md. 732, 43 Atl. 817; Hall v. Nester, 122 Mich. 141, 80 N. W. 982; Kern v. Field, 68 Minn. 317, 64 Am. St. Rep. 479, 71 N. W. 393; Shaffer v. Stull, 32 Neb. 94, 48 N. W. 882; Leach v. Harbough (Neb.), 91 N. W. 521; Morris etc. R. R. Co. v. Hudson Tunnel R. R. Co., 25 N. J. Eq. 384; Poughkeepsie Gas Co. v. Citizens' Gas Co., 89 N. Y. 493; Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67; Garvey v. Long Island R. R. Co., 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57; Johnson v. Rochester, 13 Hun, 235; Valentine v. Schreiber, 38 N. Y. Supp. 417, 3 App. Div. 235; Olivella v. New York etc. R. R. Co., 64 N. Y. Supp. 1086, 31 Misc. Rep. 203; Appeal of Scheetz, 35 Pa. St. 88; Lonsdale v. Cook (R. I.), 44 Atl. 929; McClellan v. Taylor, 54 S. C. 430, 32 S. E. 527; Ragsdale v. Southern Ry., 60 S. C. 381, 38 S. E. 609; Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418; King v. Stuart, 84 Fed. 546; United States Freehold etc. Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470; Pittsburgh etc. R. R. Co. v. Fiske, 123 Fed. 760; note to Jerome v. Ross, 11 Am. Dec. 504, 505; Goodson v. Richardson, L. R. 9 Ch. App. 221.

In order to justify the interference of a court of equity in cases of trespass, for the purpose of avoiding a multiplicity of suits, it is said that there must be different persons controverting the same right, and not a mere repetition of the same trespass by the same person, the case being susceptible of compensation in damages: Deegan v. Neville, 127 Ala. 471, 85 Am. St. Rep. 137, 29 South. 173; Carney v. Hadley, 32 Fla. 344, 37 Am. St. Rep. 101, 14 South. 4; Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372, 36 N. E. 88; Taylor v. Pearce, 71 Ill. App. 525; Crenshaw v. Cook, 65 Mo. App. 264; Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484; Hart v. Mayor of Albany, 9 Wend. 571, 24 Am. Dec. 165; Roebling v. First Nat. Bank, 30 Fed. 744. This rule has no application, however, when the repetition or continuance of a trespass by one person is of such a character that the ordinary legal remedies are inadequate to redress the wrongs. This will be seen upon an examination of the cases cited in the previous paragraph and in those to follow. It has been held that the commission of several similar trespasses upon each of several persons, thereby laying the ground for each to maintain a separate action against the same trespasser, does not give rise to such a multiplicity of suits as equity will interpose to prevent: Coulson v. Harris, 46 Miss. 728.

A court of equity will be especially ready to act to enjoin repeated or continuous trespasses when the trespasser is insolvent; but, although he is financially responsible, the court will have no hesitation in assuming jurisdiction when the trespass is such that redress cannot be had by the ordinary course of the law. Equity will interfere in order to avoid a multiplicity of suits, notwithstanding the solvency of the wrongdoer: Edwards v. Haeger, 180 Ill. 99, Am. St. Rep., Vol. 99-47.

54 N. E. 176; Slater v. Gunn, 170 Mass. 509, 49 N. E. 1017; Sills v. Goodyear, 80 Mo. App. 128; Metropolitan Land Co. v. Manning, 96 Mo. App. 248, 71 S. W. 696.

And if the trespass, when repeated and continued, may ripen into a prescriptive right, title, or easement, this is a circumstance which will hasten a court of equity to extend its aid by injunction: McCloskey v. Doherty, 97 Ky. 300, 30 S. W. 649; Cobb v. Massachusetts Chemical Co., 179 Mass. 423, 60 N. E. 790; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 Pac. 194. This may be illustrated by enjoining the use of a private way or road under an unfounded claim of right: Hart v. Hildebrandt, 30 Ind. App. 415, 66 N. E. 173.

The use of a roadway across one's premises is restrained by injunction in Rhoades v. McNamara (Mich.), 98 N. W. 392. Compare High v. Whitefield, 130 Ala. 444, 30 South. 449. And the use of private road is enjoined in Hagar v. Wilson (Tenn. Ch.), 46 S. W. 1083.

The repeated, recurrent, or continuous flooding of land amounts to such a trespass as will warrant the intervention of a court of equity by injunction to restrain the continuation of the wrong. There is an early Maryland decision (Carlisle v. Stevenson, 3 Md. Ch. 499) which may seem irreconcilable with this statement; but, so far as it is so, it is misleading: Lake Erie etc. R. R. Co. v. Young, 135 Ind. 426, 41 Am. St. Rep. 430, 35 N. E. 177; Stone v. Roscommon Lumber Co., 59 Mich. 24, 26 N. W. 216; Davis v. Franklust Township, 118 Mich. 494, 76 N. W. 1045; Carlson v. St. Louis Dam etc. Co., 73 Minn. 128, 72 Am. St. Rep. 610, 75 N. W. 1044; Whitefield v. Rogers, 26 Miss. 84, 59 Am. Dec. 244.

No doubt a trespass may be of such trifling importance that a court of equity will, for that reason, refuse to restrain its commission: See ante, p. 735. Yet it is not to be supposed that equity will permit a right to be violated merely because the injury involved is not of great magnitude, and especially when the trespass causing it is recurring or repeated. Indeed, the very fact that the amount recoverable in law would be small in comparison with the cost and trouble of litigation, would seem an additional reason why equity should extend its aid: Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828, 24 N. E. 686. "Where a trespass has already been committed, and the court can see that it is the purpose of the defendant to commit other deliberate trespasses which cannot be adequately compensated by a judgment at law, or where the damage of such trespass is merely nominal, then a bill for injunction lies; and where the defendant is insolvent, an additional ground of equitable jurisdiction is added by that fact": Alden Coal Co. v. Challis, 103 Ill. App. 52.

The supreme court of Washington, in Rigney v. Tacoma Light etc. Co., 9 Wash. 576, 38 Pac. 147, where the diversion of water from

a stream was enjoined, though the actual damage to the riparian proprietor was perhaps slight, says: "The respondent, having this clear right to the natural flow of the waters of Clover creek over his lands, cannot unwillingly be deprived of it without compensation or due process of law, even by the public or for a public use, without disregarding the fundamental law of this state. Even if his damages were shown to be slight, or merely nominal (which is not shown), the right still exists, and cannot be violated with impunity. Actual damage is not indispensable as the foundation of an action. It is sufficient to show the violation of a right. The law will then presume some damage. And where the act done is such that, by its repetition or continuance it may become the foundation or evidence of an adverse right, its repetition or continuance will be restrained by injunction: *Webb v. Portland Mfg. Co.*, 3 Sum. 109, Fed. Cas. No. 17,322. In all cases a court of equity is the only tribunal competent to grant speedy and adequate relief. And it will not withhold its aid simply because the injuries sought to be redressed may not be the cause of great pecuniary damage. While a court of equity will not undertake to correct merely theoretical or imaginary wrongs, it will never refuse its aid, in cases where it has jurisdiction to enforce clear legal rights, however small they may appear when viewed from merely a pecuniary standpoint. Concerning this question Mr. Wood well says: 'But if the legal remedy does not afford that relief to which the party in equity and good conscience is entitled, the smallness of the damages on the one hand, or the magnitude of interest to be affected on the other, will not prevent the exercise of the preventive power of the court' (2 Wood on Nuisances, p. 1151). . . . While it is perhaps true that the respondent may recover in an action at law such damages as he may be entitled to on account of past injuries, he can hardly be said to have a present legal remedy for injuries which may, and probably will, be inflicted upon his property in the future by a continuance of the wrongs complained of. The mere fact that he may bring a separate action for each recurring injury does not prove the adequacy of the legal remedy. Indeed, there is no adequate and effectual relief from a constantly operating injury save that of prevention."

Said the supreme court of Massachusetts, in deciding that the defendants should be enjoined from going upon the station premises of the plaintiff railroad company to solicit incoming passengers and their baggage, and from interfering with the carrying out of a contract between the plaintiff and a third person whereby such person had the exclusive right to use the station premises to solicit the passenger trade: "The facts show that the defendants have been guilty of trespass, which they propose to continue. The ownership of the plaintiff is admitted, and no question of title is involved. Nor is any claim to a right of way over the plaintiff's land set up in the answer of the defendants. It seems to us clear

that the bill in this case may be maintained. If the plaintiff were to sue at law, the amount recoverable could not be large in comparison with the amount expended in litigation, and every trespass would give a new right of action. Hence, there would arise a great multiplicity of suits. At some time the plaintiff would be entitled to the protection of a court of equity, and there is no reason why, on the facts of this case, the remedy by injunction should not be granted at once': *Boston etc. R. R. Co. v. Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689. A somewhat similar decision is rendered in *New York etc. R. R. Co. v. Scovill*, 71 Conn. 136, 71 Am. St. Rep. 159, 41 Atl. 246.

An injunction should be granted against the defendants where it appears that they have repeatedly trespassed upon the plaintiff's property, and interfered with the peaceable enjoyment thereof; that they have unlawfully torn down and carried away a screen erected thereon by the plaintiff, and threaten to continue so doing if such structures are again erected; and that the defendants are insolvent: *Chambers v. Haskell* (Ky.), 78 S. W. 478.

b. Injury or Inconvenience to Trespasser.

Injunctions are sometimes refused because the hardship, injury or inconvenience which they would cause the defendant are out of all proportion to the benefit they would bring to the plaintiff: *Robinson v. Clapp*, 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504; *Scott v. Palms*, 48 Mich. 505, 12 N. W. 677; *Grey v. Mayor etc. of Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 994; *Chapin v. Ground*, 15 R. I. 579, 10 Atl. 639; *Pettibone v. La Crosse etc. R. R. Co.*, 14 Wis. 443. Hence it is that courts have refrained from restraining the commission of a trespass where the injunction would result in little or no benefit to the plaintiff, and would cause great inconvenience and expense to the trespasser: *Cobb v. Massachusetts Chemical Co.*, 179 Mass. 423, 60 N. E. 790; *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 78 Am. St. Rep. 810, 54 Pac. 244. This doctrine, however, is of limited application. The mere fact that inconvenience will result will not induce a court to withhold preventive relief: *Northern Pac. Ry. Co. v. Cunningham*, 103 Fed. 708. Moreover, the principle that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, "has no application where the act complained of is in itself, as well as in its incidents, tortious. In such a case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him as compared with the advantages that

would accrue to the defendants from its occupation": *Walters v. McElroy*, 151 Pa. St. 549, 25 Atl. 125.

c. **Legal Disability of Complainant.**—If it should occur that the legal remedy for a trespass, though otherwise adequate, should prove practically ineffectual because of the injured party being under a legal disability, a court of equity may take jurisdiction and grant injunctive relief when, but for this circumstance, the plaintiff would be left to his remedy at law: *Thomas v. James*, 32 Ala. 723. See, too, *Smith v. Smith*, 57 N. C. (4 Jones Eq.) 303.

d. **Nonresidence of Trespasser.**—The nonresidence of a trespasser is entitled to much weight in determining the propriety of awarding an injunction against him; for it would be unjust that a court of equity should turn from its door a citizen of the commonwealth, who has been subjected to vexatious trespasses, and leave him to seek redress through the precarious remedy of an action at law in a foreign jurisdiction: *Miller v. Wills*, 44 W. Va. 484, 67 Am. St. Rep. 777, 28 S. E. 337. Perhaps, however, the mere fact of nonresidence is not, of itself alone, sufficient to give a court of equity jurisdiction, for the trespasser might own property in the state, which would obviate the necessity of resorting to an action in the courts of another commonwealth: *Morgan v. Boxer*, 113 Ga. 144, 38 S. E. 411.

e. **Insolvency of Trespasser.**—If a trespasser is insolvent, and therefore unable to respond in damages for the injuries he may cause, this is a circumstance to be taken into consideration in determining whether his action should be restrained: *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 73 Am. Dec. 575; *Derry v. Rosa*, 5 Colo. 295; *Walker v. Walker*, 51 Ga. 22; *Cottle v. Harrold*, 72 Ga. 830; *Silva v. Bankin*, 80 Ga. 79, 4 S. E. 756; *Justice v. Aiken* (Ga.), 30 S. E. 941; *Wall v. Mercer* (Ga.), 46 S. E. 420; *Commissioners of Highways v. Green*, 156 Ill. 504, 41 N. E. 154; *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071; *Gibbs v. McFadden*, 39 Iowa, 371; *Martin v. Davis*, 96 Iowa, 718, 65 N. W. 1001; *Sword v. Allen*, 25 Kan. 67; *Musselman v. Marquis*, 64 Ky. (1 Bush) 463, 89 Am. Dec. 637; *Coulson v. Harris*, 43 Miss. 728; *Sumner v. Blakslee*, 59 N. H. 242, 47 Am. Rep. 196; *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097; *Mechanics' etc. Bank v. Debolt*, 1 Ohio St. 591; *Hanley v. Watterson*, 39 W. Va. 214, 19 S. E. 536. But while the pecuniary irresponsibility of the wrongdoer will be given due weight, it is not decisive of the question: *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166; *Morgan v. Palmer*, 48 N. H. 336. His insolvency alone will not give chancery jurisdiction, when the other circumstances of the case preclude it: *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703; *Carney v. Hadley*, 32 Fla. 344, 37 Am. St. Rep. 101, 13 South. 4; *Centreville etc. Turnpike Co. v. Barnett*, 2 Ind. 536; *Murray v. Knapp*, 62 Barb. 566, 42 How. Pr. 462; *Parker v. Furlong*, 37 Or.

248, 62 Pac. 490; *Moore v. Halliday* (the principal case), ante, p. 724. And, on the other hand, his solvency will be no defense to the issuance of an injunction if the other facts of the case are such as to render an injunction the proper remedy: *Crescent City Wharf etc. Co. v. Simpson*, 77 Cal. 286, 19 Pac. 426; *McPike v. West*, 71 Mo. 199; *John L. Roper Lumber Co. v. Wallace*, 93 N. C. 22.

f. *Inadequacy of Legal Remedies.*—The inadequacy and incompleteness of the legal remedy is the grand criterion which determines the jurisdiction of equity to enjoin a trespass: *Camp v. Dixon*, 112 Ga. 872, 38 S. E. 71; *Hall v. Nester*, 122 Mich. 141, 80 N. W. 982; *Colliton v. Oxborough*, 86 Minn. 361, 90 Minn. 793; note to *Jerome v. Ross*, 11 Am. Dec. 501. Ordinarily, if the remedies at law are regarded as efficacious, there is no occasion for the invocation of the extraordinary powers of a court of equity: *Anthony v. Brooks*, 5 Ga. 576; *Bethune v. Wilkins*, 8 Ga. 118; *Morris Canal etc. v. Fagin*, 22 N. J. Eq. 430; *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091. On the other hand, if the legal remedies are not efficacious, then injunctive relief is proper: *De Groot v. Peters*, 124 Cal. 406, 71 Am. St. Rep. 91, 57 Pac. 209; *Robertson v. Meyer*, 59 N. J. Eq. 366, 45 Atl. 983. And it is not enough to preclude the jurisdiction of equity that there is a remedy at law; it must be an efficient remedy. "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction; and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity": *Wilton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771, 57 N. W. 559; *Carter v. Warner* (Neb.), 89 N. W. 747. See, too, *Winnipisiogee Lake Co. v. Worster*, 29 N. H. 433; *Pomeroy's Equity Jurisprudence*, sec. 1357, and note. And why should this not be so? Why should courts not meet such questions rationally? And if they have two remedies for a wrong, one preventive rather than curative, one better than the other, administer the former, and that without hesitation?

"The incompleteness and inadequacy of the legal remedy is the criterion which determines the right to the equitable remedy by injunction. The earlier rule as to the jurisdiction of a court of equity to restrain trespass to real property was very strict, and such preventive relief would only be granted, if the wrongdoer were solvent, in cases where the threatened trespass was essentially destructive of the freehold. . . . The modern rule is less strict, for the day has passed when a wrongdoer, if he happens to be able to make a money compensation for the consequences of his acts, and refrains from acts destructive of the freehold, may repeatedly trespass upon real

property in the possession of another, and threaten to continue indefinitely such wrongful acts, and not feel the restraining hand of equity": *Colliton v. Oxborough*, 86 Minn. 361, 90 N. W. 793, per Chief Justice Start.

"The remedy by an action at law for damages against a trespasser may have been an efficient remedy at the common law. But at this day, when property of all kinds readily and easily changes hands; when a man who is solvent to-day may be insolvent to-morrow; when the ready means of transportation quickly convey personal property from one section of the country to another, perhaps out of the jurisdiction of the courts which have been established for the protection of property rights; and when we consider the long delays that often precede a trial, a judgment, and an execution—we see how entirely inadequate is the remedy at law to secure compensation to a person whose property is destroyed by a trespasser. So far from his remedy at law being full, complete and adequate, he may find himself, at the end of his litigation, with a naked execution in his hands, with no means for its satisfaction. In the meantime his most valuable property interests have been destroyed": *King v. Stuart*, 84 Fed. 546, per Justice Paul.

Though the threatened injury is not irreparable, in the sense that it is destructive of the freehold, an injunction may be warranted when the legal remedies are inadequate: *Clark v. Jeffersonville etc. R. E. Co.*, 44 Ind. 248; and, notwithstanding the injury may be susceptible of pecuniary compensation, a court of equity will not refuse its protection, when the existence or integrity of the property is imperiled: See "Irreparable, Destructive and Permanent Injuries," ante.

III. Instances of the Exercise of the Jurisdiction.

a. Making Excavations and Putting Up Structures.

1. **Making Excavations.**—The jurisdiction of equity to enjoin encroachments on land by making excavations, erecting permanent structures, and the like, is undoubted: *Chicago etc. Ry. Co. v. Porter*, 72 Iowa, 426, 34 N. W. 286. Thus, in *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113, the cutting of a tunnel through the plaintiff's land is enjoined; and in *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550, the constructing of an aqueduct by ditches and embankments, is restrained; and in *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715, the digging of a ditch, with the consequent tearing up the soil and the destroying of crops; and in *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38, 39 Pac. 399, the widening of a ditch and the building of a dam calculated to destroy a ford. But in *Thorn v. Sweeney*, 12 Nev. 251, the digging of a ditch across rocky, barren and uncultivated land is not enjoined. See, too, *Waldron v. Marsh*, 5 Cal. 119; *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091. Where one proceeds to excavate on the land of an adjoining owner, and to erect thereon a supporting wall, he will be

restrained by injunction: *Gobeille v. Meunier*, 21 R. I. 103, 41 Atl. 1001. See, too, *Herr v. Bierbower*, 3 Md. Ch. 456.

2. **Laying Out Streets or Highways.**—The entrance upon private property and its occupation for a street or highway, against the will of the owner, and without having acquired a right so to do by proper proceedings, will be restrained by injunction: *Diamond Match Co. v. Village of Ontonogan*, 72 Mich. 249, 40 N. W. 448; *Lewis v. North Kingston*, 16 R. I. 15, 27 Am. St. Rep. 724, 11 Atl. 173; *Uren v. Walsh*, 57 Wis. 98, 14 N. W. 902. And so will the construction of a causeway under similar circumstances (*Creely v. Bay State Brick Co.*, 103 Mass. 514), or the construction of a railroad: *Lake Erie etc. Ry. Co. v. Michener*, 117 Ind. 465, 20 N. E. 254.

3. **Erecting Buildings and Other Structures.**—An encroachment on land by the erection of permanent buildings will be enjoined: *Chicago etc. Ry. Co. v. Porter*, 72 Iowa, 426, 34 N. W. 286; *Long v. Kasebeer*, 28 Kan. 226; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181. But see *Schnuster v. Myers*, 148 Mo. 422, 50 S. W. 103. And the projection of a building on or over the premises of another may furnish a ground for injunctive relief: *Norwalk Heating etc. Co. v. Vernaam*, 75 Conn. 662, 96 Am. St. Rep. 246, 55 Atl. 168. Erecting a building so as to take possession of part of an adjoining lot and reduce its frontage, is enjoined in *Long v. Ragan*, 94 Md. 462, 51 Atl. 181. And in *Crocker v. Manhattan Life Ins. Co.*, 70 N. Y. Supp. 492, 61 App. Div. 226, a mandatory injunction for the removal of shutters that swing over the complainant's premises, is granted; and in *Norton v. Elwert*, 29 Or. 583, 41 Pac. 926, the removal of the wall of a building is commanded. But in *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528, it is held that the owner of a wooden building, which for over twenty years had encroached six inches on a private alley, will not be restrained from veneering it with brick; and thereby causing it to encroach three inches more, it not appearing that the addition would materially injure the way; and in *Kankin v. Charles*, 19 Mo. 490, 61 Am. Dec. 574, the court refuses to compel a builder to remove his joists, inserted without license in the wall of an adjoining owner.

The setting of a permanent awning post was sought to be enjoined in *Whalen v. Dalashmutt*, 59 Md. 250, but an injunction was refused when the complainant failed to show in what manner the erection would cause irreparable injury.

A person will not be allowed forcibly to enter upon another's land and there build a wall, to the exclusion of the owner: *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828. And one who goes upon another's property and builds a wall, without any claim of right, will be required by injunction to remove the wrongful construction: *Bright v. Allan*, 203 Pa. St. 394, 93 Am. St. Rep. 769, 53 Atl. 251. In *Calmelet v. Siche*, 48 Neb. 505, 58 Am. St. Rep. 700, 67 N. W. 467, one of the parties to a party-wall is enjoined from constructing another

story thereon in his own right, for his own benefit, and in open hostility to the wishes of the other.

In *Giller v. West* (Ind.), 69 N. E. 548, the court refused to restrain a trespasser from constructing a fence across the rear end of the complainant's lot. But in *Barbee v. Shannon*, 1 Ind. Ter. 199, 40 S. W. 584, the defendant was enjoined from placing a fence across the plaintiff's land and excluding the latter's lessee therefrom.

b. Removal of Structures and Property.

1. *In General.*—The removal of a building from the owner's premises will be enjoined: *State Sav. Bank v. Kircheval*, 65 Mo. 682, 27 Am. Rep. 310; *Lewis v. North Kingston*, 16 R. I. 15, 27 Am. St. Rep. 724, 11 Atl. 173. In *De Veney v. Gallagher*, 20 N. J. Eq. 33, the threatened removal of the part of a house, which the defendant alleged projected upon his land, was enjoined. An injunction against the removal from one place to another of a church is refused in *Tigard v. Moffitt*, 13 Neb. 565, 14 N. W. 534.

The tearing out of a valuable dam will be restrained: *Winnipeg Lake Co. v. Worster*, 29 N. H. 433; *Clark v. Mayor etc. of Syracuse*, 13 Barb. 32; so will the removal of a part of a wharf and dock by the agents of the canal board: *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154.

An injunction will not be granted to restrain the owner of brick, situated on the complainant's land from removing them when no harm will be done beyond a purely technical trespass: *Gates v. Johnston Lumber Co.*, 172 Mass. 495, 52 N. E. 736. See, also, *Clark's Appeal*, 62 Pa. St. 447.

2. *Interference with Fences and Gates.*—The destruction of a fence and the threatened repetition thereof as often as it may be replaced, entitles the owner to an injunction against the invader, whether or not he is insolvent. The remedy at law by an action for each wrong as it is perpetrated is inadequate, and equity intervenes to avoid the multiplicity of suits: *Musselman v. Marquis*, 1 Bush, 463, 89 Am. Dec. 637; *Shaffer v. Stull*, 32 Neb. 94, 48 N. W. 882; *Pohlman v. Lohmeyer*, 60 Neb. 364, 88 N. W. 201; *Lynch v. Egan* (Neb.), 93 N. W. 775; *Fonda etc. E. R. Co. v. Olmstead*, 81 N. Y. Supp. 1041, 84 App. Div. 127. Compare *Nichols v. Sutton*, 22 Ga. 369. In *Hoff v. Olson*, 101 Wis. 118, 70 Am. St. Rep. 903, 76 N. W. 1121, the threatened removal of a line fence is enjoined; but in *Miller v. Burket*, 132 Ind. 469, 32 N. E. 309, the repeated tearing down of a fence in order to harvest a crop of wheat is not restrained; and in *Cooper v. Hamilton*, 8 Blackf. (Ind.) 377, the taking of rails from land is not enjoined.

The taking down of fences and the opening of a road is enjoined in *Grisby v. Burnett*, 81 Cal. 406. But see *Leach v. Day*, 27 Cal. 642. So, in *McPike v. West*, 71 Mo. 199, is the opening of a road, accompanied with the cutting of hedges, the removal of fences, and

the exposure of crops. In *Village of Itasca v. Schroeder*, 182 Ill. 192, 55 N. E. 50, municipal officers are enjoined from changing a street so as to encroach upon private property, and necessitate the destruction of shade trees and the removal of fences. See, too, *Southern Pac. R. Co. v. Oakland*, 58 Fed. 50. The repeated throwing down of fences under a claim that a public road exists over the premises, will be restrained by injunction (*Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Carpenter v. Gwynn*, 35 Barb. 395), although in *Smith v. Garner*, 12 Or. 221, 53 Am. Rep. 342 a contrary view seems to be taken. An irresponsible road commissioner who removes a fence a number of times, claiming it is an obstruction in a public road, and declares that he will remove it as often as it is replaced, should be restrained by an injunction: *Owens v. Crossett*, 105 Ill. 354. But in *Frink v. Stewart*, 94 N. C. 484, the court refused to enjoin the removal of posts which the plaintiff placed in and across what was claimed to be a public way, and the passing of vehicles over his land. This decision was based on the trifling nature of the trespass. And in *Smith v. Oconomowoc*, 49 Wis. 694, 6 N. W. 329, the court refused to restrain the threatened action by a city to remove a fence and a storm door, on the ground they were in the street. So, in *O'Neil v. McKeesport*, 201 Pa. St. 386, 50 Atl. 920, the taking away of a fence across an alley, which the complainant claimed was opened for the convenience of neighbors and not for the public, was not enjoined. But in *Gillfillan v. Shattuck* (Cal.), 75 Pac. 646, the destruction of a fence across a private way was enjoined, without regard to whether the plaintiff owned the fee to the center of the passageway.

The throwing down of fences and the letting in of cattle on a growing crop has been held not such a trespass as will warrant a court of equity to grant an injunction: *Catching v. Terrell*, 10 Ga. 576. This decision finds some support in the principal case: See ante, p. 724. But it is not, we believe, a true statement of the law. It would seem that such an aggravated wrong as repeatedly tearing down fences or opening gates and letting stock in upon crops or pasture land could leave no alternative with a court of equity but to grant an injunction against the wrongdoer: *Tautlinger v. Sullivan*, 80 Iowa, 218, 45 N. W. 765; *Miller v. Wills* (W. Va.), 28 S. E. 337. See, further, "Trespass of Animals—Pasturing and Grazing," post.

When trespasses committed by a road overseer in removing gates from an alleged highway, which has no legal existence, will probably be repeated indefinitely, injunction is a proper remedy: *Smithers v. Fitch*, 82 Cal. 153, 22 Pac. 935. And so it is where a land owner persistently leaves open, and also injures and destroys, gates on a railroad's right of way, at a farm crossing kept for his access to his premises, although the gates are heavy and unsuitable: *Arthelm v. Chicago etc. R. R. Co.* (Neb.), 89 N. W. 313.

One who, in building a fence on what he claims is the line between himself and an adjoining owner, trespasses on the land of the

latter, cannot restrain him by injunction from removing the fence: *Currier v. Jones* (Iowa), 96 N. W. 766. See, too, *Minnig's Appeal*, 82 Pa. St. 373.

c. Removal of Earth, Rock, Mineral, and Oil.

1. **Of Earth and Rock.**—The excavation and removal of earth or rock by a trespasser, going as it does to the destruction of the estate, may constitute a ground for the intervention of a court of equity to prevent the perpetration of the wrong. Thus, the wrongful excavation and removal of clay may be enjoined at the suit of the owner: *Bates v. Slade*, 76 Ga. 50; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550. Compare *Thornton v. Roll*, 118 Ill. 350, 3 N. E. 145, and see *Cobb v. Illinois etc. R. R. & Coal Co.*, 68 Ill. 233. The excavating and hauling away of a railroad grade is enjoined in *Clark v. Jeffersonville etc. R. R. Co.*, 44 Ind. 248.

The quarrying and taking away of valuable rock is a trespass which will be enjoined: *More v. Massini*, 32 Cal. 590; *Cowper v. Baker*, 17 Ves. 128; *Thomas v. Oakley*, 18 Ves. 184. The mining of phosphate rock is enjoined in *Brown v. Salary*, 37 Fla. 102, 19 South. 161. In *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484, however, the court refused to interfere with a trespass in entering upon land and taking away large quantities of stone from a ledge of rock; but it did not appear that the ledge was of any particular value to the owner, or was desirable for building or other purposes. The correctness of this decision is doubtful. Equity will not permit one's property to be thus destroyed, notwithstanding its value may be slight, and the wrong done may be redressed in an action for damages. One has the right, in the absence of public necessity, to have the integrity of his property preserved, and this right is not dependent on the value of the property. It is believed, therefore, that the removal of stone by a trespasser, though it be of little value, will authorize the issuance of an injunction: *Ellis v. Wren*, 84 Ky. 254, 1 S. W. 440.

2. **Of Minerals, Oil, and Gas.**—Equity is prompt in restraining a trespasser from digging into mines and removing their valuable deposits, for such wrongs tend to the destruction of the estate. Trespasses of this kind were among the first to demand the attention of the extraordinary powers of chancery: See the monographic note to *Jerome v. Ross*, 11 Am. Dec. 501; *Halpin v. McCune*, 107 Iowa, 494, 78 N. W. 210; *Lockwood v. Lansford*, 56 Mo. 68; *Lytle v. James*, 82 Mo. App. 618; *Graham v. Womack*, 98 Mo. App. 337; *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675; *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936; *Bracken v. Preston*, 1 Pinn. (Wia.) 584, 44 Am. Dec. 412; *Nichols v. Jones*, 19 Fed. 855. Thus, a trespasser taking gold quartz from a mine will be enjoined: *Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; so will a trespasser working a placer mine: *Chapman v. Toy Long*, 4 Saw.

28, Fed. Cas. No. 2610; and a trespasser removing iron ore: *Anderson v. Harvey*, 10 Gratt. 386; or removing asphaltum: *More v. Massini*, 32 Cal. 590. But it has been thought that the taking of coal from an open mine should not be enjoined when the coal does not constitute the chief value of the land: *Cresap v. Kemble*, 26 W. Va. 603. This, however, may well be doubted: See the preceding paragraph.

The unlawful boring for and extraction of oil or gas is an irreparable injury which will be enjoined: *Chappell v. Jasper County Oil etc. Co.*, 31 Ind. App. 170, 66 N. E. 515; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. 793; *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 523. But see *Charities Block Coal Co. v. Mellon*, 152 Pa. St. 286, 34 Am. St. Rep. 645, 25 Atl. 597; *Hicks v. American Natural Gas Co.*, 207 Pa. St. 570, 57 Atl. 55; *Erskine v. Forest Oil Co.*, 80 Fed. 583.

d. Cutting, Removing, and Interfering with Trees.

1. *Cutting and Removing Trees and Timber.*—We must confess no little surprise at the number of decisions, some of which are comparatively recent, wherein an injunction against the cutting and destruction of growing trees and timber has been refused. The decisions proceed on the theory that the owner has adequate means of redress by an action for damages, and among them the following are cited: *Meyers v. Hawkins*, 67 Ark. 413, 56 S. W. 640; *Hatcher v. Hampton*, 7 Ga. 49; *Kennedy v. Guise*, 62 Ga. 171; *Wiggins v. Middleton*, 117 Ga. 162, 43 S. E. 432; *Cowles v. Shaw*, 2 Iowa, 496; *Jordan v. Updegraff*, 1 Kan. 527; *Hillman v. Hurley*, 82 Ky. 626; *Powell v. Rawlings*, 38 Md. 239; *Heaney v. Butte etc. Commercial Co.*, 10 Mont. 590, 27 Pac. 379; *Hodgman v. Richards*, 45 N. H. 28; *Kerlin v. West*, 4 N. J. Eq. 449; *Cornelius v. Post*, 9 N. J. Eq. 196; *Stevens v. Beekman*, 1 Johns. Ch. 318; *Gause v. Perkins*, 3 Jones Eq. 177, 69 Am. Dec. 728; *Thompson v. McNair*, 62 N. C. 121; *Dunkart v. Rinehart*, 87 N. C. 224; *Sharpe v. Loane*, 124 N. C. 1, 32 S. E. 818; *Schooner v. Bright*, 24 W. Va. 698.

The doctrine of these cases may perhaps be expressed in the language of the supreme court of Florida: "It is safe to say that even in cases of the destruction of timber by cutting and removing from the land, it is not sufficient, in order to obtain an injunction, to simply allege that such cutting and removal amount to irreparable injury to the land, and a great damage and loss to the owner. In addition it must appear that the trees are of such peculiar value and importance to the estate as that their destruction or injury will so affect the uses and purposes for which it is designed as to make their loss an irreparable injury to the owner. If adequate compensation can be made in money, the remedy is at law": *Carney v. Hadley*, 32 Fla. 344, 37 Am. St. Rep. 101, 14 South. 4; *Woodford v. Alexander*, 35 Fla. 338, 17 South. 658. Or, to quote from *Morgan*

v. Baxter, 113 Ga. 144, 38 S. E. 411: "The cutting of timber will not be enjoined unless the injury will be irreparable in damages, or the trespasser is insolvent, or there exist other circumstances which, in the discretion of the court, render the injunction necessary and proper."

We do not believe that the law requires that one shall submit to his estate being stripped of its timber, and be driven to the precarious remedy of an action at law for damages to make good his loss. To be sure, the extent of the injury will be governed by many circumstances, such as the character of the timber, the amount of it on the premises, and the like. It has never been supposed, however, that the right to appeal to a court of justice for redress or protection is dependent upon the extent of the wrong done or threatened, so long at least as it is not trifling or theoretical. There are few trespasses of a more aggravated or destructive character than the cutting of timber, and if courts of equity have no power to restrain such wrongs they little deserve the encomiums that are bestowed upon them. In our opinion the cutting, destroying, and removing of growing timber, by a trespasser, without other matter or special circumstances, should and will be enjoined. See, as supporting this statement, *Natoma etc. Min. Co. v. Clarkin*, 14 Cal. 544; *Halleck v. Mixer*, 16 Cal. 574; *Palmer v. Crisle*, 92 Mo. App. 510; *King v. Stuart*, 84 Fed. 546; "Inadequacy of Legal Remedies," ante.

Certain it is that the destruction by a trespasser of growing timber which constitutes the chief value of the property will be enjoined: *Sullivan v. Robb*, 86 Ala. 433, 5 South. 746; *Camp v. Dixon*, 112 Ga. 372, 38 S. E. 71; *Butman v. James*, 34 Minn. 547; *Powell v. Conaday*, 95 Mo. App. 713, 69 S. W. 686; *Piper v. Piper*, 38 N. J. Eq. 81; *Griffith v. Hillard*, 64 Vt. 643, 25 Atl. 427. And so will a trespass in cutting trees be restrained, which can be regarded as permanently or irreparably injuring the estate: *Sears v. Ackerman*, 128 Cal. 583, 72 Pac. 171; *Fleming v. Collins*, 2 Del. Ch. 230; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *McKay v. Chapin*, 120 N. C. 159, 26 S. E. 701; *Elliott v. Bloyd*, 40 Or. 326, 67 Pac. 202; *Smith's Appeal*, 69 Pa. St. 474; *Bruce v. Lumber Co.*, 87 Va. 381, 24 Am. St. Rep. 657, 13 S. E. 153; *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Starks v. Redfield*, 52 Wis. 349, 9 N. W. 168; *United States v. Guglard*, 79 Fed. 21.

Statutes have been enacted in some jurisdictions declaring that an injunction may be issued against the cutting or destruction of timber by a trespasser: *Louisville etc. R. R. Co. v. Gibson*, 43 Fla. 315, 31 South. 230; *Simmons v. McPhaul*, 117 Ga. 751, 45 S. E. 76. Such statutes are constitutional: *McMillan v. Wiley (Fla.)*, 33 South. 993. The Georgia statute has been construed to require the complainant to hold a perfect paper title of the property: *Wiggins v. Middleton*, 117 Ga. 162, 43 S. E. 432. And under the Florida statute it has been decided that the fact that the timber constitutes

the chief value of the land does not give equity jurisdiction to enjoin its cutting upon the application of one owning only the timber: *Doke v. Peek* (Fla.), 34 South. 896.

At the suit of a stranger to the title or possession, an injunction will not issue to restrain the commission of a trespass by cutting timber on land: *Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371.

The timber being cut by a trespasser is sometimes of such a character as to afford special reasons for its destruction being enjoined. Thus, the wrongful destruction of trees where there is only a limited amount of timber on the farm, or where they have been reserved as a lot, will be restrained by a court of equity: *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Thatcher v. Humbler*, 67 Ind. 444; *Davis v. Reed*, 14 Md. 152; *Smith v. Rock*, 59 Vt. 232, 9 Atl. 551. Courts of equity are always ready to prevent the destruction by trespassers of shade, fruit, and ornamental trees and shrubbery; *Daubenspeck v. Grear*, 18 Cal. 443; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Village of Itasca v. Schroeder*, 182 Ill. 192, 55 N. E. 50; *Tainter v. Mayor of Morristown*, 19 N. J. Eq. 46; *Wilson v. Mineral Point*, 39 Wis. 160. The cutting of a sugar orchard is enjoined in *Clendening v. Ohl*, 118 Ind. 46, 20 N. E. 639; and the destruction of an osage hedge fence, in *Sapp v. Roberts*, 18 Neb. 299, 25 N. W. 96. The cutting of timber protecting a dwelling is enjoined in *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371; and the destruction of timber along a stream, protecting property from the encroachment of the water, is enjoined in *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756.

The removal of timber by a trespasser after he has cut it may be restrained by injunction: *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67; *Disbrow v. Westchester Hardware Co.*, 45 N. Y. Supp. 376, 17 App. Div. 610.

2. **Working Trees for Turpentine.**—It has been decided in a number of cases that a trespass by working pine trees for turpentine will not warrant a court of equity in granting an injunction: *Carney v. Hadley*, 32 Fla. 344, 87 Am. St. Rep. 101, 14 South. 4; *Daniels v. Edwards*, 72 Ga. 196; *Bell v. Chadwick*, 71 N. C. 329. And a statute giving to the owners of timbered lands the right to an injunction against trespassers, has been held not to confer that right upon one who claims to own only the turpentine in the trees, with the privilege of cutting, boxing, and scraping them: *McDonald v. Padgett* (Fla.), 35 South. 336.

c. **Injuring, Harvesting, and Removing Crops.**—There are decisions to the effect that the destruction, removal, or harvesting of crops or grass by a trespasser will not be enjoined: *Peterson v. Orr*, 12 Ga. 464, 68 Am. Dec. 484; *Moore v. Halliday* (the principal case), ante, p. 724; *Smith v. Pettingill*, 15 Vt. 82, 40 Am. Dec. 667. For example, the plowing up of clover orchard grass is held not to be such a trespass as to justify the issuance of an injunction:

Bridges v. Sargent, 1 Kan. App. 442, 40 Pac. 823. The soundness of these decisions is, to our mind, more than doubtful. See what has been said under the heads of "Inadequacy of Legal Remedies" and "Cutting and Removing Timber," ante. Where one wrongfully enters upon a farm and threatens to repeat the trespass by planting, harvesting, and carrying away the crops to be raised thereon, and, further, to interfere with the owner's tenants and carry away any crops they may raise, such trespasses will be enjoined, although the wrongdoer is not insolvent: *Colliton v. Oxborough*, 86 Minn. 361, 90 N. W. 793. See, also, *Page v. Akins*, 112 Cal. 401, 44 Pac. 666; *Lee v. Watson*, 15 Mont. 228, 38 Pac. 1077. And one who has the title to a crop may enjoin another who is insolvent from harvesting and removing it: *West v. Smith*, 52 Cal. 322. In this case the crop was grown on public land, and neither party had title to the soil.

f. Pasturing, Grazing, and Roaming of Animals.—We have already expressed an opinion that the repeated throwing down of fences or opening of gates and letting in livestock upon meadow lands or crops, constitutes such a trespass as will induce a court of equity to prevent a continuance of the wrong by issuing an injunction. See "Interference with Gates and Fences," ante, p. 745. So, continuous and repeated acts of trespass in turning sheep and cattle upon uninclosed land to the destruction of the grass thereon will be enjoined, especially when the principal or only value of the land is for pasture: *Strawberry Valley Cattle Co. v. Chipman*, 13 Utah, 454, 45 Pac. 348 (the land in this case seems to have been unfenced); *Smith v. Bivens*, 56 Fed. 352; *Northern Pac. Ry. Co. v. Cunningham*, 103 Fed. 708.

An injunction against the trespass of wild animals was issued in *Ellis v. Blue Mountain Forest Assn.*, 69 N. H. 385, 41 Atl. 856. It appears that a game preserve belonging to the defendants surrounded the plaintiff's land. This park or preserve was surrounded by a high fence. The animals therein were dangerous at times, and were allowed to roam unrestricted over the plaintiff's premises.

g. Hunting, Fishing, and Boating.—Trespassing sportsmen have, in a number of instances, felt the restraining hand of a court of equity. In *Lamprey v. Dantz*, 86 Minn. 317, 90 N. W. 578, the plaintiff was the owner of certain swamp land, the chief value of which consisted in hunting and shooting opportunities, and he and his friends made use of the property for duck shooting. Part of the land was covered with water, but it could not be used for boating and fishing or for any purpose but hunting. The plaintiff did his shooting from a place of concealment on land, and did not pursue the ducks on the water. The defendant and his friends, from a place of concealment on his own land, were in the habit of shooting out over the water covering the plaintiff's land, and going in a boat after the ducks after their shooting. This practice had been con-

tinned for a number of years. It interfered in the feeding, roosting, and breeding of the ducks, and impaired the value of the plaintiff's shooting privileges. The court enjoined him from continuing such conduct.

"Where lands subject to the ebb and flow tides are usable only for the shooting of ducks and other game, intrusions day by day upon such lands for the purpose of shooting will be enjoined. The injury suffered by the owner, in lessening the quantity of game, increasing the danger of accidental shooting, and interfering with his exclusive shooting rights, is not adequately remediable in damages": *Simpson v. Moorehead* (N. J. Eq.), 56 Atl. 887.

One who has, under a lease, an exclusive right of hunting upon a game preserve, may by injunction restrain persons who invade the premises and shoot and drive away the game. It is a case of irreparable damage from the destruction of the very substance of the property right held under the lease. Moreover, the lessee is entitled to an injunction in order to avoid a multiplicity of suits: *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166.

Boating and fishing are enjoined in *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828, 24 N. E. 686, at the suit of the owner of the bed of a lake. Were the defendants "both solvent," said the court, "and fully able to respond to any damages that might be recovered against them in actions of trespass, yet it is apparent from the whole record that such actions would not afford an adequate remedy for the violations of the rights of the plaintiff in error in the past; and those threatened in the future were, and are, during certain seasons of the year, of daily, if not of hourly, occurrence, under the claim of the right to do so; besides the injury resulting from each separate act would be trifling, and the damages recoverable, therefore, scarcely equal to a tithe of the expense necessary to prosecute separate actions therefor."

h. Interfering with Churches and Cemeteries.—Courts of equity have taken jurisdiction to restrain one faction of church society from trespassing on the church property: *Fulbright v. Higginbotham*, 133 Mo. 668, 34 S. W. 875. See, too, *Reis v. Rohde*, 34 Hun, 161; *Trustees of German Evan. Congregation v. Hoessli*, 13 Wis. 388. Continued attempts of trespassers to take and hold possession of a tent in a camp-meeting, thereby creating a disturbance, will be enjoined: *Ford v. Burleigh*, 60 N. H. 278.

Where one faction of a church refuses another faction entrance into the cemetery for the purpose of burial, the forcible entry of the latter for that purpose should not be enjoined: *Miller v. English*, 6 N. J. Eq. 304. But in *Mooney v. Cooledge*, 30 Ark. 640, an injunction is held properly to issue to prevent the removal of the bodies of friends and relatives from a cemetery.

1. Miscellaneous Trespasses.—The setting out of trees for a fence, which would injure the adjoining land, was enjoined in *Brock v.*

Connecticut etc. R. R. Co., 35 Vt. 373. The going upon premises and defacing landmarks or making new ones thereon, is enjoined in *Preston v. Preston*, 84 Ky. 16, 2 S. W. 501. And the covering of lots with heavy boulders is enjoined in *Wheelock v. Noonan*, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67. Though the throwing of earth and debris on land is not enjoined in *King v. Mullins*, 27 Mont. 364, 71 Pac. 155; *Mulvaney v. Kennedy*, 26 Pa. St. 44. And the washing of sand in times of high water from a railroad embankment into a watercourse, is not enjoined in *Caldwell v. Broad Top R. R. etc. Co.*, 169 Pa. St. 99, 32 Atl. 85. Piling obstructions on the road-bed of a railway is enjoined in *Henderson v. Ogden City Ry. Co.*, 7 Utah, 199, 26 Pac. 286. Compare *Indianapolis Rolling Mill v. Indianapolis*, 29 Ind. 245. The flowing of oil from a factory on meadow land is enjoined in *Starr v. Woodbury Glass Works* (N. J. Eq.), 48 Atl. 911. And the discharge of surface water by a city on land is enjoined in *Andrews v. Steel City* (Neb.), 89 N. W. 739. The obstruction of a bayou by filling it with saw logs may be restrained: *Turner v. Holland*, 54 Mich. 300, 20 N. W. 51. The successful contestant for a tract of public land may have his adversary restrained from interfering with his possession: *Barnes v. Newton*, 5 Okla. 428, 48 Pac. 190, 49 Pac. 1074. So, one who has been removed from land under a writ of assistance, will be restrained if he insists on returning: *Ten Eyck v. Sjoburg*, 68 Iowa, 625, 27 N. W. 785. For further instances of trespass calling for the intervention of courts of equity, see the monographic notes to *Jerome v. Ross*, 11 Am. Dec. 497-507; *Smith v. Gardner*, 53 Am. Rep. 346-355.

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HOOVER v. KING.

[43 Or. 281, 72 Pac. 880.]

RES JUDICATA—Ejectment.—At common law ejectment was a mere possessory action between fictitious parties, and the judgment therein did not determine the estate or interest of the parties in the property, nor conclusively determine the right of possession. Therefore it was not a bar to a subsequent action for the possession of the same property. (p. 755.)

RES JUDICATA.—A Judgment in Ejectment is by the Statutes of Oregon Conclusive of the Title to the land when such title is tried and determined, and such determination appears on the face of the judgment. (p. 756.)

RES JUDICATA.—A Judgment in Ejectment is not Conclusive of the Title to the Property Under the Statutes of Oregon when all that appears by the record is that the jury found for the defendant, and the complaint was dismissed and the cost awarded to him. (p. 757.)

RES JUDICATA.—Where there are Two Issues in a Case upon Either of Which the Judgment may Rest, one going to the merits and the other not, its disposition will generally be considered as resting on the latter, the merits remaining adjudicated, unless the judgment appears to have been on the merits. (p. 757.)

RES JUDICATA.—A Judgment Dismissing the Complaint in an Action at Law is unknown to the laws of Oregon, and does not necessarily determine any of the issues involved. It is at most a mere judgment of nonsuit. (p. 758.)

RES JUDICATA.—The Recovery by Defendant of His Costs does not constitute a bar or estoppel, unless there appears to have been a judgment on the merits of the question in dispute between the parties to an action of ejectment. (p. 758.)

John G. Saxton and Will R. King, for the appellants.

Parrish & Rembold, for the respondents.

²⁸¹ **BEAN, J.** This is an action by Newton Hoover against W. J. King and others to recover possession of the east half of the southwest quarter of section 8, township 25 south of range 35½ east, in Harney county, which plaintiff tried to recover possession of from the same defendants in an action begun in 1889, wherein he alleged in his complaint that he was the owner in fee simple and entitled to the possession of the property, and that the defendants and each of them wrongfully and unlawfully withheld possession from him. The defendants answered, denying the plaintiff's title or right ²⁸² to the possession, or that they wrongfully or unlawfully withheld possession from him, and for an affirmative defense pleaded title

in the defendant, Mrs. Alice L. Bartlett. A trial was had, and the jury returned the following verdict, omitting title: "We, the trial jury in the above-entitled action, find for the defendants Alice L. Bartlett and George W. Bartlett, and against the plaintiff, Newton Hoover." Upon motion of defendants for judgment on the verdict, it was "ordered and adjudged that said motion for judgment be, and the same is hereby, granted and allowed, and that plaintiff's complaint filed herein be, and the same is hereby, dismissed, and the defendants have and recover of and from the plaintiff their costs and disbursements herein, taxed at sixteen dollars." Thereafter the plaintiff commenced the present action. The complaint is in the usual form. The answer denies the material allegations thereof, sets up title in the defendant, Alice L. Bartlett, and pleads as a bar the judgment in the former action. The court held the plea in bar good, and instructed the jury that the former judgment was a sufficient defense to this action. Notwithstanding this instruction, however, the jury found that the plaintiff was the owner in fee simple of the premises in controversy, returned a verdict in his favor, and assessed his damages at seven hundred dollars. The verdict was set aside on motion of the defendants, and a new trial ordered, upon which the jury, by direction of the court, returned a verdict in favor of the defendants. From the judgment entered thereon plaintiff appeals.

²⁸³ The only question presented by this appeal is whether the judgment in the former action is a bar to this. At common law, ejectment was a mere possessory action between fictitious parties. The judgment therein did not determine the estate or interest of the parties in the property, nor did it conclusively determine the right of possession. It therefore was not a bar to another or subsequent action to recover possession of the same property: 2 Black on Judgments, sec. 650. But in the majority of the states of the Union the common-law action has been pruned of its fiction and artificiality, and made a simple remedy for the recovery of the possession of real property and the trial of the title thereto. It has generally been prescribed, either expressly or by necessary inference, that the judgment in such an action shall be conclusive between the parties and privies. Such are the provisions of our statute. Any person having a legal estate in real property and the present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law: B. & C. Comp., sec. 326. The plaintiff is

required to set forth in his complaint the nature of his estate, whether in fee, for life, or for a term of years, and for whose life, or the duration of such term: B. & C. Comp., sec. 328. The defendant is not allowed to give evidence of any estate in himself or another, or any license or right to the possession of the property, "unless the same be pleaded in his answer," with "the certainty and particularity required in a complaint": B. & C. Comp., sec. 329. The jury are required to find, if their verdict is for the plaintiff, "that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be," and, if for the defendant, "that the plaintiff is not entitled to the possession of the property described in ²⁸⁴ the complaint, or to such part thereof as the defendant defends for, and the estate in such property or part thereof, or license or right to the possession of either, established on the trial by the defendant, if any, in effect, as the same is required to be pleaded": B. & C. Comp., sec. 330. The judgment "shall be conclusive as to the estate in such property and the right to the possession thereof, so far as the same is hereby determined, upon the party against whom the same is given, and against all persons claiming from, through, or under such party, after the commencement of such action, except as in this section provided": B. & C. Comp., sec. 339. It is thus apparent that the statute contemplates that the title to land may be tried in an action to recover possession thereof, and that, so far as the same is tried and determined, the judgment therein is conclusive upon the party against whom it is given: *Barrell v. Title Guarantee Co.*, 27 Or. 77, 39 Pac. 992; *Moores v. Moores*, 36 Or. 261, 59 Pac. 327. But it is only when it appears from the judgment that the title has in fact been tried and determined that it can have such an effect. At common law, the judgment in an action to recover real property was not conclusive upon the parties, nor is it conclusive under the statute, unless it is within the terms thereof. It is declared in express terms that the judgment is conclusive on the title only "so far as the same is thereby determined," and "that only is deemed to have been determined by a former judgment, decree, or order which appears upon its face to have been so determined, or which was actually and necessarily included therein or necessary thereto": B. & C. Comp., sec. 748.

Now, looking at the verdict and judgment in the former action brought by the plaintiff to recover possession of the property now in controversy, all that appears to have been determined thereby is that the jury found "for the defendants," that the complaint was dismissed, and costs were ²⁸⁵ awarded to the defendants. There is no finding by the jury nor adjudication by the court concerning the title, nor was it necessarily included in the judgment rendered, or essential thereto. There were two issues in the case—one as to the plaintiff's title, and the other as to his right to the immediate possession of the property in controversy. A finding and judgment adverse to him on either issue would have defeated the action; but the record does not disclose whether the judgment was based upon the one or the other. The verdict affords no information on the subject. It contains no finding as to the title or right to the possession of the property. It does not conform to the requirements of the statute, and any judgment that might have been entered thereon would have been erroneous and reversible on appeal: *Long v. Linn*, 71 Ill. 152; *Pensacola Ice Co. v. Perry*, 120 U. S. 318, 7 Sup. Ct. Rep. 576; *Oney v. Clendenin*, 28 W. Va. 34. If the jury had found that the plaintiff was not entitled to the possession of the property, and that Mrs. Bartlett was the owner in fee thereof and entitled to the possession as pleaded in the answer, a judgment entered thereon, merely dismissing the complaint and awarding costs, might perhaps have been construed as an adjudication of the title, and therefore a bar to a subsequent action: 2 *Black on Judgments*, sec. 703; *Amory v. Amory*, 26 Wis. 152; *Granger v. Singleton*, 32 La. Ann. 898. So, too, a judgment rendered on the verdict actually returned, determining the question of title, might perhaps have been sufficient on a collateral attack; but, when neither the verdict nor the judgment contains any finding or adjudication on such issue, it is not perceived on what theory the court would be justified under our statute in holding that the judgment is a bar to the present action.

2. When there are two issues in a case, upon either of which the judgment may rest, one going to the merits and the other not, its disposition will generally be considered ²⁸⁶ as resting upon the latter; the merits remaining unadjudicated, unless the judgment appears to have been upon the merits: 21 *Am. & Eng. Ency. of Law*, 1st ed., 265. Now, the verdict in the former action was simply a finding in favor of the defendants,

and the judgment merely dismissed the complaint and taxed costs and disbursements against the plaintiff. Only two points were thereby determined: 1. That the complaint should be dismissed, no grounds thereof being stated; and 2. That the defendants should have judgment for their costs. Neither of these questions necessarily went to the merits of the title. Either could properly rest on the failure of the plaintiff to show a right to the immediate possession of the property, and, in view of the rule stated, it will be so considered.

3. A judgment dismissing a complaint in an action at law is a proceeding unknown to the statute, and does not necessarily determine any of the issues involved. Costs are but an incident to the judgment, and do not add to its force or effect. A bill or suit in equity may be "dismissed," and such dismissal is an effectual bar to a subsequent suit for the same cause, unless given without prejudice: B. & C. Comp., sec. 412. An action at law, however, is disposed of either by a judgment in favor of the plaintiff or defendant, or one of nonsuit. If the former, the cause of action is determined, and it is brought to an end. If the latter, only the pending action is disposed of, and another may be brought upon the same cause: *Hughes v. Walker*, 14 Or. 481, 13 Pac. 450. Since neither the verdict nor the judgment in the former action shows that the title to the property was tried and determined, the judgment can, in our opinion, have no more force than a nonsuit, and is not a bar to a subsequent action to recover possession of the same property: *Fitch v. Cornell*, 1 Saw. 287 156, Fed. Cas. No. 4834; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386.

4. It is not the recovery by the defendants that constitutes the bar or estoppel, but the decision upon the merits of the question which is in dispute between the parties: *Dawley v. Brown*, 79 N. Y. 390; *King v. Townsend*, 65 Hun, 567, 20 N. Y. Supp. 602; same case, 141 N. Y. 358, 36 N. E. 513.

It was insisted at the argument that, if the court should conclude that the court below was in error in holding the former judgment a bar, the cause should be remanded, with directions to enter a judgment on the verdict returned on the first trial of the present action. The verdict was contrary to the instructions of the trial court, for which reason it was set aside and a new trial awarded; and we do not think that we would be justified, under the circumstances, in so remanding the cause.

The judgment will be reversed, and a new trial ordered.

A *Judgment* in ejectment was not a bar to another and similar action at the common law, but this rule has been changed in many states by statute: Note to Caperton v. Schmidt, 85 Am. Dec. 208-211; Sanford v. Herron, 161 Mo. 176, 61 S. W. 839, 84 Am. St. Rep. 703, and cases cited in the cross-reference note thereto. If two issues are raised in an action, which are both distinctly passed upon and adjudged, the judgment will be conclusive as to both; but if an action is dismissed, or a judgment given for the defendant, upon a preliminary point, before reaching the merits, it seems to be no bar to a second action: See the monographic note to Fahey v. Esterley Machine Co., 44 Am. St. Rep. 565.

BEAVER LUMBER COMPANY v. ECCLES.

[43 Or. 400, 73 Pac. 201.]

WASTE.—A Mortgagee Ordinarily has the Right to Restrain the commission of waste if it impairs his security, and it is impaired by acts which render the security insufficient for the satisfaction of the debt or of doubtful sufficiency. (p. 760.)

WASTE—Removal of Standing Timber from Mortgaged Premises.—Where a mortgage is given of timber lands, they being of little or no value after its removal, the mortgagor is guilty of waste if he removes as much as one-tenth thereof in one year, and will, by injunction, be prevented from so doing until the debt is paid. (p. 762.)

WASTE, When Renders Security of Doubtful Sufficiency.—Where timber land purchased for forty-seven thousand five hundred dollars is subject to a lien for five thousand dollars, and to a mortgage for thirty thousand dollars, an injunction against the cutting off of timber by the mortgagor of one-tenth per year may properly be awarded, on the ground that it will render the security of doubtful sufficiency. (p. 762.)

WASTE.—Mortgagor Acquires No Right to Commit by Placing Improvements on Property, nor by Giving a Bond of Indemnity.—The fact that the owner of timber lands, who has mortgaged them, subsequently makes large outlays to remove the timber and manufacture it into lumber does not give him any right to remove such timber, if thereby the security will be rendered of doubtful sufficiency, nor to compel the mortgagee to permit such removal on receiving a bond to pay all damages which may result to him therefrom. (p. 763.)

Coovert & Stapleton, for the appellants.

Fulton Brothers, for the respondent.

401 **WOLVERTON, J.** This is an appeal by William Eccles and others from a decree of the circuit court enjoining them, at the instance of the Beaver Flume and Lumber Company, from cutting and removing certain timber, until a mortgage to se-

cure the payment of thirty thousand dollars, one-half payable in one year and the remainder in two years from the date thereof, given by defendant Eccles to plaintiff April 8, 1902, is fully paid. The mortgage covers eighteen hundred acres of timbered land, and also the timber upon about four hundred acres additional, together with certain fluming privileges and rights of way, and is subject to a mortgage to the board of school land commissioners to secure a loan of five thousand dollars. The chief or principal value of the land thus encumbered consists in the standing timber thereon, denuded of which the land itself would be practically worthless. Subsequent to the execution of the mortgage, the defendant Eccles placed valuable improvements upon the land, at a large expense to himself, for the purpose of cutting and manufacturing the timber into lumber, shingles, and piling, and was actively engaged in the business when this suit was begun and a temporary injunction granted. The value of the timber is variously estimated, ranging from twenty-five thousand dollars to one hundred thousand dollars. The defendants make no denial of their purpose to continue cutting and removing the timber, but say that it would take ten years to remove the whole thereof, and that not more than one-tenth of it will be taken by them prior to the maturity of the debt, and that plaintiff's security will not be materially impaired thereby; and, further, the defendant Eccles proffers to give to the plaintiff such a bond as the court may require and approve, conditioned that he will pay all such indebtedness at maturity, or that he will pay to plaintiff any damages that it may suffer by reason of removing any such timber, and thereby reducing the value of its security.

⁴⁰² The questions involved are (1) whether plaintiff has shown a right to the relief sought, and, if so, (2) whether the defendants are entitled to stay the injunction by executing the proffered bond.

1. Ordinarily, a mortgagee has the right to restrain the commission of waste, where it tends to the impairment of his security. An action at law for trespass, if one lies, is not a certain nor always an adequate remedy in such cases, and it is therefore, as a general rule, unnecessary to allege insolvency of the mortgagor, or that the injury threatened is literally irreparable: 1 Jones on Mortgages, 2d ed., sec. 684; 1 High on Injunctions, 2d ed., sec. 693; *Vanderslice v. Knapp*, 20 Kan. 647. Such acts as will render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency, constitute, ac-

according to the consensus of authority, an impairment of the security, through the commission of waste. Such is the conclusion reached by Mr. Justice Dickinson in *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203, 44 N. W. 531; citing many text-writers and adjudicated cases. Among them, see references above, and *King v. Smith*, 2 Hare, 239, 244; *Coker v. Whitlock*, 54 Ala. 180; *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Harris v. Bannon*, 78 Ky. 568. See, also, *State v. Northern Cent. Ry. Co.*, 18 Md. 193. But, in the application of the rule, he says: "We think that the mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of doubtful sufficiency. ⁴⁰³ He is entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt. That would not ordinarily be deemed sufficient as security to one whose purpose is to secure payment, and not to become a purchaser of the property at its market value. And not only must it be considered that the mortgage is held to secure payment of the debt, and not for the purpose of converting the mortgagee into a purchaser, but that, if the debt is not yet mature, it is to be considered whether, during the time which may elapse before maturity, the present value of the property may not become depreciated from causes not now known." The rule is applicable where realty is mortgaged in the usual way, and constitutes the embodiment of the security. The mortgagor may do many things as the owner of such an estate, and use it in the ordinary way, without in any wise affecting the mortgage contract, and, unless the waste goes to the impairment of the estate itself to such an extent as to render the security of doubtful sufficiency, regarded in the light of business principles, there can be no restraint. The present, however, is not the usual case. The growing timber, and not the realty as such, except as the timber may be regarded as realty, is the very substance of the security, and was so considered from the inception of the contractual relations. Its severance and removal, therefore, is as much a taking of the substance as if lumber had been mortgaged and it was sought to dispose of a portion of it contrary to the conditions of the hypothecation. While the cutting of firewood and the severance of other parts of realty, in its usual acceptance, as are incident to the use, occupation, and improvement of land, in the ordinary manner and for the purposes for which it is ordinarily used, are not

accounted an invasion of the mortgagee's right or estate (2 Tiffany on Modern Law of Real Property, sec. 524), ⁴⁰⁴ yet it seems almost self-evident that a direct withdrawal or dislodgment of one-tenth of the very property hypothecated would amount to a material and vital deterioration of the security contracted for, and, not only this, but would be a direct impairment of the contract itself, and it would be inequitable and unjust to permit it.

2. The question as to whether it would render the security of doubtful sufficiency is hardly in the case. But, if it were, the facts are such as would warrant the injunction at any rate. Eccles bought the property for forty-seven thousand five hundred dollars, paid twelve thousand five hundred dollars down, and it is encumbered for the balance, the plaintiff's mortgage being subordinate to one to the board of school land commissioners for five thousand dollars; so that, in business estimation, the value of the security may not be considered disproportionate to the amount of the mortgage. True, the mortgagor has placed large improvements thereon, and it is probable that timber has advanced in value. But without the timber the improvements would be of little value; besides, the price of timber is fluctuating in the market, and it cannot be said with certainty that its value will even be as great when the debt becomes due as it was when the mortgage was executed; hence the contention of appellants is without merit, and the injunction was, therefore, in our opinion, properly granted.

3. Should the defendant Eccles be allowed to execute a bond for the payment of the debt, or for such damages as the plaintiff may suffer by reason of the removal of the timber, and thereby avoid the injunction process? If permitted to do so, it would, it must be conceded, amount to the virtual substitution of one security for another, and that, not only without the consent, but against the protests of the mortgagee. The conditions must certainly be unusual that would warrant a court of equity in adopting such a procedure. A case is cited where the security consisted of pine woodland which had been burned over, ⁴⁰⁵ and it became necessary to cut the wood off in order to preserve it and to permit a new growth to take its place, and the court allowed the cutting to proceed upon the defendant's furnishing security equal to the value of the wood, to be fixed by a referee: *Brick v. Getsinger*, 5 N. J. Eq. 391. Other cases are cited where pending a dispute as to the title or right to the possession of realty courts have permitted security to be

given to cover any damages sustained by the removal of the timber in the meanwhile, where extensive preparations had been made for the purpose, and a present delay would result in great loss to the investors: *Wood v. Braxton* (C. C.), 54 Fed. 1005; *Roper Lum. Co. v. Wallace*, 93 N. C. 22; *Commissioners of Burke County v. Catawba Lumber Co.*, 114 N. C. 505, 19 S. E. 636. The applicability of these cases is not apparent here. Whatever outlay the defendant Eccles made was for the purpose of invading the very substance of the estate or property which he expressly pledged as security for the payment of his debt. Now, the mere fact that the expenditure was incurred, and men employed to remove the timber and manufacture it into lumber and other commodities to be disposed of in the market, can afford no sufficient reason why a court of equity should interpose to change the basis of the security in order to permit the further prosecution of the enterprise. The enterprise was inaugurated in subordination to the contractual rights of the plaintiff, and, unless some peculiar change in the conditions over which the parties had no control should require special interference to protect them, or either of them, from loss or damage, there can be no interposition to relieve against a contract legally made and fairly entered into. The decree of the circuit court should be affirmed, and such will be the order of this court.

That Cutting Down Trees may amount to waste, see *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621, 32 South. 278. As to the right of a mortgagee to an injunction against the commission of waste, see the monographic note to *Webber v. Ramsey*, 43 Am. St. Rep. 432-434. And as to the effect of waste by a mortgagee in possession, see *McMichael v. Webster*, 57 N. J. Eq. 295, 73 Am. St. Rep. 630, 41 Atl. 714; *Whiting v. Adams*, 66 Vt. 679, 44 Am. St. Rep. 875, 30 Atl. 32.

WAITE v. GRUBBE.

[43 Or. 406, 78 Pac. 206.]

GIFTS.—There are Two Essentials to a Valid Gift—the intent on the part of the donor to bestow on the donee the thing given, and a delivery accompanied by an acceptance of the gift on the part of the donee, express or implied. (p. 767.)

GIFT of Hidden or Buried Money, when Complete.—If one who has hidden his money by burying it in different places, being seriously ill and in the belief that his illness will terminate fatally, goes with his daughter to the immediate vicinity of the hiding places, and points them out, and there tells her that he gives her all such money, but advises her to leave it where it is unless he should sell the place, stipulating that if he should get well and want some of the money, she would let him have it, the gift from him to her is complete and is not rendered inoperative by this stipulation, nor by her leaving the money in its hiding places until long after his death. (p. 767.)

GIFTS, Delivery Necessary to.—A delivery to support a gift need not be manual or by actual tradition from hand to hand. It may be constructive or symbolical, but must be, as a general rule, as complete and perfect as the nature of the property and the attendant circumstances and conditions will permit. (p. 768.)

GIFT, Evidence of as Between Parent and Child.—A delivery by a father to his child in pursuance of an intended gift may be established by less positive and unequivocal proof than is required where the fact is at issue between strangers. (p. 769.)

GIFT, Delivery of Hidden Money, when Sufficient.—If a father, barely able to walk, goes with his daughter to his garden, where he has hidden money in different places, and points them out and describes them to her, and tells her that he gives her such money, but advises her to leave it remain hidden where it is, unless he sells the place, and stipulates that she will give him some of the money if he gets well, and needs it, the delivery is as complete as the circumstances permit, and is sufficient to support the gift, though she does not remove any of the money until after his death. (pp. 769, 770.)

ESTATES OF DECEDENTS, Claims Against, What are not.—One claiming the ownership of moneys under a gift to her by her father, since deceased, cannot be regarded as presenting or having a claim against his estate within the meaning of the statutes of the state requiring satisfactory evidence other than the testimony of the claimant to establish the claim. (p. 770.)

George M. Brown, J. C. Fullerton and Dolph, Mallory, Simon & Gearin, for the appellant.

F. W. Benson and Oliver P. Coshow, for the respondent.

406 WOLVERTON, J. This is an action by F. B. Waite, as executor of the estate of Fendal Sutherlin, deceased, against Kate Grubbe and her husband to recover possession of seven thousand eight hundred and eighty-five dollars in gold coin,

alleged to be the property of the estate of Fendal Sutherlin, deceased. The defendant Kate Grubbe claims to be the owner of the money, and to have acquired it by gift from the deceased. At the trial, all the evidence having been submitted, the circuit court, upon motion of the plaintiff, directed the jury to return a verdict in his behalf for the entire sum, and, judgment having been rendered accordingly, the defendants appeal.

407 Fendal Sutherlin died testate August 29, 1901, leaving an estate of the probable value of two hundred thousand dollars. The defendants are his daughter and her husband. Mrs. Grubbe testified, in substance, that she was with her father one week in May, during his last illness, and from the last of June or first of July to the day of his death, and attended upon him constantly; that he told her several times he intended to give her some money, as he had not done as much for her as for the other girls—had never sent her to school, or educated her, or given her any money; that late one night he observed that there was a swelling in his legs, and became apprehensive that it was going to his heart, and said to her: "I have ten thousand dollars buried on this place, and I want to give it to you. I am going to give it to you, and in the morning I will show you where it is buried"; and she continued in language following: "So in the morning he said for me to get a little bucket, and go to the garden, 'and I will come to the garden. I can take a little bucket along, and get some beans, and the rest will not suspicion what we are going for.' So I got a bucket and we went to the garden and I saw that he could not walk very far, so as we passed the smokehouse there was a box there, so I picked up the box and carried it along for him to sit on, and when we got a little ways he began to fall. So I got hold of him, and placed him on the box, and he sat there, and he pointed the place out to me and he said: 'I give this money to you. It is yours. But if I should get well, and want some of it, would you let me have it?' And I said: 'Yes, papa; if you get well you can have all of it. I will give it back to you if you get well.' He went then and pointed out the places there. He said, 'You know that old chicken-house down there in the hog lot,' and I said 'Yes,' and he said, 'I buried about two thousand dollars there.' He said: 'I dug 408 up one thousand dollars. I had the boys scrape the dirt away from the top of it, and haul it on the garden. They thought I was putting it on the garden, but I was having them take it away so I could get the money. Now,' he said, 'in the old

chicken-house across the creek, I buried two thousand dollars there. In some places there may be more, and in some places there may be less; but the next place, now,' he said, 'is the smokehouse. I buried two thousand dollars there, but I have strong suspicions someone found part of it.' Then he said: 'The next place is the water-closet. I buried two thousand dollars in there.' And he said: 'You know the garden, there. You see that Red June tree in the corner of the garden?' And I said 'Yes.' And he said: 'The second post this side of that tree is a tile ditch goes through there, and out this way there is a tile ditch goes through there'; and he says, 'I buried two thousand dollars there; one thousand dollars on each side of the ditch.' He said it was mine; he gave it to me; he wanted me to have it. . . . He talked with me about it several times during his sickness. The next time, I think, that he mentioned it was when Mr. Waite and his wife came back over there, and he said not to tell anyone about this money." The witness further testified that her father told her to leave the money where it was unless he should rent the place, in which event she should get what was in immediate danger of being found, but he said to leave the other where it was for safekeeping and get it as she needed it; and that she left the money there on the premises on the advice of her father. Benton Myers testified that Sutherlin some time in July, about six weeks prior to his death told him that Kate, who was present at the time, was a noble woman; that he had not provided for her as well as he had for the other girls, and that he intended to pay her for staying with him—to give her something before he died; that he was so bad off after that he did not talk about the matter, but that at one time prior he said he expected to make Kate a ⁴⁰⁰ present of enough money before he died to make her even with the other girls. It was further shown that about the time of the transaction Sutherlin was very feeble, and was soon confined to his bed, from which he was never able to arise. Mrs. Grubbe did not possess herself of the money, or any part of it until some nine or ten months after the death of her father, when she and her husband and son found money at every locality pointed out to her as a place of concealment. This evidence was practically undisputed, and the question arises, Was it sufficient to carry the case to the jury? And that depends upon its sufficiency to support a gift.

1. The gift, if consummated, was manifestly made in the apprehension of death from an impending mortal affliction.

Two things are essential to a valid gift—the intent on the part of the donor to bestow the thing to be given upon the donee or object of his bounty, and a delivery, coupled with an acceptance on the part of the donee, express or implied. From the testimony of Mrs. Grubbe there can be no cavil touching the intent of her father to give her the money secreted at the different places disclosed and pointed out to her. His declarations were positive, signifying unmistakably a present gift or bestowal of the money upon her. His words were, “I give this money to you; it is yours,” and other expressions of like import, indicating a purpose to bestow the money presently and unconditionally. True, he said to her in the same connection, while pointing out the places of deposit, “If I should get well, and want some of it, would you let me have it?” and she replied, “Yes, papa; if you get well you can have all of it. I will give it back to you if you get well.” But this only emphasizes the purpose to give presently and effectually, as he made himself dependent upon her favor to let him have some money if he should get well, and be in need of it. He was manifestly laboring ⁴¹⁰ under the solemn conviction that he would never recover from his impending malady, and that he was making an absolute and final disposition of the money, and that in all human probability he would never be in want of any of it.

2. The intention to give being manifest (and this is tacitly conceded), the real controversy is whether there was a delivery of the money by the father to the daughter sufficient to meet the requirements of the law, and thereby to make the gift effectual. We held in *Liebe v. Battmann*, 33 Or. 241, 72 Am. St. Rep. 705, 54 Pac. 179, that, to constitute a delivery, “there must be a parting with the dominion over the subject matter of the pretended gift, with a present design that the title shall pass out of the donor and to the donee, and this so fully and completely, to all intents and purposes, that, if the donor again resumes control over it without the consent of the donee, he becomes a trespasser, for which he incurs a liability over to the donee, except after revocation of a gift *causa mortis*.” From the viewpoint of the donee, the principle is stated by Harper, C., in *Blake v. Jones*, Bail. Eq. 141, 21 Am. Dec. 530, 534, as follows: “That seems to be regarded as a sufficient delivery which would authorize the donee to take possession without committing a trespass.”

It is not necessary that there be a manual delivery, or an actual tradition from hand to hand. The delivery may be con-

structive or symbolical, but the general rule is that it must be as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit: 14 Am. & Eng. Ency. of Law, 2d ed., 1058; *Hillebrant v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757. Says Harker, P. J., in *People v. Benson*, 99 Ill. App. 325, 327: "An unequivocal declaration of gift, accompanied by a delivery of the only means by which possession of the article given can be obtained, is sufficient." The subject ⁴¹¹ of the gift in that case consisted of some notes that at the time were locked up in a safe in a shop where the donor had transacted business before being stricken with his last illness. Coupled with the situation of the notes was the declaration that he had given them to his wife in lieu of a certain policy of life insurance, and it was held sufficient to support the gift. In the language of Mr. Justice Ruggles: "The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it": *Harris v. Clark*, 3 N. Y. 93, 113, 51 Am. Dec. 352. Or, as was said by Mr. Justice Leonard, with more elaboration: "It is essential to a valid gift by parol that there should be an actual or symbolical delivery. The title does not pass unless possession, or the means of obtaining it, are conferred by the donor and accepted by the donee. The situation, relation and circumstances of the parties and of the subject of the gift may be taken into consideration in determining the intent to give and the fact as to delivery. A total exclusion of the power or means of resuming possession by the donor is not necessary": *Cooper v. Burr*, 45 Barb. 9. In that case the donor who was confined to her bed, delivered the keys of a bureau and some trunks kept in her room, with an unequivocal declaration that she gave to the donee all her property, and it was held to constitute a completed gift of the gold and silver coins and jewelry contained in the bureau and trunks. These principles and declarations of the law touching the manner of delivery essential to a completed and effectual gift have been many times applied: *Goulding v. Horbury*, 85 Me. 227, 35 Am. St. Rep. 357, 27 Atl. 127; *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246; *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Coleman v. Parker*, 114 Mass. 30; *Hagemann v. Hagemann*, 90 Ill. App. 251; *Stephenson's* ⁴¹² *Administrator v. King*, 81 Ky. 425, 50 Am. Rep. 173; *Gammon Theolog. Sem. v. Robbins*, 128 Ind. 85, 27 N. E. 341; *Fletcher v. Fletcher*, 55 Vt. 325; *Ross v. Draper*, 55 Vt. 404, 45 Am.

Rep. 624. Where the intent to bestow is obvious and clear, and the language and deportment of the donor indicate a belief upon his part that he has done all that is necessary to accomplish his purpose, they come to the aid of the act of delivery, if slight and ambiguous, but not to dispense with it as an essential element of a valid gift: Thornton on Gifts, sec. 148. And a delivery by a father to a child in pursuance of an intended gift may be established by less positive and unequivocal proof than is required where the fact is at issue between strangers: *Schwindt v. Schwindt*, 61 Kan. 377, 59 Pac. 647; *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 843.

Aided by these authorities and the principles and rules of law which they announce, we will determine whether the fact of delivery may be reasonably deduced from the facts in evidence. There was not a manual delivery or an actual transfer of the money from the hand of the father to the hand of the daughter. If there was a delivery at all, it was constructive. The manual possession was not in the father at the time, although he had it constructively, the money being deposited upon the premises then in his possession and under his control. The places of deposit were known to him only, and the secret was his protection from plunder. Being barely able to walk to the garden, a place apart from all other persons, he there imparted to his daughter the information as to the whereabouts of the money by pointing out to her definitely and particularly the several localities in which it was concealed, with a positive and unequivocal declaration that he gave it to her and that it was hers, cautioning her not to let anyone else know where it was, and advising her at the ⁴¹³ same time to leave it there until the place was rented or until she needed it. The delivery was as complete as the circumstances of the case would permit. He was physically unable to disinter the coins, and it was not advisable for the daughter to attempt to do so, as it might have led to a discovery of the deposits by others, and this he evidently deemed unnecessary for a full accomplishment of his undoubted purpose of bestowing the money upon his daughter. The taking of the money subsequently by her would not have been attended with the commission of a trespass, and the gift would assuredly have been complete if she had taken manual possession thereof during his lifetime. Was the delay in this respect a fatal oversight on her part? She accepted the money when he made his declarations of the gift to her, and it was so understood between them. It seems to us, therefore, that the

delivery was as perfect and complete as the nature of the property, the situation of the parties, and the circumstances of the case would permit. By imparting to the daughter the information as to the location of the deposits by specifically pointing them out to her, he, in effect, gave her the key to his safety vault—employing the very apt figure of speech of one of the counsel for appellants—whereby she was enabled to unlock it, and take the deposits therefrom. The vault was not in his immediate presence, nor could he safely or by reason of his physical infirmity, go to it, so that he could reach in and take the money and hand it to her, nor was it convenient or prudent for her to take it from out the vault at once, or prior to his decease, so that it remained there without molestation until removed as shown by the testimony, each of the parties believing without doubt that the gift was a thing fully accomplished. This, to our minds, was a good delivery, constructive though it was, and the property in the money passed to the daughter at the time, and henceforth it was her right ⁴¹⁴ to take it, and do as she liked with it. The case should, therefore, have gone to the jury for them to determine as to the credibility and weight of the testimony adduced by the parties to establish their respective contentions. The case of *Liebe v. Battmann*, 33 Or. 241, 72 Am. St. Rep. 705, 54 Pac. 179, in no wise conflicts with these views.

3. Nor can the defendants' claim of ownership of the money be regarded as a claim against an estate of a deceased person, within the meaning of section 1161, B. & C. Comp., requiring satisfactory evidence other than the testimony of the claimant to establish it. Reversed, and remanded for such other proceedings as may seem proper, and not inconsistent with this opinion.

To Constitute a Gift, there must be an intention to give, and a delivery, actual or constructive, of the thing given: *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19, 71 Pac. 83; *Getchell v. Biddeford Sav. Bank*, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895; *Liebe v. Battman*, 33 Or. 241, 72 Am. St. Rep. 705, 54 Pac. 179; *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, 55 N. E. 7; *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430, 78 N. W. 647. Actual manual delivery, however, is not necessary in all cases; but where the circumstances do not admit of other delivery, it may be symbolical or constructive: *Hillebrant v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757; *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, 22 N. E. 940; *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454, 85 N. W. 915. But while delivery may be by words, acts, or both combined, it is generally indispensable, whatever means are

employed, that the subject of the gift pass beyond the dominion and control of the donor: *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338; *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836. The delivery of a pass-book as a delivery of the bank deposit is considered in *McNamara v. McDonald*, 69 Conn. 484, 61 Am. St. Rep. 48, 38 Atl. 54; *Larrabee v. Hascall*, 88 Me. 511, 51 Am. St. Rep. 440, 34 N. W. 408; and the delivery of the key to a box or trunk as a delivery of its contents is considered in *Keepers v. Fidelity Title etc.*, 56 N. J. L. 302, 44 Am. St. Rep. 397, 28 Atl. 585; *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389.

A Gift from a Father to His Son requires less positive and unequivocal proof of delivery than does a gift between persons not related: *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 843.

Gifts Causa Mortis are discussed at length in the monographic note to *Johnson v. Colley*, post, p. 890.

BERGMAN v. INMAN.

[43 Or. 456, 72 Pac. 1086, 73 Pac. 341.]

LIS PENDENS.—A Purchaser of Personal Property During Litigation Respecting the Title or the Validity of a Lien Thereon takes the property subject to the rights of the plaintiff as settled by the final decree or judgment of the court. (p. 774.)

LIS PENDENS.—The Removal of Personal Property from the State Pending a Suit to Foreclose an Alleged Lien Thereon does not render the judgment in such state incompetent evidence in an action in the state to which the property was removed to prove the existence of the lien at the time of removal. (p. 775.)

RES JUDICATA.—Judgment Foreclosing a Lien, when Evidence in an Action for Removing the Property from the State and Rendering it Impossible of Identification.—If, during the pendency of a suit to foreclose an alleged lien on personal property consisting of logs, they are removed from the state and manufactured into lumber by one not a party to the suit, and judgment is subsequently entered for the plaintiff, he may afterward maintain an action in the state to which the property has been removed to recover the damages sustained by him by the violation of a statute of the state where the suit was pending in effecting such removal and rendering the property impossible of identification, and such judgment is admissible against the defendant in such action to establish the existence of such lien and to show that the plaintiff was damaged by such removal. (p. 775.)

CONFLICT OF LAWS.—Enforcing in One State a Cause of Action Arising in Another.—Where a right of action has become fixed, and a legal penalty has been incurred in one state, that liability may be enforced in any court in another state that has jurisdiction of such matters, and can obtain jurisdiction of the parties, if the

alleged cause of action is not contrary to the public policy of the state where the action is brought, nor against justice and good morals. (p. 775.)

LIMITATIONS, Statute of, in Actions for Doing Acts Forbidden by the Statutes of Another State.—In an action for removing logs from another state, and rendering their identification impossible, contrary to the provisions of its statutes, the cause of action is necessarily based on the acts done within that state, and the statute of limitations commences to run at such removal, and is not suspended by any act done in the state wherein the action was brought. (p. 776.)

ESTOPPEL BY DELAY or Laches.—One having a lien on logs and knowing that another has taken possession of them and rendered them impossible of identification, contrary to the provisions of a statute, is not estopped from maintaining an action under such statute, if commenced within the time allowed by the statute of limitations, by his long delay in commencing the action and his failure to institute some proceeding to enforce his lien. (p. 776.)

ELECTION OF REMEDIES, Right of.—One who has a lien on personal property, and also a right to recover damages from a person for removing it from the state and rendering it impossible of identification has a choice of remedies, and the defendant cannot complain, because the plaintiff pursues that to recover damages. (p. 776.)

LIMITATIONS, STATUTE OF, Pleading, when It Applies to a Part Only of a Cause of Action.—If the statute of limitations is pleaded to a whole cause of action, and it appears on the trial that the plea is good as to some only of the items for which plaintiff seeks to recover, such plea is not bad because interposed to the whole cause of action. (p. 778.)

Cake & Cake, for the appellant.

Reynolds & Stewart and Milton W. Smith, for the respondent.

457 BEAN, J. Under the statute of the state of Washington, every person performing labor upon or assisting in obtaining or securing sawlogs has a lien thereon for such work or labor, and "any person who shall injure, impair, or destroy, or who shall render difficult, uncertain or impossible of identification," any sawlogs upon which there is a lien, "without the express consent of the person entitled to such lien, shall be liable to the lienholder for the damages to the ⁴⁵⁸ amount secured by his lien, which may be recovered by a civil action against such person": Hill's Ann. Stat. & Codes (Wash.), sec. 1694. The plaintiff and various other persons performed work and labor for one Makarainen, in that state, at divers times between the 1st of May and the 29th of September, 1892, in obtaining and securing some five million feet of sawlogs. On October 1, 1892, they each filed a claim of lien with the auditor

of the proper county, as required by law. On the 27th of the same month, plaintiff, to whom the other lienholders had duly assigned and transferred their claims, commenced an action in the superior court of Lewis county against Makarainen to foreclose these various liens. On March 9, 1893, a final judgment was rendered in his favor and against Makarainen for two thousand eight hundred and fifty-eight dollars and seventy-five cents, decreeing a foreclosure of the liens, and that the logs therein described, amounting to about four million feet, should be sold to satisfy the judgment. The logs were in the state of Washington when the action was begun, but while it was still pending the defendant, under an alleged purchase from Makarainen, took possession of and brought into this state about one and one-half million feet thereof, which some months later were sawed and converted into lumber at its mill in Portland. After the defendant had taken possession of and removed the logs into this state, Makarainen assigned and transferred his account therefor to Fleckenstein & Mayer, who, on the 26th of April, 1893, commenced an action against the defendant to recover the contract price thereof. Such action resulted in a judgment in their favor for the amount found due and owing thereon, which judgment, it is alleged, has been fully paid and satisfied. On the 26th of January, 1899, this action was brought against the defendant to recover the damages alleged to have been sustained by plaintiff on account of its violation of the statute of Washington in removing the logs from that state and rendering them impossible of identification, ~~also~~ without the consent of the plaintiff lienholder. The several provisions of the statute of Washington with reference to loggers' liens and the methods of procedure thereunder are set out in full in the complaint. The verdict and judgment being in favor of plaintiff, the defendant appeals, assigning as error (1) the admission in evidence of the judgment-roll in the action brought by the plaintiff against Makarainen in the superior court of Lewis county, Washington, to foreclose the loggers' liens against the property in controversy; (2) the refusal of the trial court to instruct the jury that the statute of limitations is a bar to the cause of action for all logs taken by the defendant in the state of Washington and removed into this state prior to January 27, 1893; and (3) in refusing to charge that, if the plaintiff permitted defendant, after taking the logs from the boom in Washington, to saw them into lumber or if the defendant held them after such taking a sufficient length of

time to permit the plaintiff to protect his rights by a foreclosure of his lien, he cannot recover.

1. It is urged that the judgment-roll was not admissible in evidence, because the defendant was not a party to that action, and because the logs were removed from the state of Washington prior to the rendition of the judgment. As already stated, the defendant took possession of the logs under an alleged purchase from Makarainen in Washington, after the commencement of the action in that state to foreclose the liens thereon; and it is common learning that a purchaser of real or personal property pending litigation concerning the title or the validity of a lien thereon takes the property subject to the rights of the plaintiff as settled by the final decree or judgment of the court: *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537; *Houston v. Timmerman*, 17 Or. 499, 11 Am. St. Rep. 848, 21 Pac. 1037; 2 *Black on Judgments*, 2d ed., sec. 550; *Richardson v. Petersen*, 58 Iowa, 724, 13 N. W. 63; *Diamond v. Lawrence* ⁴⁰⁰ County, 37 Pa. St. 353, 78 Am. Dec. 429; *Fletcher v. Ferrel*, 9 Dana. 372, 35 Am. Dec. 143; *McCutchen v. Miller*, 31 Miss. 65, 88. The defendant's counsel do not seriously controvert this rule, but seek to make a distinction between an action of tort to recover damages for a violation of the Washington statute and a suit to foreclose plaintiff's lien on the logs. It is admitted, if we understand correctly, that in a suit to foreclose the plaintiff's lien in this state the decree of the Washington court would be conclusive, because the proceeding in that state was quasi in rem; but, since this is an action in tort, to recover damages for destroying the identity of the property to which the lien attached, the judgment can have no such effect. An essential element in this case, and one necessary for the plaintiff to establish, was the existence of his lien at the time the logs were taken from the state of Washington by the defendant. The defendant purchased and took possession of the property subject to the lien in favor of the plaintiff during the pendency of the foreclosure suit, and is therefore bound by the decree therein, so far as it determined the existence of the lien. "The law is," says the supreme court of the United States, "that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset": *Tilton v. Cofield*, 93 U. S. 163, 168. It can make no difference in this respect whether the action here is to foreclose the lien or to recover damages under the statute for destroying the

identity of the property covered by it. It was incumbent upon the plaintiff to prove the existence of the lien at the time the property was taken by the defendant, and the judgment rendered in Washington was competent evidence for that purpose. Nor did the removal of the property from that state prior to its rendition render it incompetent. The decree established ⁴⁶¹ the fact that at the time the property was removed by the defendant the plaintiff had a lien thereon. As the property was removed from the state prior to its rendition, the decree could not fix a lien thereon at its date, because the court did not have jurisdiction of the property (*North Pac. Lumber Co. v. Lang*, 28 Or. 246, 261, 52 Am. St. Rep. 780, 42 Pac. 799); but it judicially determined that there was a lien on it when it was removed, and that was sufficient in this action. This is not a suit to foreclose the lien, or to enforce the judgment of the Washington court. It is an independent action on a liability created by a statute of that state, based upon the contention that the defendant removed property upon which plaintiff had a valid lien, and destroyed its identity. The question as to what property was affected by the decree and ordered sold to satisfy the plaintiff's judgment is therefore immaterial.

2. The evidence tended to show that a portion of the logs in controversy was taken by the defendant from the state of Washington and brought into this state prior to the twenty-seventh day of January, 1893, more than six years before the commencement of the present action. The defendant requested the court to instruct the jury that the action was barred by the statute of limitations as to all logs taken by the defendant prior to the date mentioned. This is an action for tort, alleged to have been committed in the state of Washington, and not for one committed in this state. Where a right of action has become fixed and a legal liability incurred in one state, that liability may be enforced in any court of another state that has jurisdiction of such matters and can obtain jurisdiction of the parties, if the alleged cause of action is not contrary to the public policy of the state where the action is brought, nor against justice or good morals: *Aldrich v. Anchor Coal Co.*, 24 Or. 32, 38, 41 Am. St. Rep. 831, 32 Pac. 756; *North Pac. Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799; ⁴⁶² *Dennick v. Railroad Co.*, 103 U. S. 11, 18. This is on the principle of comity, and because the right of action is entitled to recognition everywhere.

3. But it necessarily follows from this principle that such right must have accrued in the state where it is alleged to have arisen. The action cannot be grounded upon acts done in the state where it is commenced. The law of the place where the right was acquired or the liability incurred will govern as to the right of action. All that pertains merely to the remedy will be controlled by the law of the state where the action is brought: *Herrick v. Minneapolis etc. Ry. Co.*, 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413. Now, as this is an action to enforce in the courts of this state a liability created by a Washington statute, the right of action, if it exists at all, must have accrued in that state. No cause of action can arise here for a violation of a Washington statute, as it has no extraterritorial effect; and no act committed here can give rise to such a cause of action, since it cannot be a violation of such a statute. The cause of action sought to be enforced must, therefore, have accrued when the logs were taken from the state of Washington by the defendant, and the plaintiff's argument is not sound that it did not accrue until five or six months later, when the logs were sawed into lumber at its mill in Portland. The instruction, therefore, that the action is barred as to all logs taken from the state of Washington by the defendant more than six years prior to the commencement of the present action is sound law, and should have been given.

4. There is, so far as we can understand the record, no merit in the contention of the defendant that the plaintiff has by his conduct waived his right of action against it for a violation of the Washington statute, or that he is estopped from prosecuting such action. The fact that he knew defendant had taken possession of the logs and removed ⁴⁰³ them into this state, and did not commence some proceeding to enforce his lien thereon, could not operate as an estoppel against the prosecution of an action for the tort. He was entitled under the statute to proceed against the defendant to recover such damages, if any, as he may have sustained by reason of its taking and removing the logs into this state and converting them into lumber, independent of his right to foreclose his lien thereon. He had a choice of remedies, and the defendant cannot complain because he chose one rather than the other.

It follows, however, from the views hereinbefore expressed, that the judgment of the court below must be reversed, and a new trial ordered.

ON MOTION FOR REHEARING.

BEAN, J. Counsel for plaintiff, in their petition for a rehearing, insist for the first time that the instruction relating to the statute of limitations, for the refusal to give which the judgment was reversed, is erroneous, and was properly refused, because it assumed as established facts which were disputed. They presented no such question at the argument or in their briefs, although an issue thereon was tendered by the appellant in its brief. We therefore very naturally assumed, as we were clearly justifiable in doing, that the instruction was proper, and should have been given, unless plaintiff's contention was sound that the right of action "accrued when the logs were cut up by the appellant in this case, rendering them impossible of identification, alleged in the complaint to be about May 10, 1893, but the proofs show they were cut up in June, 1893." Ordinarily we should be disposed to let the question rest here. However, in order to avoid the possibility of injury to the plaintiff, we have again examined the record, from which ⁴⁰⁴ it clearly appears that there is no ground in fact for the criticism of the instruction. The bill of exceptions recites that "all the testimony showing the various quantities and dates" of the removal of the logs from the state of Washington by the defendant is contained therein. The logs were removed from the boom of the Cowlitz & Columbia River Boom Company. One Banks was an employé of the boom company during the time, and scaled the logs. He testified that he saw them in the raft of the defendant at the time, and "scaled them there." He made a memorandum at the time of the date and the quantity of logs scaled in each raft, and testified in detail concerning that matter at the trial. He said the logs were taken from the boom, but he did not know when or by whom. Mr. Poulsen, one of the officers of the defendant corporation, testified, however, that "we took them [the logs] away as quick as they were rafted," and "they were taken away as they were rafted; they were taken away at that time." Mr. Dodd, who was the president of the boom company, testified that "they [the logs] were delivered as they were rafted, during January, February, and March, 1893." All this testimony stands uncontradicted, and it appears therefrom that Banks scaled the logs after they were put in the raft of the defendant company, and that it took them away as soon as they were scaled. Under the testimony given, therefore, there was no error in the instructions assuming as an established fact that a certain

definite quantity of logs was taken by the defendant from the state of Washington after January 23, 1893.

5. Nor is there any merit in the point made in the petition, also for the first time, that the defense of the statute of limitations is insufficient because it only applies to a portion of the logs taken. There is an old rule of the common law that, if a defense is set up as an answer to the whole cause of action, while it is in fact only a partial defense, ⁴⁶⁸ it will be held bad on demurrer, although it would be admissible as a partial defense if properly pleaded: Pomeroy on Code Remedies, 3d ed., sec. 608. In this case, however, the complaint sets up but one cause of action, alleged to have accrued on or about the tenth day of March, 1893. The plea of the statute of limitations was interposed as a defense to this cause of action. If it appeared upon the trial that a portion of the logs was taken more than six years prior to the commencement of the action, the defendant is entitled to the benefit of such defense, so far as it is applicable to the facts.

The petition for rehearing is denied.

The Law of Lis Pendens as applied to personal property is considered in the monographic note to *Stout v. Phillipi Mfg. etc. Co.*, 56 Am. St. Rep. 862-864.

The Comity of One State will enforce the law of another when such enforcement neither violates its own laws, nor infringes the rights of its own citizens: *Derringer v. Derringer*, 5 Houst. 416, 1 Am. St. Rep. 150; *North Pac. Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799. See, also, *People v. Martin*, 175 N. Y. 315, 67 N. E. 589, 96 Am. St. Rep. 628, and cases cited in the cross-reference note thereto; *McGiinnis v. Missouri Gas etc. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553, 73 S. W. 586.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

LYONS v. LYONS.

[207 Pa. St. 7, 56 Atl. 54.]

PARTNERSHIP—Liability of Partners to Each Other.—If a loss sustained by a partnership is imputed to the conduct of one partner more than to that of another, yet, if the former acted bona fide with a view to the benefit of the firm, and without culpable negligence, the loss must be borne equally by all. (p. 781.)

PARTNERSHIP—Liability of Partner for Uncollected Debt.—A partner cannot be charged with a debt due the firm at the time of its dissolution, if, at that time, and thereafter, the debtor was insolvent, and it is not shown that such debt could have been collected by legal process, or that there was any request for the institution of a suit for its collection or for the appointment of a receiver. (p. 781.)

PARTNERSHIP—Attachment Proceedings Between Partners—Indemnity.—A liquidating partner summoned in attachment proceedings against his copartner cannot be required to pay over any money to his former partner until the attachment is determined or he is given protection by a satisfactory bond of indemnity. (p. 782.)

J. G. Johnson and E. Rosenberger, for the appellant.

G. D. Crawford, for the appellee.

• **POTTER, J.** Elizabeth J. Lyons filed a bill against J. Harry Lyons and Samuel Simpson alleging partnership between herself and the defendant, Simpson. The court below found that there was a partnership and ordered an accounting, and on appeal the decree was affirmed by this court in *Lyons v. Lyons*, 199 Pa. St. 302. The case was referred to Benjamin Daniels, Esq., as master to state an account, and the present appeal is taken from the decree of the court below, dismissing exceptions to the report of the master, who found a balance

of \$35,024.69 with costs to be due by the defendant Simpson to complainant.

The main question raised by the appeal is whether the master was in error in charging against the defendant one-half of a claim against Duncan & Co. which had not been collected. The facts in regard to the Duncan claim as gleaned from the report of the master are as follows:

The firm of A. L. P. Duncan & Co. were manufacturers of glazed kid, and purchased nearly all their skins from Samuel Simpson & Co. The firm consisted solely of Ada L. P. Duncan, who was the wife of John A. Duncan. The latter had failed in business, and was unable to do business in his own name. He acted as manager for his wife, continuing ¹⁰ the same business after his failure. The firm was practically without credit, but effected an arrangement with J. Harry Lyons, who was then manager for Samuel Simpson & Co., to furnish them with skins.

When the latter firm was dissolved March 18, 1899, Duncan & Co. was indebted to them in the sum of \$21,884.79, and had also given drafts and notes amounting to \$5,338.85, upon which Simpson & Co. were indorsers, and which had not yet matured. After the dissolution of his firm, Samuel Simpson, the defendant, continued to supply goods to Duncan & Co., but credited the payments made by them upon account of the goods so furnished.

No part of the indebtedness which existed March 18, 1899, has been paid except by dividends from Duncan's bankrupt estate. The notes and drafts, however, amounting to \$5,338.85, were paid in full by Duncan when they became due. On December 23, 1899, Duncan gave Simpson a judgment note for \$5,200 in payment of a balance on a new account, and on May 30, 1900, judgment was entered upon this note and execution issued. Thereupon Mrs. Duncan filed her petition of involuntary bankruptcy.

The only evidence offered to establish ability on the part of Duncan to pay the indebtedness to Simpson & Co. was a statement made by Duncan to Simpson about July 1, 1899, which showed assets in excess of liabilities to the amount of \$5,915.62. but this statement was shown to be erroneous in several important particulars, and when corrected, it indicates that Duncan & Co. were then insolvent.

Upon the facts thus shown, we do not see that it would have been possible for Simpson to have collected the debt from Duncan & Co. had he begun proceedings against them at any time

after March 18, 1899. Any such attempt upon his part would probably have had the same result as the effort made a year later, when Mrs. Duncan took advantage of the bankruptcy law. As it was, through the good management of Simpson, the indebtedness of Duncan & Co. was reduced by the payment of their notes in the sum of \$5,338.85, and Mrs. Lyons was benefited to that extent. Simpson was equally interested with her in the collection of the debt, and his own interest would certainly prompt him to secure it if possible.

¹¹ We see no fair reason to criticise his business management. He can only be held liable for the loss, if any, upon proof that he has been culpably negligent. "Even if a loss sustained by a firm is imputed to the conduct of one partner more than to that of another, still, if the former acted bona fide with a view to the benefit of the firm, and without culpable negligence, the loss must be borne equally by all": Lindley on Partnership, *368.

In a New Hampshire case (cited as authority on another point by Mr. Justice Sharswood in *Gyger's Appeal*, 62 Pa. St. 73, 1 Am. Rep. 382), it was sought to charge a partner, on settlement of the partnership accounts, with sums due the firm from several debtors, which he had not collected. The court said: "We have found no authority that will justify the court in charging the plaintiff with these demands (as if he had collected them) by reason of his neglect, and without an authority we are not prepared to adopt the principle. The defendant (the other partner) might also have instituted suits for their collection; and if the plaintiff had then released them, or withheld the evidence, perhaps that would have been sufficient. A release would have been good evidence that he had received the amount. A receiver might have been appointed to collect the demands": *Hollister v. Barkley*, 11 N. H. 501, 511.

In the present case if the claim against Duncan & Co. was at any time collectible, Mrs. Lyons had a right to institute suit in the firm name, or she might have asked for the appointment of a receiver. She did neither, nor did she in so far as the evidence shows, even request Simpson to bring suit. As this indebtedness existed while J. Harry Lyons was still managing the business, and no attempt to collect it was made by him, or his mother, it is fair to presume that in their judgment the loss could not have been avoided at that time by adverse proceedings against Duncan & Co. The evidence of negligence on the part of Simpson in the collection of the Duncan claim was insufficient to warrant the master in charging him with any portion

of the amount. If there was any evidence of negligence upon his part, it was certainly not sufficient to show what portion, if any, of the claim was lost through the negligence of Simpson. It was a mere conjecture upon the part of the master that the loss was fifty per cent of the entire amount.

¹²⁹ When the case was here before, upon an appeal from the interlocutory decree, it was ordered that there should be no final decree for the payment of the balance found due by Simpson until the attachment then pending against him as garnishee of J. Harry Lyons had been finally determined. We understand those proceedings have now been disposed of, but that during the accounting before the master, another attachment was served upon the defendant Simpson as garnishee of J. Harry Lyons. This attachment is still undetermined. Payment under the decree of the court below should, therefore, not be required until the attachment now pending is determined or until the defendant Simpson is properly protected against any liability thereunder by a satisfactory bond of indemnity.

The assignments of error are sustained in so far as they relate to the action of the court below in charging the defendant with the sum of \$5,471.19 for the disputed Duncan & Co. debt, and with interest upon that amount in the further sum of \$1,066.87. These amounts aggregating \$6,538.06 should be deducted from the amount of the decree as entered by the court below. This will reduce the amount of the finding to \$28,486.63.

As thus modified the decree is affirmed, and this appeal is dismissed at the cost of the appellee, Elizabeth J. Lyons.

POTTER, J. Upon a motion for a reargument in this case, our attention has been called to the fact that the amount found by the master does not include the share due to the plaintiff of the dividends received by Mr. Simpson for the firm from the receiver in bankruptcy of Duncan & Co. The order of affirmance is therefore modified by referring the ascertainment of this amount to the court below with leave to alter the amount of the decree to that extent. With this modification, the motion for reargument is refused.

As to the Liability of a Partner to his copartner for negligence, see *Yorks v. Tozier*, 59 Minn. 78, 50 Am. St. Rep. 395, 60 N. W. 846; *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, 39 Pac. 713. As to such liability for dishonest practices injuring the firm business, see *Boughner v. Black*, 83 Ky. 521, 4 Am. St. Rep. 174. And as to such liability for misappropriating partnership funds, see *Davies v. Atkinson*, 124 Ill. 474, 7 Am. St. Rep. 373, 16 N. E. 899; *Holmes v. Gilman*, 138 N. Y. 369, 34 Am. St. Rep. 463, 34 N. E. 205.

ERDMAN v. MITCHELL.

[207 Pa. St. 79, 56 Atl. 327.]

CONSPIRACY—Trade Unions—Injunction.—An agreement by a number of persons that they will, by threats of a strike, deprive a mechanic of the right to work for others, merely because he does not choose to join a particular trade union, is a conspiracy to do an unlawful act which may be restrained by injunction. (p. 785.)

CONSTITUTIONAL LAW—Rights of Laborers.—A constitutional right to the free use of his hands is the workman's property, and the right of thus acquiring property is his inherent, indefeasible right to exercise which he must have the unrestricted privilege of working for such employer, and at such wages as he chooses. This is a right of which the legislature cannot deprive him—one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect. (p. 787.)

CONSPIRACY by Trade Unions.—A conspiracy is a combination by two or more persons by some concerted action to accomplish an unlawful purpose, and may consist in a combination of two or more trade unions to deprive a mechanic or workman of work by force, threats, or intimidation of any kind. (p. 787.)

TRADE UNIONS—Rights and Liabilities.—Trade unions may cease to work for reasons satisfactory to their members, but if they combine to prevent others from obtaining work, by threats of a strike, or combine to prevent an employer from employing others by threats of a strike, they combine to accomplish an unlawful purpose, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the indefeasible right of labor to acquire property which courts are bound to restrain. If such combination is in accord with the law of trade unions, then that law and the organic law of the people cannot stand together, and the former must fall. (p. 188.)

A. Simpson, Jr., and F. S. Brown, for the appellants.

D. Lavis, for the appellee.

⁸⁷ DEAN, J. We have before us the somewhat unusual case of two warring trades unions invoking the law for the settlement of their respective rights and the determination of their legal conduct in carrying out the purpose of their respective organizations. From the facts found by the court below it appears that plaintiffs are journeymen plumbers, residents of Philadelphia, and members of an incorporated society chartered by act of assembly under the name of "The Plumbers' League of the City of Philadelphia." The defendants are members of an unincorporated association known as "The Council of Allied Building Trades of Philadelphia and Vicinity." This association is composed of delegates from different, separate and subordinate building trade unions in the city. Its theory of or-

ganization is, that there should be an affiliation of all trades unions throughout the city and the world, to the end that "competition shall be replaced by unity of action," and that workmen who make the profits of all industry possible should, as intelligent men, move and organize. The scope of their organization is indicated by this invitation: "We earnestly invite all organizations of workmen engaged in the building trades to join us in our permanent ^{ss} efforts to build a permanent edifice until there shall be no man in working trades that does not own allegiance to the Council of the Allied Building Trades of the City of Philadelphia." The Plumbers' League of Philadelphia, to which plaintiffs belonged, did not accept this invitation; it never became a member of the Allied Building Trades Council.

In April, 1901, a building was in course of erection at the corner of Third and Chestnut streets, known as the "Mariner and Merchant Building." The general contractors for it were W. A. & E. A. Wells; under them as subcontractors for the plumbing and gasfitting were Hoban & Doyle; the latter were the employers of plaintiffs, who were journeymen plumbers; no one of the defendants was employed on or about the building. At the same time there were a number of other workmen employed on the building engaged in other trades, such as steamfitters, painters, etc., who were nonunion men. While the work was thus progressing the Council of the Allied Building Trades ordered a strike of all workmen engaged at the building who were affiliated with the council. The reason given for ordering the strike was, that workmen were employed on the building who were nonunion men, and plumbers belonging to a society not affiliated with the Council of Allied Trades. Previous to the strike, defendants had tried to induce plaintiffs to join them, but plaintiffs had refused. Under the strike order two-thirds of the men then employed on the building quit work. While the strike was on, defendants called upon the manager for the general contractors and told him that if plaintiffs were removed the strike would be called off; the result was a writing, whereby it was agreed that if plumbers of the United Association of Journeymen Plumbers and all other workmen on the building had in their possession the working cards of their respective unions for the current quarter, no other strike would be declared until the completion of the building. This was signed by the general contractors and the representatives of the Allied Building Trades. The members of the United Association of Plumbers, authorized to work, were members of an association

affiliated with the Council of the Allied Building Trades. The contractors carried out their agreement and discharged the plaintiffs from work on that building; then the strike was declared off. ⁸⁹ Other workmen on the building, although non-union men, were not discharged and continued work. About this time, representatives of the Plumbers' League, to which plaintiffs belonged, had an interview with Mitchell, one of the defendants, and secretary of the Council of the Allied Trades, and Mitchell informed them that the Allied Trades intended to pursue the same course in future, and to drive every plumber in Philadelphia into the United Association of Journeymen Plumbers, one of the Allied Trades. By this conduct of defendants, plaintiffs have been unable to secure any steady employment at their trade, and will have to enter one of defendants' unions or leave the city.

The court below was of opinion that in so far as defendants, in furtherance of the purposes of the Council of the Allied Building Trades, undertook, by intimidation of plaintiffs and their employers, to coerce the plaintiffs into joining their organization or any particular organization, and by such action caused the workmen to suffer damage, such action was unlawful and ought to be restrained by equity. This conclusion is correct. This is not an indictment for a statutory offense nor for a common-law conspiracy, which last the legislature by acts of 1872, 1876 and 1891 has practically abolished; it is a suit in equity to restrain an unlawful act. It is argued by appellees' counsel that an act may be clearly unlawful although not the subject of criminal prosecution; that an agreement by a number of persons that they will by threats of a strike, deprive a mechanic of the right to work for others merely because he does not choose to join a particular union, is a conspiracy to commit an unlawful act, which conspiracy may be restrained.

We do not question that defendants may, under their constitution and rules, resolve that they will not work with members of other organizations or with nonunion men and act accordingly; that is their right, and their organization, when the conduct of its members is limited to refraining from work themselves according to such resolution, is not unlawful. But it is manifest, from the findings of fact and the testimony, that defendants went far beyond this. The contractors undertook the erection of a large and expensive building; they employed a large number of men skilled in all branches of the building

trades, a majority of whom were members of defendants' ²⁰ union. No notice was given by the organization to the contractors that their members would not be permitted to work on the same building with members of plaintiffs' union or with non-union men; after the building had progressed until it had reached what may be called its critical stage, a strike was ordered of all the workmen affiliated with defendants' union and two-thirds of all at work quit. After the strike, negotiations for calling it off were opened between the manager for the contractors and defendants, and the result was the agreement with their union heretofore noticed; then followed the discharge of plaintiffs from work on that building and then an interview between the president of plaintiffs' union and the secretary of defendants'; the latter told the president that the Allied Trades intended to pursue the same course as at the Mariner and Merchant Building on every building in the city, for the purpose of driving every plumber into a union affiliated with the Allied Trades. This evidence would have established a criminal conspiracy at common law; concede that it would not, under our present legislation, now establish it, nevertheless it is still an unlawful act. There was no complaint as to wages by any of the workmen on the building when the strike was declared; all wanted to work and their employers wanted them to work. But these defendants who did not work on the building had a grievance; plaintiffs refused to and would not join defendants' union; they must be driven to joining it by threats of loss of work, and their employers must be compelled to aid defendants by threats of loss of money on their contract.

This is so plain that it is a waste of time to more than state the facts to convince that the conduct of defendants was calculated to intimidate both employes and employers, and consequently was unlawful. The frightened employers, to avoid further loss, yielded; the plaintiffs did not yield, and to prevent further intimidation of those who would otherwise employ them, they seek by this suit to restrain defendants from future acts of intimidation.

The first article of the constitution says: "That the general great and essential principles of liberty and free government may be recognized and unalterably established, we declare that all men are born equally free and independent, ²¹ and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing

and protecting property and reputation and of pursuing their own happiness." Then follows the conclusion of this section: "Everything in this article is excepted out of the general powers of the government and shall forever remain inviolate." This clause, unlike many others in the constitution, needs no affirmative legislation, civil or criminal, for its enforcement in the civil courts. Wherever a court of common pleas can be reached by the citizen, these great and essential principles of free government must be recognized and vindicated by that court, and the indefeasible right of liberty and the right to acquire property must be protected under the common-law judicial power of the court. Nor does it need statutory authority to frame its decrees or statutory process to enforce them against the violators of constitutional rights.

The right to the free use of his hands is the workman's property as much as the rich man's right to the undisturbed income from his factory, houses and lands; by his work he earns present subsistence for himself and family; his savings may result in accumulations which will make him as rich in houses and lands as his employer. This right of acquiring property is an inherent indefeasible right of the workman; to exercise it he must have the unrestricted privilege of working for such employer as he chooses at such wages as he chooses to accept. This is one of the rights guaranteed him by our "Declaration of Rights"; it is a right of which the legislature cannot deprive him, one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect. The one most concerned in jealously maintaining this freedom is the workman himself.

A conspiracy is the combination of two or more persons by some concerted action to accomplish an unlawful purpose. It is unlawful to deprive a mechanic or workmen of work by force, threats or intimidation of any kind; a combination of two or more to do the same thing by the same means is a conspiracy. That by the legislation referred to such conspiracy is no longer criminal does not render it lawful. At common law the courts held that such combination was so prejudicial to the public interests ²² and so opposed to public policy as rendered it punishable criminally; but the legislature, which generally determines what is and what is not public policy, has declared that it is no longer a crime or misdemeanor. But this is as far as it has gone, it is as far as it could go without abolishing the Declara-

tion of Rights; to do that the whole people of the commonwealth must be directly consulted and they must give assent. For while the plain implication from the declaration is that the power to limit this indefeasible right rests solely with the people, yet when they adopted the constitution of 1874, with an extreme of caution they expressly said, "Everything in this article is excepted out of the general powers of government and shall forever remain inviolate." That is, shall forever remain with the people; they will not trust their own legislature with power to minimize or fritter it away, much less a trades union. If the legislature to-day abolished indictment for willful and malicious trespass, or abolished the writ of estrepement, to-morrow courts of equity would still be bound under the Declaration of Rights to protect the citizen in the peaceable possession and enjoyment of his land, even if to do so they were compelled to imprison the lawless trespasser who refused to obey their writs. So the same courts are still bound to protect the humblest mechanic or laborer in his right to acquire property.

Trades unions may cease to work for reasons satisfactory to their members, but if they combine to prevent others from obtaining work by threats of a strike or combine to prevent an employer from employing others by threats of a strike, they combine to accomplish an unlawful purpose, a purpose as unlawful now as it ever was, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the indefeasible right of labor to acquire property which courts are bound to restrain. It is utterly subversive of the letter and spirit of the Declaration of Rights. If such combination be in accord with the law of the trades union, then that law and the organic law of the people of a free commonwealth cannot stand together; one or the other must go down.

It is argued defendants, either individually or by organization, have the right, now, to peaceably persuade plaintiffs and others not to work and their employer not to hire them; ^{as} so they have. It is further argued that they can quit work when they choose; so they can. But neither of these suggested cases is the one before us.

Here a strike on a large building was declared because plaintiffs would not join a particular society; the declared purpose of the strike was to cause loss of employment to plaintiffs because they would not join the Allied Building Trades, chose to remain faithful to their own union, the Plumbers' League; the

Allied Trades would not declare the strike off, and permit work on the buildings to proceed until the employers entered into contract, practically stipulating that they would discharge plaintiffs and not re-employ them. It is not important that apt language precisely expressing the threat should have been used; the meaning of their declarations and acts was well understood by all parties. The men lost their work; the employers after a damaging stoppage were permitted to proceed because they yielded to the threat, that is, they were intimidated because they feared further loss. How absurd it is to call this peaceable persuasion, and how absurd to argue that if the law attempts to prevent it the right of the workmen to organize for their common benefit is frustrated. And then, what about the right of the Plumbers' League to organize for the common benefit of its members of whom the plaintiffs are a part? The declared purpose of the Allied Trades is by these acts to absorb this union and thereby destroy it. Under no possible view of the conduct of defendants was it lawful. The opinion of the superior court of Massachusetts (*Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011), on a case much like this, expresses the manifest deduction from these facts:

"The manifest object of the defendants was to have all the members of the craft subjected to the rules and discipline of their particular union in order that they might have better control over the whole business, and to that end they combined and conspired to get the plaintiffs and each of them to join the defendant association, peaceably if possible, but by threat and intimidation if necessary. . . . The right involved is the right to dispose of one's labor with full freedom. This is a legal right and is entitled to legal protection. . . . The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business and molested and disturbed them in their efforts to work at their trade. It is true they committed no acts of personal violence or physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat however, there was plainly that which was coercive in its effort upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would force man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like these."

In that case the injunction was awarded as it was here. 1 Eddy on Combinations, 416, says: "The courts recognize the right of workmen to combine together for the purpose of bettering their condition, and in endeavoring to attain their object they may inflict more or less inconvenience and damages upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage inflicted upon the employer is the same; but in the one case the means used are to obtain a legitimate purpose, namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party; and while it may be argued that indirectly the discharge of the nonunion employé will strengthen and benefit the union and thereby indirectly benefit the union workmen, the benefit to the members of the combination is so remote, as compared to the direct and immediate injury inflicted upon the nonunion workmen, that the law does not look beyond the immediate loss and damage to the innocent parties to the remote benefits that might result to the union."

And so, as already intimated, it comes simply to the question. Shall the law of an irresponsible trades union, or shall the organic law of a free commonwealth, prevail? We answer every court of the commonwealth is bound to maintain the latter in letter and spirit.

The learned judge of the court below has so framed his decree ^{as} that it is directed only against the unlawful acts. If there be disobedience or evasion of it, he thoroughly understands how to enforce it.

All the assignments of error are overruled and the decree is affirmed at costs of appellants.

The Action of a Labor Union and its walking delegates in causing the discharge of certain workmen by threatening their employers with a strike is not unlawful when the object is restricted to obtaining employment for the members of such union: *National Protective Assn. etc. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369. But a general scheme of a union to compel the members of another union to desert it, and become members of the former, and if necessary to that end, to threaten employés and cause them to believe that there will be trouble if they continue their employment unless the members abandon their union and join the other, is held unlawful and enjoined in *Plant v. Woods*, 176 Mass. 492, 79 Am.

St. Rep. 330, 57 N. E. 1011. As to the right to an injunction against the enticing of apprentices to join a labor union, see *Flaccus v. Smith*, 199 Pa. St. 128, 85 Am. St. Rep. 779, 48 Atl. 779. As to the constitutional right of an employer to discharge an employé on the ground that he belongs to a union, see *State v. Kreutzberg*, 114 Wis. 530, 91 Am. St. Rep. 934, 90 N. W. 1098. And as to the right to an injunction against a boycott of employers by a union, see *Marx v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, 67 S. W. 391.

LEITZ v. HOHMAN.

[207 Pa. St. 289, 56 Atl. 868.]

JUDGMENTS—Setoff—Equity.—The setoff of one judgment against another is not a legal right, but is allowed by courts under their inherent powers in the administration of justice, and is governed by the principles of equity. (p. 791.)

JUDGMENTS—Setoff of.—If judgments are both founded on contract, *prima facie*, the setoff of one against the other should be allowed, and the same presumption should prevail where one or both judgments may be in tort, but of a kind, such as damage from negligence, which does not involve the element of willful injury, but if one judgment is in contract, and the other in tort, which implies intent to injure, the presumption is against a setoff, and the person asking for it, especially if the tort-feasor, must show some equity in its favor. (p. 792.)

JUDGMENTS—Setoff of.—If two judgments are in contract, or two judgments are in tort, the element of priority in time is generally of importance on the question of setoff, but each case is to be determined on its own circumstances and merits viewed by the eyes of a chancellor in equity. (p. 793.)

JUDGMENTS—Setoff of—Practice on Appeal.—The decision of a lower court refusing to set off one judgment against another, may be reviewed on appeal, and such an appeal brings up the whole case for consideration on its merits. (p. 793.)

JUDGMENTS—Setoff of.—A judgment for slander cannot be set off against a former judgment in contract, unless there is some equity which demands it. (pp. 793, 794.)

J. W. Brown and D. McMullan, for the appellant.

I. C. Arnold and B. F. Davis, for the appellee.

²⁰¹ MITCHELL, C. J. It is settled and unquestionable law that the setoff of one judgment against another is not a legal right even under our defalcation act, but is allowed by the courts under their inherent powers in the administration of justice and is governed by the principles of equity. In *Wellock v. Cowan*, 16 Serg. & R. 318, it is said *per curiam*: "Setoff had no existence at the common law, relief being had only in equity. Since the statute this branch of chancery jurisdiction has not been

exercised where relief might be had at law; although for a particular equity not provided for, chancery will go beyond the statute, and allow of what is called an equitable setoff by virtue of its original powers. Courts of common law have long exercised the same powers in setting judgments against each other; a matter not provided for in the statute, and therefore constituting perhaps the only equitable jurisdiction which those courts possess." In *Ramsey's Appeal*, 2 Watts, 228, 27 Am. Dec. 301, Chief Justice Gibson says: "There is a fallacy in supposing defalcation in a case like the present to be a legal right. Judgments are set against each other, not by force of the statute, but by the inherent powers of the courts immemorially exercised. . . . An equitable right of setting off judgments, therefore, is permitted only where it will infringe on no other right of equal grade." And in *Burns v. Thornburgh*, 3 Watts, 78, it is again said, *per curiam*, the power to set one judgment against another "is not a legal power, nor its exercise demandable of right."

But though the principle in general has been thus clearly and frequently declared, its limits and practical application between the original parties have been little discussed, most of the cases from *Jacoby v. Guier*, 6 Serg. & R. 448, down to *Clement v. Philadelphia*, 137 Pa. St. 328, 21 Am. St. Rep. 876, 20 Atl. 1000, having arisen on disputes as to the rights of assignees.

Some few rules, or at least presumptions, may be gathered from the incidental discussions and applications in the cases. Thus if the judgments are both founded on contract, *prima facie* the setoff should be allowed, and probably the same presumption should prevail where one or both judgments may be in tort but of a kind, such as damage from negligence, which does not involve the element of willful injury. But if one judgment ²⁹² is in contract and the other in tort which implies intent to injure, though there is no fixed rule which prevents a setoff, yet the presumption is against it, and the party asking for it, especially if the tort-feasor, should show some equity in its favor. In such cases, as also where both judgments are in tort, the element of priority in time is generally of importance. And all of these rules and presumptions are subservient to the fundamental principle that each case is to be determined on its own circumstances and merits viewed with the eyes of a chancellor in equity.

It is argued by the appellant in this court, that the setoff not being of legal right, the decision of the common pleas can only

be reviewed for abuse of discretion. This, however, cannot be sustained. Though the jurisdiction is one resting on discretion, it is a judicial discretion to be exercised on the established principles of equity. It was held in *Wellock v. Cowan*, 16 Serg. & R. 318, and again in *Burns v. Thornburgh*, 3 Watts, 78, that as the facts do not appear on the record the action of the court on motion or rule to set off judgments could not be reviewed on writ of error. And in *Horton v. Miller*, 44 Pa. St. 256, it was expressly held that the proper remedy was by appeal. And see *Aber's Petition*, 18 Pa. Super. Ct. 110. The proceeding being in its nature equitable, an appeal brings up the whole case for consideration on its merits.

In 1893 Hohman sold a property to Leitz for \$5,000, received \$1,000 on account and a bond for \$4,000 on which judgment was duly entered. Later in the same year Hohman assigned the judgment with a guaranty and Leitz failing to make the subsequent payments the land was sold under the judgment to Arnold, one of the assignees, for \$1,000, and by him conveyed back to Hohman in March, 1897. In June, 1897, Leitz began suit against Hohman for slander which resulted in a judgment for plaintiff for \$300. While this suit was pending in April, 1898, the judgment against Leitz was retransferred by the assignees to Hohman, and this he now seeks to set off against the judgment in the slander suit. The court below refused permission. His reasons are convincing. It does not appear that the transaction in regard to the land resulted in any pecuniary loss to Hohman. He got his property back again, with \$1,000 paid on account and a judgment for the rest of the agreed purchase ~~298~~ money. While this does not affect his legal rights so long as the judgment stands unchallenged on the record, yet it bears very significantly on the equity of his claim to setoff. After the sheriff's sale nothing further was done under the judgment. Its lien was allowed to expire without renewal, and the vendor was again in possession of the land. But when the vendee's suit for slander had been pending a year, the dormant judgment was aroused from its torpor and reassigned to its original plaintiff Hohman. It is apparent that the principal, if not the whole, purpose of this action was to put Hohman in position to use it for protection against the result of his own wrong. If he could do this in slander, he might do it in assault and battery or other tort. It is not in the interest of good order or the pub-

lie peace to allow satisfaction for even a judgment debt to be obtained in this way. If the tort had been first in time or the circumstances different, the rule might have been different, but on the merits of the case as presented we concur with the learned judge of the common pleas and "do not think that because one man holds a judgment against another, he is entitled . . . to slander his character to the amount of his judgment with immunity from other punishment, and we see no equity that can sustain such a proposition."

The judgment of the superior court is reversed and the order of the common pleas reinstated and affirmed.

The Setoff of One Judgment against another is considered in the note to *Duncan v. Bloomstock*, 13 Am. Dec. 729-731; and the subsequent cases of *De Camp v. Thompson*, 159 N. Y. 444, 70 Am. St. Rep. 570, 54 N. E. 11; *Zinn v. Dawson*, 47 W. Va. 45, 81 Am. St. Rep. 772, 34 S. E. 784; *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458, 53 Atl. 837. The jurisdiction to set off one judgment against another is equitable in its nature, and the application therefor is addressed to the discretion of the court. The setoff is not of right, but of grace: *Simmons v. Reed*, 31 S. C. 389, 17 Am. St. Rep. 36, 9 S. E. 1058; *Thropp v. Susquehanna etc. Ins. Co.*, 125 Pa. St. 427, 11 Am. St. Rep. 909, 17 Atl. 473. A judgment founded on contract may be set off against one founded on tort: *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280.

The Right of Setoff after insolvency is the subject of a monographic note to *St. Paul etc. Trust Co. v. Leek*, 47 Am. St. Rep. 578-595. As to the setting off one tort against another, see *Keller v. B. F. Goodrich Co.*, 117 Ind. 556, 10 Am. St. Rep. 88, 20 N. E. 254. Consult, too, *Becker v. Northway*, 44 Minn. 61, 20 Am. St. Rep. 543, 46 N. W. 210. And as to the right to purchase claims to use as setoffs, see *Nix v. Ellis*, 118 Ga. 345, 98 Am. St. Rep. 111, 45 S. E. 404.

PETTIGREW v. PETTIGREW.

[207 Pa. St. 313, 56 Atl. 878.]

DEAD BODIES—Property in.—The law recognizes property in a human corpse, but such property is subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. (p. 796.)

DEAD BODIES—Right of Burial.—There is no universal rule as to the burial of the dead applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association. (p. 799.)

DEAD BODIES.—The Paramount Right of Burial of a dead body is in the surviving husband or widow, and if the parties were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wish of the survivor. (p. 799.)

DEAD BODIES—Right of Burial.—If there is no surviving husband or wife, the right of burial of a dead body is in the next of kin in the order of their relation to the decedent as children of proper age, parents, brothers and sisters, or more distant kin, modified as it may be by circumstances of special intimacy or association with the decedent. (p. 799.)

DEAD BODIES—Method and Right of Burial.—How far the desires of a decedent as to his method of burial should prevail against those of a surviving husband or wife is an open question, but as against remoter kindred such wishes, especially if strongly and recently expressed, should usually prevail. (p. 799.)

DEAD BODIES—Right of Reinterment.—With regard to reinterment of a dead body in a different place, the presumption against the right of removal grows stronger with the remoteness of connection with the decedent and reserving always the right of the court to require reasonable cause for such removal and reinterment. (p. 800.)

DEAD BODIES—Right of Removal and Reinterment.—If a decedent leaving a widow and one child surviving, is buried in a lot belonging to his father's family, with the widow's consent, at least to such temporary burial, and upon the subsequent death of such child it is buried in a lot owned by the widow in another cemetery, the widow has a right to remove the body of her husband to the lot purchased by her, in accord with the expressed wish of such child, especially when there is not room in the lot where the husband was buried for the burial of the widow and child, unless they were put in the same grave with the husband, and the hostile feelings of his family make it doubtful if this privilege would be granted. (p. 800.)

J. H. McCain and W. J. Christy, for the appellants.

M. F. Leason, J. B. Neale and J. H. Painter, for the appellee.

³¹⁵ MITCHELL, C. J. When a man dies, public policy and regard for the public health, as well as the universal sense of propriety, require that his body should be decently cared for and disposed of. The duty of disposition, therefore, devolves upon some one and must carry with it the right to perform. It is commonly said, being repeated from the early cases in England where the whole matter of burials was under the jurisdiction of the ecclesiastical courts, that there can be no property in a corpse. But inasmuch as there is a legally recognized right of custody, control and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. Whether, ³¹⁶ however, the rights be called property or not is manifestly a question of words rather than of substance.

The general subject is treated historically with great learning and ability in *Matter of Widening Beekman Street*, 4 Bradf. Surr. 503, by the referee, Hon. Samuel B. Ruggles, whose report is a storehouse to which all subsequent discussions have resorted for materials. An exhaustive catalogue of the law of literature on burials, etc., will also be found in a note to *Johnston v. Marinus*, 18 Abb. N. C. 75. The principal judicial decisions on the subject are *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506; *Fox v. Gordon*, 16 Phila. 185; *Pierce v. Cemetery Co.*, 10 R. I. 227, 14 Am. Rep. 667; *Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. Rep. 762, 26 Atl. 42; *Secord v. Secor*, 18 Abb. N. C. 78, note; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. 238; *Johnston v. Marinus*, 18 Abb. N. C. 75; *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249, 25 N. E. 822; *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906; *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 63 Pac. 170; *McEntee v. Bonacum* (Neb.), 92 N. W. 633.

It is not necessary here to go into a general discussion of the various questions raised in the decisions. They have been reviewed with admirable clearness and accuracy by Judge Thayer in *Fox v. Gordon*, 16 Phila. 185. But certain deductions may be drawn and put into practical shape from the cases.

The right of control and disposition, whether called property or not, springs, as already said, from the legal duty or obliga-

tion. In Pennsylvania, as generally elsewhere, that devolves on the executor or administrator. The statute puts the duty of paying the decedent's debts out of his assets on his executor, and expressly names funeral expenses as first in the order of priority of payment. Prima facie, therefore, the duty to determine when, where and in what manner the body shall be buried rests with the executor or administrator. But his right is not absolute nor his judgment conclusive. The determination must rest, as said in *Fox v. Gordon*, 16 Phila. 185, "upon considerations arising partly out of the domestic relations; . . . partly out of the universal sentiment . . . that the dead should repose in some spot where they will be secure from profanation; partly out of what is demanded by society for the preservation of the public health, morality and decency; and partly often out of ³¹⁷ what is required by a proper respect for and observance of the wishes of the departed themselves." Under the statute in Pennsylvania the right to administration belongs first to the surviving husband and widow. To such survivor, therefore, belongs the right of control of the body for interment, and a waiver of the right to administer will not include a waiver of such right of control unless it be express and absolute. In the exigencies of business and the interests of the estate it is not unfrequently desirable that a stranger, or even a creditor should administer, but no court would sanction a disregard by such an administrator of the wishes of a widow or even of the next of kin, as to the place and manner of burial.

How far the decedent's own wishes or even his specific directions are to prevail must be regarded as unsettled. In *Williams v. Williams*, L. R. 20 Ch. Div. 659, Kay, J., held that the right of custody being incident to the duty of burial which is in the executors, a man in England "cannot by will dispose of his dead body." And in a note to a report of the same case in 21 Am. Law Reg., N. S., 512, Professor Ewell seems to approve the ruling, though he admits that it is of first impression. The case grew out of the disinterment and cremation of the body by a stranger to the family, under written directions of the deceased, and with great respect for the tribunal I cannot help thinking that the decision was unconsciously influenced by the English conservatism in regard to burial, and the attendant reluctance to countenance in any way the innovation of burning. The clear trend, I think, of the

American decisions is to the contrary, notwithstanding the apparent assent in *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 63 Pac. 170, where the cases cited do not support the dictum. See *Fox v. Gordon*, 16 Phila. 185, already cited; *Pierce v. Cemetery Co.*, 10 R. I. 227, 14 Am. Rep. 667; *Johnston v. Marinus*, 18 Abb. N. C. 75; *Secord v. Secor*, 18 Abb. N. C. 78; *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906; *Lowry v. Plitt*, 16 Am. Law Reg., N. S., 155, and note by Mr. Francis Rawle. And whether the decedent's directions are regarded as paramount or not it is agreed in all the cases that they are entitled to respectful consideration whenever the question comes into court.

In the absence of a surviving husband or widow the wishes of the next of kin are entitled to be considered with varying weight according to the nearness of the kinship and the personal ³¹⁸ relations between them and the decedent. A more distant relative or even a friend not connected by ties of blood may have a superior right under exceptional circumstances to one nearer of kin, as was held in *Scott v. Riley*, 16 Phila. 106.

The foregoing observations relate chiefly to the first interment. A reinterment involving a removal to another locality stands upon a somewhat different footing and has been the cause of most of the litigation on the subject. The duties of the executor or administrator terminate with the first interment, and on the question of removal he is not a party in interest. The controversy, if there be one, must be between next of kin. The presumption is against a change. The imprecation on the tomb at Stratford "curst be he that moves my bones," whether it be Shakespeare's own or some reverent friend's, expresses the universal sentiment of humanity not only against profanation but even disturbance. When a case comes into court, the chancellor will regard this sentiment, and consider all the circumstances in that connection.

The case of *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506, has been frequently cited, and is relied on by appellant here as deciding that the rights of the next of kin are superior to those of the widow. The reporter's syllabus apparently goes that far, but it is much too broad and is an improvident generalization from the second conclusion of the referee in *In re Beekman Street*, 4 Bradf. Surr. 503 (quoted by Read, J.), that the right "belongs exclusively to the next of

kin." But the Beekman street case was a claim by next of kin to be allowed to control the removal of a body which had been buried more than fifty years and whose removal was made necessary by the widening of a street through the churchyard. There was no widow living and the contest was an amicable one between the next of kin and the church to determine their respective rights. The referee held that in such case the rights of the next of kin were exclusive of those of the church, and it is said (*Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. Rep. 762, 26 Atl. 42) that he added a note to his report explaining that his use of the term "next of kin" had no reference to any rights of a surviving husband or widow. The Wynkoop case grew out of the attempt of the widow to remove the body of Colonel Wynkoop, a distinguished soldier, more than a year after it had been buried, as claimed, by her consent, with the ³¹⁹ honors of war, and in accordance with his known wishes, in the city of his home. What the case really decides is that the rights of the widow as administratrix ended with the first interment, and as to her rights as widow the court was justified "in refusing permission to a removal under the circumstances." The case is not authority for anything more.

The result of a full examination of the subject is that there is no universal rule applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent and the rights and feelings of those entitled to be heard by reason of relationship or association.

Subject to this general result it may be laid down, first, that the paramount right is in the surviving husband or widow, and if the parties were living in the normal relations of marriage it will require a very strong case to justify a court in interfering with the wish of the survivor.

Secondly, if there is no surviving husband or wife, the right is in the next of kin in the order of their relation to the decedent, as children of proper age, parents, brothers and sisters, or more distant kin, modified, it may be, by circumstances of special intimacy or association with the decedent.

Thirdly, how far the desires of the decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes, especially if strongly and recently expressed, should usually prevail.

Fourthly, with regard to a reinterment in a different place, the same rules should apply, but with a presumption against removal growing stronger with the remoteness of connection with the decedent and reserving always the right of the court to require reasonable cause to be shown for it.

In the present case the court finds as facts that when the decedent died he left a widow and one child, his next of kin. The child died about a year afterward and was buried in a lot in another cemetery purchased by the widow. The daughter, though young, appears to have had a sentiment on the subject and desired her father to be buried with her. The decedent was buried in a lot belonging to his father's family, with the widow's consent, but whether her consent was more than for a temporary interment is disputed. Whatever may be the fact ³²⁰ as to that, it is found by the court below that there is not room in the family lot for the burial of the daughter and the widow unless they be put in the same grave with the decedent, and the hostile feelings of the brother and sisters make it doubtful if even this privilege would be conceded. These facts more than justify the conclusion of the learned judge below that the right of the widow to remove the body to the new lot purchased by her for that purpose should not be interfered with.

Decree affirmed at costs of appellant.

The Questions Involved in the Principal Case have, on two occasions, engaged our attention in this series of reports: See the monographic notes to *Wynkoop v. Wynkoop*, 82 Am. Dec. 509-516; *Keyes v. Konkel*, 75 Am. St. Rep. 424-430. It has been held that one cannot dispose of his dead body by will (*Enos v. Snyder*, 131 Cal. 69, 82 Am. St. Rep. 330, 63 Pac. 170), and also that replevin will not lie for the return of a corpse: *Keyes v. Konkel*, 119 Mich. 550, 75 Am. St. Rep. 423, 78 N. W. 649. The burial of a body by the consent of those interested is ordinarily regarded in law as a final sepulture, which cannot be disturbed against the will of those who have a right to object, on account of change in feeling or circumstances: *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871.

COMMONWEALTH v. SCHMUNK.

[207 Pa. St. 544, 56 Atl. 1088.]

FALSE PRETENSES—Venue in.—It a person in one state, by means of false statement as to his financial standing, inclosed with an order for goods mailed to a person in another state, causes such person, who relies upon his statement, to deliver the goods to a carrier for shipment to the person thus ordering them, who receives them at their destination in the former state, he may be properly tried and convicted in that state for obtaining goods under false pretenses. (p. 802.)

G. Q. Horwitz, H. H. Patterson and E. W. Arthur, for the appellant.

A. L. Weil, J. C. Haymaker, district attorney, W. D. Grimes, assistant district attorney, and C. M. Thorp, for the appellee.

545 BROWN, J. The facts of this case appear in the report of it in 22 Pa. Super. Ct. 348. In the opinion of that court, affirming the judgment of the court below, it was properly said: "The verdict of the jury conclusively establishes that the important facts in the statement mailed by the defendant were false and had been designedly and knowingly made with intent to cheat and defraud the New York Company, that the New York Company had relied and acted upon the statement, believing it to be a truthful one, and that the defendant received the goods in Allegheny county. The verdict of guilty was fully justified by the evidence, which phase of the case is not questioned by the appellant." In the statement of questions involved on this appeal we are asked to consider nothing but the jurisdiction of the court of quarter sessions of Allegheny county to try the appellant on the indictment found against him. In their printed brief, however, his counsel contend as a reason for reversing the judgment, "that the commonwealth utterly and absolutely failed to show actual possession by the defendant or by the company of which he was an officer, or by any one in whom he was interested." We pass this by with the simple comment that, in the statement of questions involved, it is admitted that the goods were received by the consignees; and the jury, under the testimony of Edward R. Gilmore as to what took place between him and Schmunk in January or February, **546** 1900, uncontradicted by the latter, were fully justified in finding that the goods had been received by the consignee in Allegheny county.

That there was a delivery to the consignee of the goods in New York, by delivering them to the common carrier in that state, is not to be questioned, and it is equally clear that the title and right of possession passed there to the consignee, but to this delivery of title and right of possession of the goods there was a string. If at any time while in the custody of the common carrier on their way to the consignee the fraud practiced upon the prosecutor had been discovered, the string could have been pulled and the goods could have been estopped in transitu, and, under a rescission of the contract, reclaimed and retaken by the vendor. This, however, is not the question now before us. What we are to decide is, whether the offense of false pretense charged against the defendant was committed within the county of Allegheny. The offense under the statute is obtaining the chattels of another by false pretenses with intent to cheat and defraud him of the same. The pretenses themselves do not constitute the crime. They are but the means for its accomplishment. In this case they were made in Allegheny county when the misrepresentations were mailed to New York for the purpose of carrying out the intention to cheat, which had been formed here. All the defendant did he did in Allegheny county, and what he set out to accomplish in his scheme was accomplished there. The offense charged against him is not that he procured a technical delivery to himself by a delivery of the goods to a common carrier in another state, but it is that he actually obtained it. This he did only when they reached him in the county in which he was indicted, as is charged in the indictment. In so holding the court below, as well as the superior court, gave to the word "obtain," as used in the statute, the only sensible meaning to be ascribed to it in connection with the crime of false pretense as therein defined. A fundamental meaning of the word, as given by standard lexicographers, is, "to get hold of by effort," "to get possession of," or "to have in possession." If, instead of delivering the goods to a common carrier, the vendor had intrusted them in New York to one of its agents or representatives, to be taken to the defendant's company at Pittsburg, and there ⁵⁴⁷ handed over to it, can it be pretended that, until they were so handed over, the vendee would have obtained them, got hold of them or got possession of them? And yet, as a matter of fact, for the purpose of putting the vendee in actual possession of the goods, this is just what the vendor did when it

delivered them to the common carrier with its retained right of stoppage in transitu.

But to us there is a persuasive reason, apparently overlooked by counsel for the commonwealth, that the legislature intended the word "obtain" should receive the meaning given it by both courts. By section 179 of the act of March 31, 1860 (Pub. Laws, 382), it is provided that, on a conviction of the offense of false pretense, the defendant shall be adjudged to restore to the owner the property fraudulently obtained from him. If the goods fraudulently obtained are not actually obtained and in the actual possession of the offender, how can there be a sentence of restitution? It is made part of the penalty clearly because actual possession is intended by the act defining the offense.

Innumerable authorities have been pressed upon our attention by counsel on both sides of this controversy. Pages would be needlessly consumed in considering and distinguishing them without adding profitably anything to what is said by Or-lady, J., in delivering the opinion of the superior court. We rest our judgment upon what we regard as the plain meaning of the statute and the manifest intention of the legislature to which we have referred. As peculiarly applicable to this case we cite, without more, what was said in *Queen v. Holmes*, L. R. 12 Q. B. D. 23. In that case the defendant was a manufacturer at Nottingham, and entered into a contract to build there a lace machine to be sent to France. He wrote at Nottingham a letter containing a pretense which was false, and posted it at that place. It was received by the prosecutor in Caudry, France, from which place a draft for one hundred and fifty pounds was sent. The defendant received it at Nottingham and had it cashed there. It was argued that no offense had been committed in England, and that, therefore, its courts had no jurisdiction; but it was said by Lord Coleridge, C. J.: "This conviction is perfectly proper. The charge was of obtaining money by false pretenses, and that charge was proved; but a question is reserved ⁵⁴⁵ as to whether the place of trial was a correct place in which to try the prisoner. There is no doubt that it was correct; it appears, if authority be needed, from the case of *Rex v. Burdett*, 4 Barn. & Ald. 95, that when a letter such as the one in question is posted the pretense is made, and here it appears the money is actually received and obtained as well as the letter posted in Nottingham. Of the

two necessary ingredients of the offense both take place in Nottingham. It may be that one important part of the offense taking place in Nottingham would be sufficient, but here both ingredients take place in Nottingham." To this Hawkins, J., added: "There is no doubt about this case; the conviction is right; every element occurred at Nottingham; whatever the prisoner did he did there. If the conviction were quashed it would enable fraudulent people to carry on a profitable trade in false pretenses with impunity."

The judgment of the superior court and its order that the record be remitted to the court below, for the purpose of carrying out the sentence there imposed, are affirmed.

The Venue in prosecutions for obtaining money or goods under false pretenses is discussed in the monographic note to *Barton v. People*, 25 Am. St. Rep. 386, 387. See, also, the remarks made on this question in *People v. Hyatt*, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706, and note. It has been said that the receipt of the money or property is the consummation of the offense; and that if the false pretenses are made in one jurisdiction, but the property obtained in another, the prosecution must be instituted in the latter jurisdiction: *Connor v. State*, 29 Fla. 455, 30 Am. St. Rep. 126, 10 South. 891. In *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291, it is held that if one by false pretenses contained in a letter sent by mail procures the owner of goods to deliver them to a designated carrier in one county, consigned to the writer in another, the offense is complete in the former county and must be prosecuted therein.

WARNER'S ESTATE.

[207 Pa. St. 580, 57 Atl. 35.]

HUSBAND AND WIFE—Antenuptial Agreements—Presumption.—If a man possessed of a competence, by an antenuptial agreement cuts off the woman he is about to and does marry, without anything for her support, from his estate after his death, it must be presumed that he designedly concealed from her the value of his estate at the time the agreement was executed, and she is not bound thereby in the absence of other proof. (pp. 805, 806.)

EXECUTORS AND ADMINISTRATORS—Right to Administrator.—The widow of a decedent has no absolute right to a grant of letters of administration on his estate. (p. 806.)

EXECUTORS AND ADMINISTRATORS.—If Differences exist between the widow and sons of a decedent by a former marriage, a disinterested, fit person, natural or artificial, should be appointed administrator when the parties themselves cannot agree upon an administrator. (p. 807.)

D. F. Patterson, B. F. Mevay and S. A. Johnston, for the appellant.

J. M. Stoner and R. T. M. McCready, for the appellee.

⁵⁸² BROWN, J. The renunciation by the appellee of her right to administer on the estate of her deceased husband was clearly due to her mistaken belief, under the facts as developed at the hearing in the court below, that she had relinquished all of her marital rights by her antenuptial agreement. This was originally executed July 6, 1897, and by its terms the prospective husband, nearly eighty years of age, and possessed of a competence, cut off the woman he was about to marry, twenty years his junior, without a cent for her support from his estate after his death. It is so harsh and unreasonable on its face as to raise the presumption that he designedly concealed from her the value of his estate at the time it was executed: *Bierer's Appeal*, 92 Pa. St. 265. The presumption that the appellee was not informed of the value of his estate at that time becomes almost conclusive in the light of the testimony of his attorney, who prepared the paper and witnessed its execution. Having subsequently, as he testified, examined the authorities and satisfied himself that trouble might arise from "an allegation on the part of the widow that she did not have full information as to the amount of the estate of the intended husband at the time of the execution of the paper," ⁵⁸³ he deemed it prudent for the protection of his client to have added to it what the parties signed on August 11, 1897.

If this contract is to be sustained, it will only be after those claiming under the deceased husband have, by proper proof, overcome the presumption that there was concealment from the wife, amounting to a fraud upon her, of the value and extent of his estate. This burden was cast upon the appellants at the hearing in the court below, but the only proof submitted by them was the supplemental writing of August 11th. Under the circumstances attending its execution equity ought not, and will not, regard it as sufficient for the purpose for which it was offered. There was no proof that, at any time before August 11th, the appellee had full knowledge of what estate her husband possessed, or that she had acted intelligently in entering into the contract, most improvident for her; but on that day, when, with the man she was about to marry, they were on their way to the parson's house, she was taken by him into his

lawyer's office for the admitted purpose of attempting to do what his attorney had satisfied himself from the authorities ought to have been done on July 6th. There, unattended by anyone to look after her interests, and confronted by the attorney, zealously trying to protect the estate of the man she was about to marry, she signed the paper purporting on its face to be an acknowledgment that she knew what estate he owned and possessed. The couple then proceeded to the parsonage and became man and wife. Though the paper was read to her, it gave her for the first time information that ought to have been given to her on or before July 6th, if the agreement of that day is to have any effect. That she is now to be concluded by the information imparted to her under the circumstances stated offends reason and good conscience; for, when on her way to the altar to take the most sacred vow assumed by woman, it can hardly be seriously contended she could, in a moment, have acted with the intelligence and proper apprehension required by the law to make binding upon her the contract which excludes her from all participation in her husband's estate.

The learned court below, in overruling the exceptions to the findings and conclusions of the judge who heard the application for the revocation of the letters granted to the appellants, was of opinion, without regard to the testimony of Mrs. Warner, ⁵⁸⁴ that the antenuptial agreement was unreasonable, and that there was a presumption of concealment by the decedent which had not been overcome by his sons. While we adopt as correct all that the learned president judge says in holding, without regard to anything testified to by Mrs. Warner, that the antenuptial agreement was unreasonable and that the presumption of concealment by the decedent had not been overcome by his sons, at this time and at this stage in the settlement of the estate, we will pass only upon the question of the right of administration and of the duty of the register in granting letters. Though, as the widow of the deceased, not bound, according to the testimony now before us, by her antenuptial contract, the appellee is entitled to letters of administration, the register is not obliged to grant them to her if it be inexpedient to do so. "Other things being equal the widow is entitled to be preferred": Wilkey's Appeal, 108 Pa. St. 567; but those otherwise entitled to administer may be rejected on account of the inexpediency of committing the trust to them: Ellmaker's Estate, 4 Watts, 34; Bieber's Appeal, 11 Pa. St. 157; Com-

propst's Appeal, 33 Pa. St. 537. With the antagonisms and differences existing between the appellee and the two sons of her husband by his former marriage, the best interests of the estate will be promoted by committing the administration of it to some disinterested fit person to be appointed by the register of wills, if the parties to this controversy cannot agree upon an administrator. By such appointment, though the present differences may continue, controversies, and disputes otherwise certain to take place between the appellee and her stepsons will be avoided.

The decree of the court below is reversed and the record remitted, with direction that the register of wills of the county of Allegheny grant letters of administration on the estate of E. S. Warner, deceased, to some disinterested fit person, natural or artificial, to be named by him, at his discretion, if the appellants and appellee cannot agree upon an administrator, the cost of this appeal to be paid out of the estate; this decree to be without prejudice to the right of the appellants to again raise, on distribution or in proceedings in partition, the question of the validity of the marriage contract, if, in view of what we have said, they can submit the proofs requisite to sustain it as binding upon the appellee.

Antenuptial Agreements are severely scrutinized by the courts; and owing to the confidential relations of the parties, it seems that the presumption is against their validity, and that the burden is on the husband to prove the perfect fairness of the transaction: *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22, and note. See, in this connection, *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256. In *Lamb v. Lamb*, 130 Ind. 273, 30 Am. St. Rep. 227, 30 N. E. 36, an antenuptial contract is set aside because procured by the husband through fraud and deception. As to voluntary conveyances by a husband on the eve of marriage, in fraud of his wife's marital rights, see *Ward v. Ward*, 63 Ohio St. 125, 81 Am. St. Rep. 621, 57 N. E. 1095; *Jones v. Somerville*, 78 Miss. 269, 84 Am. St. Rep. 627, 28 South. 940.

CASES
IN THE
SUPREME COURT
OF
UTAH

LAVAGNINO v. UHLIG.

[26 Utah, 1, 71 Pac. 1046.]

STATUTES—Construction.—The United States statute prohibiting officers, clerks, and employes in the general land office from purchasing public lands was not repealed by the statute subsequently adopted declaring public lands containing valuable mineral deposits open to purchase by citizens of the United States and those having declared their intention of becoming such. (p. 812.)

STATUTES—Construction.—If Congress adopts a statute in apparent conflict with a former statute not in terms expressly repealed, it is presumed that Congress was aware of the existence of the prior act, and intended that it should remain in full force. (p. 812.)

DECISIONS of Land Department—Binding Effect of.—While the decisions of the United States land department on matters of law are not binding upon the courts, they should not be overruled except when they are clearly erroneous. (p. 813.)

MINES AND MINING—Location by Government Officer.—The United States statute prohibiting officers, clerks and employes in the general land office from purchasing or acquiring public lands, includes deputy United States mineral surveyors while such officers, and the locating of a mining claim by such an officer is void, and he can convey no rights therein. (p. 814.)

MINES AND MINING—Adverse Claims—Presumption.—Under a statute providing that it shall be "assumed" that there is no adverse claim to mineral for which application has been filed, unless filed within sixty days, during which notice of such application is required to be published, it must be conclusively presumed that one who fails to file an adverse claim within such prescribed time has no such claim. (p. 815.)

MINES AND MINING—Object of Adverse Proceedings.—A statute providing that an adverse claimant to a mining claim may institute proceedings to determine the right of possession to the claim, does not authorize a determination of the rights of the co-

testants to a patent, but only the right of possession of the disputed claim. (p. 816.)

MINES AND MINING—Adverse Proceedings.—Plaintiff in an action to determine the right of possession of a disputed mining claim, who fails to show any right to the claim, becomes a stranger to the title and cannot avail himself of the rights of a third party, who has failed to file an adverse claim within the time prescribed by statute. (p. 817.)

MINES AND MINING—Nature of Claim—Limitations.—Mining claims are real property. They pass by deed and are subject to the operation of the statute of limitations. (p. 818.)

MINES AND MINING—Statute of Limitations.—A person who fails to institute an action to recover possession of a mining claim within seven years after adverse possession by another is barred from maintaining such action by the statute of limitations. (p. 819.)

N. W. Sonnedecker and C. E. Dey, for the appellant.

Pierce, Critchlow & Barrette, D. H. Wenger and Brown & Henderson, for the respondent.

¹³ **BASKIN, C. J.** The defendants, Edmund H. Uhlig and Alex McKernan, on or about the twenty-fourth day of August, 1898, made an application in the United States land office at Salt Lake City for a patent for the Uhlig No. 1 and Uhlig No. 2 mining claims. The plaintiff in due time filed in the said land office an adverse claim to a portion of the said Uhlig No. 1 and No. 2, which overlapped and included a part of the Yes You Do mining claim. Thereupon further proceedings on said application were stayed in the land office, and the plaintiff in due time instituted this action to determine, as provided in section 2326 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1430), the right to the possession of the portion of the Uhlig Nos. 1 and 2 which conflict with the Yes You Do.

It appears from the record that the summons in respect to the defendant Alex McKernan was quashed, and the action as to him was discontinued; that, pending the action, which was not dismissed as to the codefendant, Edmund H. Uhlig, and before the trial, he conveyed his interest in the Uhlig Nos. 1 and 2 to the St. Joe Mining Company, a corporation organized under the laws of the state of Utah, and said company was substituted as defendant in place of the said Edmund H. Uhlig. The trial court adjudged and decreed that the St. Joe Mining Company and the said Alex McKernan are the owners in possession, and entitled to the possession, except as against the paramount title of the United States, of the premises in dispute

(which were described in the decree by metes and bounds), and that the defendant recover its costs, etc. From this decree the plaintiff has taken an appeal.

It appears from the testimony of J. Fewson Smith, Jr., a witness for the plaintiff, that he located the Yes ¹⁴ You Do on the first day of January, 1898; that at that time, and at the time of the trial, he was a deputy United States mineral surveyor "attached to the office of the surveyor general of the district of Utah"; that he had an interest in the litigation; that, between the time of making said location and the time of filing the protest in the land office by the plaintiff, he agreed with plaintiff to convey to him the Yes You Do mining claim for the consideration of one dollar, and the sum of six hundred dollars, the future payment of which depended upon the conditional stipulations, the substance of which is as follows: If a patent for said claim should be obtained without litigation, Lavagnino, the plaintiff, was to pay six hundred dollars, but if there was litigation through any source in respect to said claim, and a failure to procure patent for the same, then no part of the six hundred dollars was to be paid for the conveyance. In case there was such litigation, then the said Smith was only to be paid said sum less the expense of patenting the claim, if one should be obtained; but if a patent was only obtained for a small triangle, or part of the claim, the plaintiff might refuse to pay the remainder of the consideration. In pursuance of the foregoing agreement, the claim was deeded to the said plaintiff by Smith, but the only consideration named therein was the sum of one dollar. The said Smith also testified that "when he transferred the ground to Lavagnino it was for the purpose of defeating these other claims, and not with a view of making much"; and, having further testified that he made the plat showing the conflict in question in this case, he was asked, on cross-examination, the following question: "Isn't it a fact that you, being a deputy United States mineral surveyor, couldn't make the survey and protest for your claim if you held it in your own name, and you consequently turned it over to Mr. Lavagnino? A. It is a fact that I couldn't make the protest in my own name while I held an interest in the claim."

After the disclosure of the foregoing facts plaintiff offered in evidence a certified copy of the location ¹⁵ notice of the Yes You Do, and in connection therewith the deed to Lavagnino. To this offer the defendants objected upon the grounds, which,

in substance, were as follows: That by the testimony of the witness J. Fewson Smith, Jr., it appears that said mining claim was not located by a person who had the power, under the act of Congress, to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned—January 1, 1898—a deputy United States mineral surveyor for Utah, and therefore incompetent to make locations; that in this particular action it now appears that the witness, at the time he made the protest, map, plat, and the survey fixing the boundaries for the purpose of an adverse claim and protest introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself has stated; therefore the location itself was in violation of the law, and could not be the basis either of a valid location in himself or a deed to anybody.

The trial court excluded the said notice and deed on the ground that "J. Fewson Smith, Jr., the locator of the claim, was prohibited from making the location of a lode mining claim, and, therefore, had not the qualifications to initiate any title by any act that he did with reference to locating the Yes You Do mining claim." The plaintiff, after duly excepting to the ruling of the court, rested. The defendants then proceeded to introduce evidence in support of the validity of the Uhlig Nos. 1 and 2 mining claims, after which, in rebuttal, the plaintiff offered to show that the "Levi P." and "Veta" mining claims, at the time of the location of the Uhlig Nos. 1 and 2, were valid and subsisting claims, and covered the discoveries of both the Uhlig No. 1 and No. 2, and were then owned by Andrew P. Mayberry. Mr. Sonnedecker, an attorney of the plaintiff, offered to make the same showing "on behalf of the government and as a friend of the court." Defendants' counsel objected to this on the ground that it was immaterial; "that the court was without jurisdiction to listen to and ¹⁶ decide an issue of that kind, the United States not being before the court in that sense." The trial court sustained the objection on the ground that, as no adverse claim based upon the "Levi P." and "Veta" claims had been made within the prescribed period, whatever rights the parties may have had to said claims were waived by failure to properly adverse the application for a patent by the defendants.

It does not appear from the record that any adverse claim whatever, based upon the Levi P. or Veta, was made in the land office in the matter of the defendants' application for a patent

of the Uhlig Nos. 1 and 2, nor does the plaintiff claim any interest in said mining claims.

The refusal to permit the certified copy of the location notice of the Yes You Do, and the deed offered in connection therewith, to be introduced in evidence, and the rejection of the evidence relating to the Levi P. and Veta mining claims, is assigned as error.

Section 452 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 257), provides: "The officers, clerks, and employes in the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office." Subsequent to the enactment of this section, section 2319 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1424) was passed, and is as follows: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining ¹⁷ districts, so far as the same are not inconsistent with the laws of the United States." The former section has been retained in all of the revisions of said statutes made since its enactment. These sections are therefore in *pari materia*, and must be construed together, and, if possible, made to harmonize, and not to violate, the general public policy which it is evident the former was enacted to prevent: 1 Kent's Commentaries, 13th ed., 464; *Manuel v. Manuel*, 13 Ohio St. 458, 464, 465. The presumption is that Congress, when the latter section was passed, was aware of the existence of the former, and acted in view of that fact. As the former section has not in terms been repealed, but has been retained in each of the revised editions of the United States statutes, it must be presumed that Congress intended it to remain in full force, notwithstanding the provisions of the latter section; or, in other words, it was the intention of Congress to prohibit, on the ground of public policy, the officers, clerks and employes in the general land office from acquiring, directly or indirectly, an interest in the purchase from the government of any of the public land of the United States.

It is clear from the testimony of J. Fewson Smith, Jr., in this case that his right to the unpaid consideration for the conveyance of the Yes You Do was wholly dependent upon the purchase or entry of the same, and to that extent he was interested in the entry—or in the purchase, which is the same as an interest in the entry—sought by Lavagnino. One dollar is the only consideration actually paid by Lavagnino to Smith. Both of the parties at the time anticipated litigation. Smith, in addition to his testimony before referred to, stated: "Somebody would have to stand the expense of the litigation if there was any, and, since I could not make a sale to Mr. Lavagnino out and out, I just let him take it at his own terms, with the understanding that if the claim was given to him clear, that is, if there was litigation through any source and he got the claim through ¹⁸ for patent clear, then I was to receive, in addition to what I got that day, a certain sum of money. This arrangement was in 1898, between the time of making the location and the time of entering the protest. It would be somewhere about the middle of the summer, I should think. I received one dollar in cash. That was to bind the bargain. If he doesn't get the ground I get nothing further."

Before making the adverse claim and bringing this suit, Lavagnino knew that Smith was a deputy United States mineral surveyor, for Smith, as such, made the survey and plat filed in the land office with the adverse claim; so that, if section 452 includes deputy mineral surveyors, Lavagnino, before expending any sum except one dollar, was at that time advised of the fact, if he was not before, that his agreement with Smith was in violation of the provisions of said section, and that the conveyance of the Yes You Do for that reason was invalid. The latest decisions of the Secretary of the Interior hold that under section 452 of the Revised Statutes of the United States, "a deputy mineral surveyor, while holding such office, is disqualified as a mineral entryman": *Floyd v. Montgomery*, 26 Land Dec. Dept. Int. 122; *Frank A. Maxwell*, 29 Land Dec. Dept. Int. 76. Our attention has not been called to any decision of a court touching the question, and while the decisions of the land department, on matters of law, are not binding upon the courts, they should not be overruled except when they are clearly erroneous: *Hastings etc. Co. v. Whitney*, 132 U. S. 357, 366, 10 Sup. Ct. Rep. 112, and cases there cited. We think that the section in question includes mineral surveyors, and prohibits

them, as held by the land department, from entering any of the public lands while they are such deputies, and also from directly or indirectly acquiring any interest in the purchase from the government of the same. It follows that J. Fewson Smith, Jr., while he was a deputy mineral surveyor, was prohibited by said section from ¹⁹ entering a mining claim or directly or indirectly acquiring any right or interest in the purchase from the government of such a claim. He was also prohibited at that time from doing any of the acts upon the performance of which, under the provisions of the mining claim of 1872, the right of making an entry or purchase from the government depends, and that his location of the Yes You Do was therefore void, and Lavagnino acquired no rights under the deed from him to the same.

The failure of the plaintiff to show, in chief, any right to the premises in controversy, disclosed the fact that he was "a stranger to the title" of the premises in dispute, and that a nonsuit could, on motion, have been properly granted. So that a failure to establish the defendants' claim could in no way benefit him or validate his alleged title to the Yes You Do. Therefore the plaintiff had no more interest in or right to further contest the defendants' claim, on the ground that the Levi P. and Veta were valid and subsisting claims, than the said Andrew P. Mayberry himself or any other stranger had.

Section 2325 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1429) provides that: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

In the case of *Eureka Min. Co. v. Richmond*, 4 Saw. 302, Fed. Cas. No. 4548, it was held, in the opinion delivered by Mr. Justice Field, that "under the mining act of 1872, where one is seeking a patent for his mining location, and gives the prescribed notice, any other claimant of an unpatented location objecting ²⁰ to the patent on account of extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will be afterward precluded

from objecting to the issue of the patent." The rule thus laid down has been adhered to ever since its announcement, both by the courts and the land department.

In the case of *Wight v. Dubois* (C. C.), 21 Fed. 693-696, Mr. Justice Brewer, in the opinion, summed up the propositions decided therein as follows: "1. The government, as a land owner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere; 2. Publication of notice is process bringing all adverse claimants into court, and if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land; 3. Thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the land department, and cognizable there only."

In *Golden Reward Min. Co. v. Buxton Min. Co.* (C. C.), 79 Fed. 868-874, the same distinguished judge, after quoting section 2325 of the Revised Statutes, said: "The expression 'it shall be assumed' must be construed to mean 'conclusively assumed,' as any other construction would defeat the object of the statute."

In *Burnside v. O'Connor*, 30 Land Dec. Dept. Int. 67-70, Secretary Hitchcock, after quoting the same section, said: "The *Hibernia* having failed to file an adverse claim against the *Mary Navin* during the latter's period of publication, it must be assumed that no such adverse claim exists, and the department cannot now hear any objection from the *Hibernia* claimants to the issuance of patent for the *Mary Navin*, based merely on an assertion of prior right to a portion of the land included in the *Mary Navin* entry. The provisions of the statute are clear, and as the *Hibernia* claimants²¹ have, by their own negligence, placed themselves in such a position relative to the *Mary Navin* application that it must be assumed they have no adverse claim against said application, it is useless to suspend the *Mary Navin* entry to await the result of the suit by the *Mary Navin* against the *Hibernia*."

In *Branagan v. Dulaney*, 2 Land Dec. Dept. Int. 744, Secretary Teller said: "It has been the practice of the land office not to inquire as to the status of the original or prior location when the discovery is made within the boundaries thereof, unless an application for patent has been made for such original or

prior location. If the owner of the original or prior location neglects to adverse the application for a patent to the junior location, it must be assumed, under the provisions of section 2325 of the Revised Statutes, that the claimant of such junior location is entitled to a patent as against the claims of the prior locator."

In *Matter of the Nevada Lode*, 16 Land Dec. Dept. Int. 532, it was held that: "A charge of noncompliance with law against a mineral entry made by a protestant may properly form the basis of a hearing, but the protestant in such a case is not entitled to set up his own claim to the land."

In *American Consol. etc. Co. v. De Witt*, 26 Land Dec. Dept. Int. 580, it appears that De Witt made application for a patent for the Maryland mining claim, and that the American company afterward protested, and one of the grounds of the protest was that the "Maryland was not a valid location, in that the discovery therein was on the Orbit claim, a prior and subsisting location, and not upon unappropriated public land; that the Orbit vein was the only one discovered within the limits of the Maryland." Secretary Bliss, in ruling adversely to the protestant, said: "Whether the ground which includes the Maryland discovery is a part of the Maryland, or a part of the Orbit, and whether the Maryland is the superior claim to the ground in conflict, are questions which were open to determination ²² by adverse proceedings in the local courts, and which are now determined adversely to protestant's contention by reason of its failure to adverse the Maryland's application (section 2325)."

The evident intention of the adverse proceedings authorized by section 2326 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 1430) is not to determine any of the rights of the United States, or the rights of the contestants to a patent, but, in aid of and for the information of the land department, to determine, as between the litigants, the right to the possession of the mining claim in dispute.

In *Doe v. Waterloo Min. Co.*, 17 C. C. A. 190, 70 Fed. 455-462, after quoting section 2326 of the Revised Statutes, the court said: "There is no authority in the statute to find against the United States, and that the party so establishing title is entitled to a patent from the United States. The United States is not named as a party. The suit does not purport to be one against the United States. No authority is given by the statute to sue the United States in such a matter. The application for a

patent for mineral land is made to the land department of the United States. Ultimately that department must determine the right to the patent. The trial of the right to the possession of a given tract of mineral land is a proceeding in aid of that department. It was not intended that when this issue was presented to a court it should operate as a transfer of the whole case made by the application, and that thereafter the land department would have nothing to do but to carry into effect the judgment of the court. A state court of general jurisdiction has the power to determine this issue, and such courts are often called upon to try causes arising under the said section 2326. Can it be supposed that it was intended that under the said statute such a court would have the power to determine whether or not the United States should issue a patent to any applicants? The power to sue the United States in a state court should rest upon some positive statute. It cannot be ²³ inferred from such a statute as the one in question." To the same effect see *Wight v. Dubois* (C. C.), 21 Fed. 694.

We think it is clear, both from the language of the sections of the Revised Statutes referred to and the authorities cited, that it must, as stated by Mr. Justice Brewer, be conclusively presumed that Andrew P. Mayberry, as he failed to make any adverse claim, had none, and, as the plaintiff failed to show any right to the disputed premises, he became a stranger to the title, and thereafter had no more right than any other stranger to further contest the defendants' claim. While Mayberry has the right, like any stranger, to protest, he cannot do so on the basis of any rights he may have had in either the Levi P. or Veta mining claims. It follows that he conclusively waived his right to do so by failing to file an adverse claim, and that the plaintiff in this case, and all other strangers to the title, are likewise precluded from protesting on like grounds.

The trial court found that "on or about the first day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain mining district, Salt Lake county, State of Utah, and having discovered thereon a lode of mineral-bearing rock in place, bearing lead, iron, silver and other minerals, did then and there locate the same as the 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims, by marking the boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be

readily traced, and by posting at the points of discovery upon said mining claims, respectively, notices of location, describing the same by reference to natural objects and permanent monuments; that thereafter he caused copies of said notices of location, respectively, to be filed and recorded in the office of the district recorder of said West Mountain mining district. That thereafter the said Edmund H. Uhlig and the defendant, the St. Joe Mining Company remained ²⁴ in possession of said mining claims, working and developing the same, and causing to be done thereon and for the benefit of said claims, in each and every year up to and including the year 1900, the annual assessment work required by the laws of the United States."

The application for a patent for the Uhlig Nos. 1 and 2 was made on August 24, 1898. The Yes You Do was located on the first day of January, 1898, eight years after the location of the Uhlig Nos. 1 and 2.

Section 2332 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 1433) provides that "where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state and territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property attached prior to the issuance of a patent."

Section 2997, subdivision 2, of the Compiled Laws of Utah of 1888, provides that the words "'real property' as used in the Code of Civil Procedure, unless otherwise apparent from the context, are coextensive with lands, tenements and hereditaments, water rights and possessory rights and claims."

The territorial supreme court, in *Houtz v. Gisborn*, 1 Utah, 173-176, held that, under said section, mining claims are real property and pass by deed. There are numerous authorities which hold (without regard to statutory provision) that mining claims are real estate: 1 *Lindley on Mines*, sec. 535; *Barringer & Adams on Law of Mining*, 568 et seq.; *Aspen Min. etc. Co. v. Rucker* (C. C.), 28 Fed. 222, and cases cited; *Harris v. Equator Min. Co.* (C. C.), 8 Fed. 863; *Hughes v. Devlin*, 23 Cal. 506; *Roseville Min. Co. v. Iowa Min.* ²⁵ *Co.*, 15 Colo. 29, 22 Am.

St. Rep. 373, 24 Pac. 920; *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

Section 2332 is applicable to lode mining claims: 2 *Lindley on Mines*, sec. 688; *Harris v. Equator Min. Co.* (C. C.), 8 Fed. 863; *Altoona Min. Co. v. Integral Min. Co.*, 114 Cal. 100, 45 Pac. 1047; *Belk v. Meagher*, 104 U. S. 279-287. In the last-mentioned case (page 287) after quoting section 2332, the court, speaking through Mr. Chief Justice Waite, said: "Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location, by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete." In the case of *Altoona Quicksilver Min. Co. v. Mining Co.*, 114 Cal. 105, 45 Pac. 1048, Mr. Justice Temple, in connection with said section, said: "It must therefore follow that where such possession has continued for five years before the adverse right exists, it is equivalent to a location under the laws of Congress," and in support thereof cites *Harris v. Equator Min. Co.*, 8 Fed. 863, *Belk v. Meagher*, 104 U. S. 279, and *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419.

Subdivision 2, section 2997 of the Compiled Laws of 1888, is still in the Revised Statutes of 1898, subdivision 10, section 2498.

A mining claim being a possessory right, it is real estate under the provisions of the statutes of Utah before referred to, and any claim which Mayberry might have had, as he failed to institute a suit to recover the same within seven years after the possession of the Uhlig Nos. 1 and 2, as found by the trial court, began, was barred by section 2859 of the Revised Statutes of Utah, which is as follows: "No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seised or possessed ²⁶ of the property in question within seven years before the commencement of the action." It was also waived by his failure to adverse the application for a patent of the Uhlig Nos. 1 and 2. In view of these facts, the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United States mineral surveyor, as the location of the Yes You Do was not made until eight years after the said possession of the Uhlig Nos 1 and 2 was begun, could not avail himself of any rights which the said Mayberry may have had.

The objection to the admission in evidence of the certified copy of the notice of location of the Yes You Do and the deed to Lavagnino, offered in connection therewith, and the objection to the evidence relating to the Levi P. and Veta mining claims were properly sustained.

The decree of the court below is affirmed, with costs.

Bartch, J., and Hart, D. J., concur.

The Repeal of Statutes by implication is considered at length in the monographic note to Howard v. Hurlbert, 88 Am. St. Rep. 271-297. The general rule is, that repeal by implication, in the absence of a clear intention, can be indulged only so far as unavoidable: Morrison v. Eau Claire, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280.

The Decisions of the Land Department as to matters within its jurisdiction are ordinarily final and conclusive: Diana Shooting Club v. Lamoreux, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898, and cases cited in the cross-reference note thereto; monographic notes to Boatner v. Ventress, 20 Am. Dec. 273-277; Delles v. Second Nat. Bank, 75 Am. St. Rep. 881, 882. Such decisions upon questions of law are not subject to collateral attack, and can be reviewed only in a proper case made in a direct proceeding for that purpose: Note to Delles v. Second Nat. Bank, 75 Am. St. Rep. 882.

That Adverse Possession of mines and minerals may ripen into a prescriptive title, see Delaware etc. Canal Co. v. Hughes, 183 Pa. St. 66, 63 Am. St. Rep. 743, 38 Atl. 568; Louisville etc. R. R. Co. v. Massey, 136 Ala. 156, 96 Am. St. Rep. 17, 33 South. 896.

PALMER v. PALMER.

[26 Utah, 31, 72 Pac. 3.]

HUSBAND AND WIFE—Contract for Divorce.—A contract between husband and wife reciting that irreconcilable differences have arisen between them, and that in consequence a permanent separation is desirable, that a divorce proceeding is in contemplation and will be instituted by one or the other for the legal dissolution of the marriage tie, and then, after reciting the property the wife is to have, declares that they agree so far as the law permits them to do, to a full and final separation and dissolution of the marriage relation, is not merely a contract for a separation, but is one for the purpose of facilitating the securing of a divorce, and is therefore void. (p. 822.)

CONFLICT OF LAWS.—Comity cannot be invoked to enforce the laws of another state which are inimical to the interests of the state where their enforcement is sought. (p. 822.)

CONFLICT OF LAWS.—Contracts Made in One State cannot be enforced in another if in contravention of the public policy of the latter state. (p. 822.)

CONFLICT OF LAWS.—Comity Between Different States requires no state to uphold or enforce contracts injuriously affecting the welfare of its subjects or contravening its own laws, institutions or policy. If the *lex loci contractus* comes in conflict with the *lex fori*, comity must yield to the positive law and policy of the forum. (p. 822.)

HUSBAND AND WIFE—Agreement for Divorce—Public Policy.—An agreement entered into between husband and wife calculated or intended to facilitate the securing of a divorce a vinculo matrimonii, is contrary to the policy of the law and void. (p. 825.)

HUSBAND AND WIFE—Contract for Divorce.—Courts will refuse to enforce any contract, as against public policy, which is intended to promote the dissolution of the marriage status. (p. 825.)

HUSBAND AND WIFE—Agreement to Dissolve Marriage.—Either husband or wife, or both, may violate the terms and obligations of the marriage contract, but neither nor both combined can rescind or modify it except as provided by law. (p. 825.)

HUSBAND AND WIFE—Agreement for Divorce—Widow's Right of Inheritance.—A contract to facilitate the procuring of a divorce, secured by the husband from his wife through unfair advantage and unwarranted coercion on his part, whereby she agrees to take an inadequate and fractional part of their property, is void, as against public policy, and does not bar her of her right of inheritance in the property of such husband on his death. (p. 829.)

Pierce, Critchlow & Barrette, for the appellant.

Stephen & Smith and W. B. Willingham, for the respondents.

39 **BARTCH, J.** The principal and decisive question in this case is whether the contract pleaded and relied upon by the plaintiffs is valid and bars the widow's right of inheritance. So far as material here, it reads: "Whereas, irreconcilable differences have arisen between W. D. Palmer and his wife, Ida M. Palmer, and in consequence thereof a permanent separation between them is desirable, and a divorce proceeding is in contemplation and will be instituted by one or the other of said parties, for the legal dissolution of the marriage tie existing; and, whereas, the said W. D. Palmer is willing to make a satisfactory settlement upon and with the said Ida M. Palmer in lieu of all claims for alimony against him, either temporary or permanent." And then, after mentioning the property the wife was to have, which is the same as that described in the pleadings, and making some stipulations in respect thereof, it concludes: "Now, therefore, this instrument of writing witnesseth the mutual agreement, contract and settlement above described, and the said Ida M. Palmer hereby acknowledges the receipt of said sum of money cash in hand paid by him, the said W. D. Palmer, and in consideration thereof as well as the amounts heretofore received, hereby acknowledges full and satisfactory payment by

him of all claims she has against him, and agrees in consideration thereof to, and does hereby, release him from all liability past, present or future for her support, maintenance or comfort, and they both hereby contract and agree so far as they are by law permitted to do, each for the other, to full and final separation and dissolution of the marriage relation, and all responsibility ⁴⁰ of every character of the one for the other is hereby forever ended."

The appellant, among other things, contends that this is a contract between husband and wife, entered into for the purpose of procuring a divorce, or of facilitating such a result, and is therefore collusive and void. The respondents insist that it amounts merely to a separation agreement, settling the property rights of the parties, and that it is authorized by the laws of the state of Georgia, where it was made and executed, and should be enforced, through comity, in this state.

Whether or not the contract is valid and enforceable under the laws and decisions of the state of Georgia, it is not necessary to decide, for it clearly appears from the face of the instrument that it is invalid under our laws and decisions; and, when read in light of the facts and circumstances disclosed by the evidence, the conclusion becomes irresistible that it ought not to and cannot be enforced in this state, even if enforceable in the state where made. The principle of comity cannot be invoked to enforce the laws of a foreign state which are inimical to the interests of the state where their enforcement is sought. Nor will a contract executed in one state be enforced in another if it is in contravention of the public policy of the latter state. Comity between different states requires no state to uphold or enforce contracts which injuriously affect the welfare of its subjects, or contravenes its own laws, institutions or policy. In such cases, when the *lex loci contractus* comes in conflict with the *lex fori*, comity must yield to the positive law and policy of the forum: Story on Conflict of Laws, sec. 327; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839; Seamans v. Temple Co., 105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. 408.

We are clearly of the opinion that the contention of the appellant is sound. That the contracting parties contemplated a divorce a vinculo matrimonii seems apparent. Differences had arisen between husband ⁴¹ and wife which appeared to them irreconcilable, and in the very first sentence of the instrument it is stated expressly that a "permanent separation between them

is desirable, and a divorce proceeding is in contemplation and will be instituted by one or the other of said parties, for the legal dissolution of the marriage tie existing." This language is plain, unambiguous and clearly shows that the design of the parties was to absolve all marital relations existing between them; and, if there is any doubt that the contemplated divorce was a moving cause for the contract, such doubt would seem to be removed upon perusing the concluding paragraph of the instrument, where they say "they both hereby contract and agree so far as they are by law permitted to do, each for the other, to full and final separation and dissolution of the marriage relation, and all responsibility of every character of the one for the other is hereby forever ended." In the face of such language, is it not idle to say or contend, as do counsel for the respondents, that this is a mere contract for separation, and cannot be construed into an agreement to facilitate a divorce? The parties to the instrument say "a divorce proceeding is in contemplation," and that they agree, so far as they think the law permits them to do, "to full and final separation and dissolution of the marriage relation." They, in effect, stipulate that all their marital responsibilities shall be forever ended. It is difficult to see by what process of reasoning such a contract can be construed to be anything else than an agreement to facilitate a divorce, or an attempt to put an end to the marriage status by mutual agreement of the parties. It is true it was not stipulated in the instrument which one of the parties was to institute the divorce proceedings in court, but that appears from the testimony. So the consideration and motive which induced the parties to enter into and execute the contract appears from the evidence, as well as upon the face of the instrument itself.

The wife, in substance, testified that before the execution ⁴² of the contract she was unwilling to have a divorce; that when given to understand that a divorce was the consideration in order for her to get anything from her husband, who was keeping himself concealed from her, she refused to apply for one; that she then employed Thompkins & Alston, as her attorneys, to assist her in procuring a settlement; that finally, through a mutual friend, her husband offered her the six thousand five hundred dollars mentioned in the contract, in addition to the other property referred to therein; that upon the advice of her counsel to accept it, as the best she could do under the circumstances, and fearing the mortgage of five thousand dollars which was hanging over her, and which might lose her her home, she

accepted the offer, with the agreement that she was to file suit for divorce at once, although she had at first refused to do so; and that the next day after the execution of the contract, pursuant to and in fulfillment of the agreement, the divorce proceedings were instituted by her, the papers for which had been prepared as a part of the settlement. The witness further stated: "The reasons Judge Thompkins assigned for advising me to accept the offer of settlement were that there was no property belonging to Mr. Palmer in the state that we could attach; that he had the cash, and he could get out of the state, and I couldn't get service on him; therefore he had put himself in a position where it was thought, if I let that offer go, I wouldn't get anything at all." As to much of this and other similar testimony, the wife is corroborated by that of other witnesses. The witness Alston, speaking with reference to the preparation of the papers for the divorce proceeding before the consummation of the contract, said: "I did that because I knew there would be no opposition to the divorce, as both sides wanted it"; and then, in reference to the question of the settlement, or of fighting the case in the courts, the witness said, "We would have fought it if we had been out in the open, and if he had been where we could have served him." That a divorce was in the mind of at least the husband before the consummation ^{of} the contract also appears from a letter in evidence, written by him to his wife, dated July 14, 1899, wherein, after informing her that he had disposed of all his property and would leave the state, he said: "With this letter let all communication cease forever. My cousin Hubert will represent me during my absence. I have instructed him to render any assistance he can in securing a divorce, which seems to be the best thing to do under the existing circumstances." It is true, the witness Culberson, who was the "cousin Hubert" mentioned in this letter, and the husband's attorney, at first testified that his client had left him "no instructions relative to a divorce proceeding to be instituted by his wife or himself," but when confronted with the letter dated July 19, 1899, written by the witness to Mrs. Palmer, wherein he said, "He [meaning the husband] gave me no instructions to sue for a divorce, but seems to think that was what you'd do and asked me to aid you in all ways possible in event you did," and in another letter to her dated June 3, 1899, had said, "Of course a divorce is inevitable, and after the settlement is made, if it can be made, the next question would be

where the divorce proceedings should be instituted"—he admitted that his client had instructed him to assist in all ways possible to secure a divorce.

Further reference to the evidence in detail would be useless, for, like upon the face of the contract, it is clearly shown by the proof that the procuring of a divorce was in the minds of the parties before and at the time the instrument was executed, and was a moving consideration. The fact that the very next day after the execution of the instrument the wife instituted the divorce proceedings is significant, as tending to show that she endeavored in good faith to comply with her understanding of the agreement, although, as seems evident from a careful perusal and consideration of the evidence, she never entered into the contract voluntarily but simply as the victim of circumstances over which she was led to believe she had no control. The record ⁴⁴ is quite convincing to the mind that the intention of the husband was to sever all marital relations existing between him and his wife, and that the wife was induced through unfair means to sign the agreement. Such being the case, the contract must be regarded as one executed for the purpose of facilitating the procuring of a divorce, and not as a mere separation agreement. It amounts to a mutual agreement, in writing, of the husband and wife, to dissolve the marriage and absolve themselves from all marital obligations. The agreement, therefore, being one calculated or intended to facilitate the securing of a divorce a vinculo matrimonii, is contrary to the policy of the law and is void. The law is well settled that courts will refuse to enforce any contract, as against public policy, which is intended to promote the dissolution of the marriage status: *Greenhood on Public Policy*, 490, 491. When that status is created the rights involved are not merely private, but they are also of public concern. The social system and welfare of the state having their foundation in the family, the state is an interested party, and therefore the marriage relations cannot be dissolved except through the sovereign power. It is true either the husband, or wife, or both, may violate the terms and obligations of the contract; but neither one nor both combined can rescind or modify it except as provided by the laws of the land. This subject was discussed in *Hilton v. Roylance*, 25 *Utah*, 129, 139, 69 *Pac.* 660, and it was there said: "Marriage, strictly speaking, is not a mere civil contract, but a status created by contract: 1 *Bishop on Marriage and Divorce*, sec. 34. It is true, it is founded in consent of the parties, but the con-

sent is the contract because of which the status is created. Marriage differs from ordinary contracts, in that it can only exist where one man and one woman are legally united for life, whereas ordinary civil contracts may exist between two or more of either or both sexes for any stipulated time. So the marriage relation differs from other contractual relations, in that, ⁴⁵ when the status is once created, the state becomes an interested party, and thereafter the marriage, with the rights and duties assigned by the law of matrimony, is not subject, as to its continuance, dissolution, or effects, to the mere intention and pleasure of the contracting parties. The marriage, with its privileges, obligations, rights, and duties, which are or may be assigned by the law of matrimony for the establishment of families and the multiplication and education of human kind, continues during the life of the parties, and no dissolution of the status can be effected simply by the mutual consent or agreement of the parties. It is regulated and controlled and can be dissolved only through the sovereign power of the state whenever justice to either or both parties or the welfare of the public demands it": Norton v. Tufts, 19 Utah, 470, 57 Pac. 409.

Moreover, where, as appears in this instance, the parties agree that the one shall bring a suit to dissolve the marriage, and that the other will make no defense, or a mere nominal defense, which is indicated by the context, the agreement becomes collusive and fraudulent, and is without validity. A contract of this character may be regarded not only as conceived in fraud, but as a fraud upon the court, and it comes within the reason of the maxim, "*Ex turpi causa non oritur actio.*" Mutual agreement of a male and female who are of the requisite age and capacity may create the marriage relation, but it can never dissolve it. The state being founded upon the family, so high is the marriage status regarded by mankind, so necessary is its permanency to promote the public welfare and private morals, that the state, to every marriage contract entered into within its jurisdiction, makes itself a party, in the sense that it will not permit its rescission or dissolution except for a cause provided by law, the existence of which is to be ascertained by a court of competent jurisdiction, upon evidence regularly submitted, in a proper proceeding instituted in good faith for that purpose. The parties cannot even consent to a decree in open court, nor stipulate ⁴⁶ as to the facts. The decree must be based on absolute proof. The welfare of humanity, the intelligence and progress of the human race, high moral and social ethics, alike de-

mand this. Any other method or device by which the contracting parties attempt to sever or to facilitate the severing of the bonds of matrimony, in the eye of the law, contravenes public policy, is regarded as *contra bonos mores*, and is void and ineffectual. Therefore a contract which is designed to facilitate the procurement of a divorce, to put an end to the marriage status, and absolve the parties from all their marital obligations, imposed upon them by the law of matrimony, cannot be enforced. "As the policy of the law is to preserve intact the marriage, if possible, all requirements which have for their object or which contemplate a future separation between husband and wife are universally held illegal". 15 Am. & Eng. Ency. of Law, 2d ed., 955. In 1 Bishop on Marriage, Divorce and Separation, section 1261, the author says: "Since the law makes the public a party to every suit for dissolution or separation, and forbids either form of divorce on the mutual agreement of the parties, or on the connivance of one of them to the other's wrong, any bargaining between them for a future separation or for the procuring of a divorce, or tending to the like end, being contrary to the law and legal policy, is void." In Seeley's Appeal, 56 Conn. 202, 14 Atl. 291, it was said: "The law requires husband and wife, in their relation to each other, to perform certain duties and refrain from committing certain wrongs. Taking note of human infirmity, and of certain failure of some to do as it requires, or to refrain from doing what it forbids, it makes possible a method of release from the marriage contract upon proof that its purpose must entirely fail of accomplishment. Every decree of divorce must rest upon proof of such facts as have been by the legislature declared to be sufficient to uphold it; not at all upon considerations as to rights of property; not at all upon the wishes or agreements of the parties. Courts will not enforce any contract which ⁴⁷ is the price of consent by one party to the marriage relation to the procurement of a divorce by the other. The court is entitled to know in every case whether the particular marriage tie in question is or is not of sufficient strength to bear the strain to which the law has subjected it." So in Adams v. Adams, 25 Minn. 72, it was stated: "The authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant, in a pending action for divorce, to withdraw his or her opposition and to make no defense, is void, as *contra bonos mores*." Likewise, in Phillips v. Thorp,

10 Or. 494, it was said: "So strict and careful are courts in the administration of this justice, out of regard for the public morals and the general welfare of society, that they will esteem it their duty to interfere upon their own motion whenever it appears the dissolution is sought to be effected by the connivance or collusion of the parties; and all contrivances or agreements having for their object the termination of the marriage contract, or designed to facilitate or procure it, will be declared illegal and void, as against public policy." And again in the same case: "An unlawful agreement, it is said, can convey no rights in any court to either party, and will not be enforced, in law or in equity, in favor of one against the other of two persons equally culpable." In *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345, it was observed: "The law favors marriage, and cannot therefore sanction contracts intended to promote its dissolution, by lending itself to their enforcement. We know of no case in the books in which such an appeal to any court to compel the fulfillment of such a contract, or to award damages for its breach, has been successfully made": 1 *Bishop on Marriage, Divorce and Separation*, secs. 76, 1312; 2 *Am. & Eng. Ency. of Law*, 2d ed., 127; *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. 1088; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 48 801; *Hamilton v. Hamilton*, 89 Ill. 349; *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Baum v. Baum*, 109 Wis. 47, 83 Am. St. Rep. 854, 85 N. W. 122; *Collins v. Collins*, *Phill. Eq. (N. C.)* 153, 93 Am. Dec. 606; *Blank v. Nohl*, 112 Mo. 159, 20 S. W. 477; *Friedman v. Bierman*, 43 Hun, 387; *Simpson v. Simpson*, 4 Dana, 140; *Blank v. Nohl (Mo.)*, 19 S. W. 65; *Belden v. Munger*, 5 Minn. 211, 80 Am. Dec. 407; *McKenna v. Phillips*, 6 Whart. (Pa.), 571, 37 Am. Dec. 438.

It will thus be seen that, viewed and tested by the foregoing principles, the contract in controversy clearly contravenes the policy of the law and is void. Nor does it appear that the consummation of the transaction was the result of fair dealing. The conduct of the husband toward his wife was not such as to stamp it with fairness and justice. That the execution of the instrument by the wife was obtained through unfair advantage and unwarranted coercion on the part of the husband is a conclusion irresistible from an examination of the evidence. His consent and furnishing of the means for his wife to visit her parents; his selling out their property without her knowl-

edge or assent, and leaving the state with the property in cash, while she was absent; his instructions to his attorneys to conceal his whereabouts; his keeping his wife in ignorance of the value of an amount obtained for the property; his threat that he would never return to the state while the one whom he promised to love, protect, and support was in it; his grossly unequal division of the property, which, with the assistance of her father, they had accumulated during their married life—all these things, considered with the fact that his own intemperate habits, and consequent neglect of the duties he owed his wife, had brought on the estrangement then existing between them, savor much of the fraudulent, and militate strongly against the fairness and justice of the transaction which culminated in the contract. Not only the law, but a man's most sacred honor, as well as every ⁴⁹ principle of justice and equity, demands that he treat his wife at all times, and under all circumstances, respectfully, fairly, openly. Surely nothing less was due her. In that trying hour, when the cloud of disappointment and adversity was hanging over her, when she was to attach her signature to an instrument calculated to sever an alliance which had been made for life, she had a right to see her husband and talk with him face to face, and he had no right to conceal himself or anything relating to their affairs from her.

The record in this case is such as impels one to the thought that this is one of the sad, unfortunate cases where liquor, that prince of evil, blasted happy hearts and destroyed a happy home.

We are of the opinion that the appellant is not barred of her right of inheritance.

Having taken the view that the contract is without validity, it is unimportant to discuss the other points presented.

The judgment must be reversed, with costs, and the cause remanded to the court below, with directions to set aside the present findings of fact and the decree, and enter findings of fact and a decree in accordance herewith, in favor of the appellant. It is so ordered.

Baskin, C. J., and McCarty, J., concur.

Marriage cannot be dissolved by the simple consent or agreement of the parties; it can be dissolved only through the sovereign power of the commonwealth: *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660. A contract having for its object the dissolution of a marriage is against public policy and void. Hence, it is held that an agreement to withdraw opposition to divorce proceedings cannot form a valid consideration for a promissory note: *Sayles*

v. Sayles, 21 N. H. 312, 53 Am. Dec. 208. And a contract, the consideration of which is that the wife shall not appear in a suit for a divorce nor claim alimony, is held void in *Belden v. Munger*, 5 Minn. 211, 80 Am. Dec. 407. And an agreement made, pending her application for a divorce, that when the divorce is granted she will pay a certain amount for improvements made by her husband on her lands during marriage, is held void in *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345. See, also, *Collins v. Collins*, Phill. Eq. 153, 93 Am. Dec. 606; *McKinnan v. Phillips*, 6 Whart. 571, 37 Am. Dec. 438.

Judicial Comity does not require the courts of one state to enforce, in contravention of its own law, policy, or morals, the laws of other states or contracts there made: *Commonwealth etc. Ins. Co. v. Hayden*, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922; *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703; *McGinnis v. Missouri Car etc. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553, 73 S. W. 586; *People v. Martin*, 175 N. Y. 315, 96 Am. St. Rep. 628, 67 N. E. 589; *Dearing v. McKinnan etc. Hardware Co.*, 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773.

MUNZ v. STANDARD LIFE AND ACCIDENT INSURANCE COMPANY.

[26 Utah, 69, 72 Pac. 182.]

INSURANCE, LIFE—Proof of Death—Reasonable Time.—If a life insurance policy requires proof of death to be furnished within two months thereof, in default of which all claims under the policy shall be forfeited, such requirement is a condition subsequent, and is complied with by a submission of proof of death within a reasonable time after knowledge thereof, and of the existence of the policy, under all the circumstances of the particular case. (p. 832.)

INSURANCE, LIFE—Notice of Accident and Proof of Death. Although a life insurance policy provides that the insurer must be given notice of the accident to, and proof of the death of, the insured within a specified time thereafter, or the policy will be forfeited, yet a beneficiary who is in ignorance of such death, and the existence of the policy complies with such conditions, if within a reasonable time after obtaining knowledge of such death and the existence of the policy, he gives the insurer notice of the accident and proof of the death. (p. 834.)

M. E. Wilson and J. H. Ryckman, for the appellant.

E. A. Silberstein, for the respondent.

⁷⁰ BARTCH, J. This action was brought to recover the amount claimed to be due on an accident insurance policy issued by the defendant company to Charles Meyer, the deceased, whose estate the plaintiff was appointed to administer.

The facts, as set out in the amended complaint, are that Charles Meyer was insured in the defendant company, by an

accident policy, for five hundred dollars, issued on or about May 16, 1899; that on June 29, 1900, Meyer was accidentally and instantly killed at or near Kemmerer, Wyoming; that deceased was unmarried, and left surviving him no friends or relatives, except the plaintiff, his cousin, who was then, and ever since has been, a resident of Salt Lake City, Utah; that said town of Kemmerer is two hundred and thirty-four miles from Salt Lake City; that plaintiff learned of the death of Meyer for the first time in October 1, 1900; that, by reason of plaintiff being in poor circumstances financially, she was unable to have his body disinterred and brought, with his personal effects, to Salt Lake City; that on or about February 15, 1901, plaintiff procured the personal effects, including said insurance policy, prior to which date the existence of said policy was not known to her; that on February 23, 1901, she gave notice to the defendant of said Meyer's death, ⁷¹ and made demand for payment of said policy, which demand was refused by the defendant, because notice had not been sent to defendant, and no proof of death had been made, within two months after the death; that as soon as plaintiff was able to procure legal assistance to that end, to wit, May 1, 1901, she procured and sent defendant due proofs; and that thereupon payment of the policy was again refused, because the proofs were not made within the specified time. It is then alleged that Meyer duly conformed and complied with all the provisions of the policy; that the policy was in force and effect at the time of his death; that she was duly appointed administratrix of his estate in May, 1901, by the district court of Salt Lake county. Judgment was demanded in the sum of five hundred dollars. To this amended complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff failing to amend her complaint within ten days, as ordered by the court, judgment was entered for the defendant, and the plaintiff has appealed to this court.

The appellant contends that the complaint states a good cause of action, and that the court erred in sustaining the demurrer.

The defense is based upon the ground that there was neither notice of the fatal accident given, nor proof of death furnished to the company, within the time limited by the policy. The policy, so far as material here, provides: "Immediate written notice shall be given to the company at Detroit, Michigan, of any accident and injury or sickness for which claim is made, with full particulars thereof, and full name and address of the

insured. Direct and positive proof of death must also be furnished to said company, at Detroit, Michigan, within two months from the time of death, else all claims based thereon shall be forfeited." If, under all circumstances, these provisions must be literally complied with, then the defense in this case is well founded, for it is not controverted that ⁷² no immediate notice of the accident was given, and that no proof of death was made within two months of the death. The provisions are such as are usually contained in insurance policies, and if they were to be rigidly enforced, no matter how unusual or peculiar the circumstances of a particular case, then, indeed, they would prove a pitfall or snare to the unwary. They are intended, however, for no such purpose. They constitute conditions subsequent, and, as said in *Brown v. Accident Assn.*, 18 Utah, 265, 272, 55 Pac. 63, by this court: "Doubtless the purpose of such conditions in a policy is to afford the insurer an opportunity within a reasonable time after the occurrence to inquire into the cause of the accident, and ascertain the surrounding facts and circumstances while fresh in the memory of witnesses, so as to determine whether or not liability under the contract exists. The condition in the policy, requiring notice to be given within a specified time, with full particulars of the accident, operates upon the contract of insurance only after the fact of the accident. It is a condition subsequent, and must therefore receive a reasonable and liberal construction in favor of the beneficiary under the contract."

In the case at bar, the beneficiary was not aware of the death of the insured until about three months after it occurred, was distant two hundred and thirty-four miles from the place of the accident and death, and was not aware of the existence of the policy until over seven months after the fatal occurrence. Being thus ignorant of these things, how could she comply literally with the terms of the policy as to notice and proof? How could she give "full particulars" of an accident the occurrence of which was not within her knowledge, or the "full name and address of the insured" when she knew nothing of the insurance? We cannot assume that the parties to the insurance contract intended such absurdities. The contracting parties doubtless intended that notice and proof should be furnished at the earliest practicable time after the happening of an accident and injury for ⁷³ which liability would be claimed, so that the real facts of the case could be ascertained by the insurer before time had effaced them from the memory of witnesses. The word "im-

mediate," under such circumstances as are disclosed in this record, cannot be construed as excluding all intervening time between the occurrence of the death and the giving of notice. It does not, by any fair construction of the policy, mean instantly, but "immediate notice" means notice within a reasonable time, under all the circumstances of each particular case, and no doubt, ordinarily, unless there are circumstances excusing delay, the notice should be given at once. It would, however, be both an unreasonable and unfair interpretation to hold that, as used in the policy, the word "immediate" required the doing of a thing impossible for the beneficiary to do. Such provisions must receive reasonable construction in favor of the beneficiary.

May, in his work on Insurance, volume 2, section 462, says: "If the notice be required to be 'forthwith,' or 'as soon as possible,' or 'immediately,' it will meet the requirement if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the word a literal interpretation would in most cases strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud."

In *Kentzler v. American Mut. Acc. Assn.*, 88 Wis. 539, 43 Am. St. Rep. 934, 60 N. W. 1002, it was said: "In case of an injury or disability not resulting in death, such notice affords the association an opportunity to ascertain the exact condition of the person and apply the most effectual remedy. But in case of death there can be no remedy, and the only object of the notice is to secure evidence of identity. What is meant by giving notice 'immediately after the accident occurs'? Does it mean, in the language of Webster: 'In an immediate manner; without intervention' ⁷⁴ of anything; . . . without interval of time; without delay; instantly'? If the contract is to be thus literally construed, compliance by the beneficiary would seldom be possible. But courts, looking at the substance of contracts and statutes, have, during the last two centuries, repeatedly declared that 'the word "immediately," although in strictness it excludes all mean times, yet, to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing.'"

So, in *Solomon v. Continental Fire Ins. Co.*, 160 N. Y. 595, 72 Am. St. Rep. 707, 55 N. E. 279, where the plaintiff did not obtain the policy until about fifty days after the fire, and was

not aware of its contents, it was said: "Whether, under all the circumstances, immediate notice was given within the meaning of the policy, when fairly construed, was the question to be determined in this case. The word 'immediate,' like 'forth-with,' does not mean instantly, but immediate notice is notice within a reasonable time. In determining what was a reasonable time, it was necessary for the referee to take into consideration the situation of the plaintiff and all the circumstances by which he was surrounded. If they justify him in finding that the plaintiff used due diligence in discovering the policy, in ascertaining what it required, and in preparing and serving the notice of loss, then the referee was justified in determining that the notice was sufficient under the provisions of the policy": *McFarland v. Accident Assn.*, 124 Mo. 204, 27 S. W. 436; *Konrad v. Casualty etc. Co.*, 49 La. Ann. 636, 21 South. 721; *Richardson v. End*, 43 Wis. 316.

In this case there is no question that all the conditions of the policy were complied with by the deceased up to the time of his death. Those were conditions precedent for the purpose of continuing the policy in force and effect, and to them a more strict rule of construction is applicable. But where precedent conditions were all performed, courts are not inclined, by ⁷⁵ a very harsh and technical construction, to deprive the beneficiary of the benefit of a liability, because of a failure to do an impossible thing which was never in the minds or contemplation of the contracting parties. Forfeitures are not favored in law, and will not be aided by interpretation.

Such a defense as the one herein is purely technical.

The risk of the insurer was neither increased nor in any way jeopardized by the failure of the beneficiary to comply literally with conditions of which she had no knowledge. The defendant received the consideration for the indemnity as provided in the contract, and it has no cause to complain if the harsh and technical meaning which it now seeks to place upon the conditions as to notice and proof of loss be rejected. The construction thus put upon the conditions in question secures to the defendant every advantage and benefit to which it is entitled, and which was intended by the provisions of the policy. In such a case, and under such circumstances, the beneficiary is not required to do what amounts to an impossibility, but must perform the conditions subsequent within a reasonable time after obtaining knowledge of the existence of the policy, or after such knowledge could, by the exercise of due diligence, have been

obtained. Up to the time of the knowledge of the accident and discovery of the policy, such a beneficiary is not in default, and if after that he gives notice of the accident and proof of death within a reasonable time, or within the time limited in the policy, it will be a compliance with the intention and requirements of his contract. Before that time it is impossible for him to furnish proof of the particulars and circumstances surrounding the accident, required by the policy, and to hold that, because of the failure to do so, his rights under the contract were forfeited, would be alike unfair and unjust.

In *Woodmen Accident Assn. v. Pratt*, 62 Neb. 673, 87 N. W. 546, it was said: "When a time is fixed in a policy of accident insurance for the ⁷⁶ giving of notice of an accident and injury resulting therefrom for which indemnity is claimed, with the particulars thereof, which is reasonable in its character, this will be regarded as a condition precedent to be complied with before recovery can be had; but when, because of circumstances and conditions surrounding the transaction, obstacles or causes exist preventing and rendering impossible the performance of the act within the time stipulated, the act may be performed thereafter, and the beneficiary will be excused for the failure, if done within a reasonable time, or within the time stipulated after the obstacle or cause preventing prior compliance ceases to exist; the question of the sufficiency of the excuse offered and the reasonableness of the time in which the act is performed to be determined according to the nature and circumstances of each individual case, the beneficiary in all cases being required to act with due diligence and without laches on his part."

So, in *McElroy v. John Hancock Life Ins. Co.*, 88 Md. 137, 71 Am. St. Rep. 400, 41 Atl. 112, referring to the conditions of a policy requiring notice and proof within a time limited, the court said: "It is perfectly clear that the rule was made for the ordinary cases where the existence of the policy and the death of the insured are known, or might or should be known, in time to comply with the rule. It cannot reasonably be supposed that the holder of the policy could be required to give proof of a fact of which he was himself ignorant. 'To decide that one was not duly diligent, and that he lost his right as beneficiary because he did not give notice of a policy of which he knew nothing, would be more strict and exigent than in our opinion the language of the policy requires. There was timely notice given after the fact of insurance came to the knowledge of the plaintiff. This delay in finding the policy was not strange

and unexceptional. On the contrary, it appears to have been entirely consistent with good faith.'"

In *Tripp v. Provident Fund Soc.*, 140 N. Y. 23, 77 37 Am. St. Rep. 529, 35 N. E. 316, it was observed: "The plaintiff was the widow of the deceased, and the beneficiary named in the certificate. She was the only party interested in the enforcement of the contract and who could give the notice, and she could not give it, within the meaning of the condition, until she had knowledge of the facts which she was bound to communicate. To hold that plaintiff was bound to give notice of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made": *Phillips v. Benevolent Society*, 120 Mich. 142, 79 N. W. 1; *Insurance Cos. v. Boykin*, 12 Wall. 433; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015; *Globe Accident Ins. Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563.

That the beneficiary in this case acted with due diligence after the discovery of the policy, we think is clear from the facts alleged in the complaint, which, for the purposes of this decision, must be assumed to have been admitted to be true by the filing of the demurrer. The notice of the accident and proof of death, with the particulars required, appear to have been given and furnished within a reasonable time after she obtained the policy and learned that she was entitled to the benefit. As the policy, in the event of death, was payable to the insured's estate, executors, or administrators, it became necessary for her to be appointed administratrix before she could proceed in a lawful manner, and this necessarily caused some delay. Considering the facts and circumstances, however, we cannot say that, under our laws, she was guilty of laches in securing her appointment as administratrix, or in furnishing the company the necessary proofs or in instituting this suit. Where such a policy contains an agreement on the part of the insurer that, in the event of the death of the insured, ⁷⁸ the indemnity shall be paid to his legal representatives, the conditions subsequent as to notice and proof within a certain time must not, in the absence of express language to that effect, be held to apply to them. If they act without unreasonable delay, it is sufficient: *Globe Accident Ins. Co. v. Gerisch*, 163

Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563; Providence Life Ins. & Inv. Co. v. Baum, 29 Ind. 236. We are of the opinion that the complaint states a cause of action, and that the demurrer was erroneously sustained.

The judgment must therefore be reversed, with costs, and the cause remanded, with directions to the court below to overrule the demurrer and proceed in accordance herewith. It is so ordered.

Baskin, C. J., and McCarty, J., concur.

Conditions in Policies of Insurance as to the time of giving notice of loss, accident, or death are construed reasonably and most strongly against the insured. If the condition is that the notice must be given immediately or forthwith, it is necessary only that due diligence be exercised and notice given within a reasonable time, regard being had to the circumstances surrounding the case: Woodmen Accident Assn. v. Pratt, 62 Neb. 673, 87 N. W. 546, 89 Am. St. Rep. 777, and cases cited in the cross-reference note thereto; Ward v. Maryland Casualty Co., 71 N. H. 262, 93 Am. St. Rep. 514, 51 Atl. 900; Horsfal v. Pacific Mut. Life Ins. Co., 32 Wash. 132, 98 Am. St. Rep. 846, 72 Pac. 1028. A condition requiring notice of death within ninety days does not defeat the claims of a beneficiary who does not know of the death until over a year thereafter, but who notifies the insurer at once upon acquiring the knowledge: McElroy v. Hancock etc. Ins. Co., 88 Md. 137, 71 Am. St. Rep. 400, 41 Atl. 112. See, in this connection, Matthews v. American Central Ins. Co., 154 N. Y. 449, 61 Am. St. Rep. 627, 48 N. E. 751.

HOGGAN v. CAHOON.

[26 Utah, 444, 73 Pac. 512.]

AGENCY—Tort of Agent—Indemnity from Principal—Pleading.—If plaintiff alleges that defendant appointed him as his agent to take certain goods and transport them to a particular place, which he did without knowing that his act constituted a tort, and acting in good faith on the defendant's representation that such taking was lawful and proper, and that thereafter a third person recovered judgment against him for such act of taking, which judgment he was compelled to pay, together with expenses of litigation, and that defendant refused to reimburse him upon demand, his complaint states a cause of action, and is not subject to general demurrer on the ground that indemnity cannot be recovered between joint tort-feasors. (N. 839.)

AGENCY—Tort of Agent—Indemnity from Principal.—If an agent acts in good faith for his principal under the latter's direction, relying upon his representations that the transaction is lawful, and it is not manifestly unlawful, the law implies indemnity from the principal to the agent, for damages of third persons, and if, as

the result of acts so performed, the agent is mulcted in damages, the principal must respond to the agent therefor, as well as for the necessary expenses incurred in resisting the claims of third persons who were injured in the transaction. (pp. 840, 841.)

AGENCY—Tort of Agent—Indemnity—Venue.—If a principal and agent reside in one county and the agent commits a tort in another county by there seizing property of a third person and bringing it into the county of the residence of his principal, under the latter's direction and acting on his representations and in good faith, such agent, in the event of being compelled to pay a judgment recovered by such third person, is entitled to bring an action to recover indemnity from his principal in the county where both agent and principal reside, and where the main facts of such cause of action arose. (p. 842.)

L. Larson, for the appellant.

W. K. Reid, for the respondent.

445 BARTCH, J. This action was commenced in the district court of Sanpete county on November 9, 1901, to recover from the defendant the sum of two hundred and ninety dollars and thirty-five cents and interest, alleged to be due on an implied contract of indemnity. It was alleged in the complaint, substantially, that on October 4, 1896, at Manti City, Sanpete county, Utah, the defendant constituted and appointed the plaintiff his agent specially to go to the city of Payson, Utah county, Utah, and take possession of, and bring to said Manti City, certain goods and chattels upon which the defendant held a chattel mortgage; that afterward on the fifth day of October, 1898, at said city of Payson, while he was acting in the capacity of agent for defendant as aforesaid, and at the special instance, request, and direction of defendant, the plaintiff took possession of said chattels and conveyed the same to said Manti City; that then, at Manti City, the defendant ratified the taking of the goods and chattels; that at the time they were so taken the plaintiff did not know that such taking was a tort, he acting in good faith as the agent of the defendant, and upon the faith of the representations and assurances of defendant that such taking was lawful and proper; that afterward one S. S. Johnson instituted suit against the plaintiff in the district court of Utah county, and on the second day of March, 1899, recovered judgment against the plaintiff for the sum of three hundred dollars, besides costs of suit, amounting to thirteen dollars and ninety cents, all of which damages and costs were collected from him; that in addition thereto plaintiff was compelled to, and did, pay ⁴⁴⁸ fifty dollars to his attorney for defending him in that action, twelve

dollars reporter's fees, and forty-seven dollars for the transportation of the goods and chattels from the city of Payson to Manti City, all of which expenses were incident to said litigation; that the defendant had due notice of the pendency of the action, the rendition of the judgment, and the collection thereof from plaintiff; that the judgment and said expenses and the payment thereof resulted from the taking of the goods and chattels; that the plaintiff and defendant were both domiciled in Manti City at the time of the institution of the agency, and at all times thereafter, up to and including the date upon which this suit was commenced; that plaintiff has at divers times demanded of defendant, at Manti City, payment of the damages and losses, and that the defendant every time, upon demand made, failed and refused to pay the same, or any part thereof, except one hundred and thirty-three dollars and fifty cents, and still does refuse and fail to pay the damages and losses, by means whereof plaintiff has been injured in the sum of two hundred and ninety dollars and thirty-five cents. For this sum judgment was demanded. To this complaint the defendant interposed a demurrer, as follows: "1. That this court has no jurisdiction of the subject matter of said action, in this: That, if any cause of action exists in favor of said plaintiff and against said defendant, that said cause of action arose in Utah county, state of Utah, and not in Sanpete county, or anywhere within the jurisdiction of this court; 2. That said complaint does not state facts sufficient to constitute a cause of action." Upon the hearing of the demurrer, the court decided against the plaintiff upon both grounds, and dismissed the action.

We will, in the first instance, consider the question whether the complaint states a cause of action. The appellant insists that facts sufficient are stated to constitute a case for indemnity, within the exceptions to the rule refusing indemnity between joint tort-feasors. For the purpose of this decision, the judgment appealed from having been rendered upon demurrer, the facts alleged in the complaint must be assumed to ⁴⁴⁷ be true. Therefrom it appears that the defendant appointed the plaintiff as his agent for the purpose of transacting certain specific business, which was to take into possession certain goods and chattels, and transport them to a particular place named. The agent proceeded to, and did, transact the business of the agency at the special instance and under the direction of his principal, and, although the goods and chattels were covered by a mort-

gage held by the principal, the agent was not aware that the taking and carrying away of them as directed by the principal constituted a tort. He, as appears, acted in good faith, and upon the faith of the representations and assurances of the principal that such taking was lawful and proper. Thereafter a third person brought suit against the agent for the goods and chattels, and recovered judgment against him for a considerable sum, which sum the agent was compelled to, and did, pay, together with the expenses incurred in the defense of the suit. The principal was aware of that litigation and of the payment of the resulting judgment and expenses, but, upon demand made by the agent for reimbursement, refused to comply with the demand. While some of the allegations showing these facts may be subject to the criticism of being indefinite and uncertain, and might be vulnerable to a specific plea, we apprehend the ultimate facts are sufficiently alleged to withstand a general demurrer. If the allegations are in fact true, the plaintiff has a right of recovery. The facts stated are such as to characterize the case as an exception to the rule of law that tort-feasors or wrongdoers cannot have redress against each other. That rule applies to cases where he who seeks redress knew or must be presumed to have known that the transaction which resulted in the damages he was compelled to pay was tortious and unlawful. But where, as appears from the allegations in this case, an agent acts in good faith for his principal, under the principal's direction, and relies upon his representations that the transaction is lawful, and the same is not manifestly ⁴⁴⁸ unlawful, the law implies indemnity, for damages of third parties, to the agent from the principal; and if, as the result of acts so performed, the agent is mulcted in damages, the principal must respond to the agent for the same, as well as for the necessary expenses incurred in resisting the claims of third parties who were injured by the transaction. "The agent has the right to assume that the principal will not call upon him to perform any duty which would render him liable in damages to third persons. Having no personal interest in the act, other than the performance of his duty, the agent should not be required to suffer loss from the doing of an act apparently lawful in itself, and which he has undertaken to do by the direction and for the benefit and advantage of his principal. If in the performance of such an act, therefore, the agent invades the rights of third persons, and incurs liability to them, the loss should fall rather upon him for whose benefit and

by whose direction it was done, than upon him whose only intention was to do his duty to his principal. Wherever, then, the agent is called upon by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise on the part of the principal to indemnify the agent for such losses and damages as flow directly and immediately from the execution of the agency. Thus an agent is entitled to be indemnified when he is compelled to pay damages for taking personal property by direction of his principal, which, though claimed adversely by another, he has reasonable ground to believe to belong to his principal": *Mechem on Agency*, sec. 653. In *Story on Agency*, section 339, the author says: "It may be stated, as a general principle of law, that an agent who commits a trespass or other wrong to the property of a third person by the direction of his principal, if at the time he has no knowledge or suspicion that it is such a trespass or wrong, but acts bona fide, will be entitled to a reimbursement and contribution from his principal for all the damages which he sustains thereby." ⁴⁴⁹ For, although the general doctrine of the common law is that there can be no reimbursement or contribution among wrongdoers, whether they are principals or are agents, yet that doctrine is to be received with the qualification that the parties know at the time that it is a wrong. And in all these cases there is no difference whether there be a promise of indemnity or not, for the law will not enforce a contract of indemnity against a known and meditated wrong; and, on the other hand, where the agent acts innocently and without notice of the wrong, the law will imply a promise on the part of the principal to indemnify him. The same doctrine applies to all other cases of losses or damages sustained by an agent in the course of the business of his agency, if they are incurred without any negligence or default on his own part." In *Jacobs v. Pollard*, 10 Cush. 287, 57 Am. Dec. 105, Mr. Justice Bigelow said: "It is undoubtedly the policy of the law to discountenance all actions in which a party seeks to enforce a demand originating in a willful breach or violation on his part of the legal rights of others. Courts of law will not lend their aid to those who found their claims upon an illegal transaction. No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed. But justice and sound policy, upon

which this salutary rule is founded, alike require that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only where a person knows, or must be presumed to know, that his act is unlawful, that the law will refuse to aid him in seeking an indemnity or contribution." So, in *Moore v. Appleton*, 26 Ala. 633, Mr. Justice Rice, speaking for the court, said: "We admit ⁴⁵⁰ the rule that the law will not enforce contribution nor indemnity between wrongdoers. But that rule does not apply to any case where the act of the agent was not manifestly illegal in itself, and was done bona fide in the execution of his agency, and without knowledge (either actual or implied by law) that it was illegal": *Story on Agency*, sec. 340; *Cooley on Torts*, 145-149; *Culmer v. Wilson*, 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833; *Nelson v. Cook*, 17 Ill. 443; *Gower v. Emery*, 18 Me. 79; *Avery v. Halsey*, 14 Pick. 174; *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376; *Moore v. Appleton*, 34 Ala. 147, 73 Am. Dec. 448. From the foregoing considerations, we are of the opinion that the complaint is not subject to demurrer on the ground that it stated no cause of action.

The respondent also contends that the suit was not brought in the proper county. This contention is not tenable, in view of the facts appearing upon the face of the complaint. Both parties resided in Sanpete county, where the suit was commenced. The agency was constituted and the relations of principal and agent created there. By direction of the principal the goods and chattels were taken into that county, and there he accepted them and ratified the acts of the agent. So the breach of the implied promise of indemnity occurred in that county, when, upon demand therefor, the principal refused to pay the damages which resulted to the agent because of the agency. It will thus be observed that the main facts which enter into the agent's cause of action arose in Sanpete county, and therefore the action was properly instituted in that county.

We are of the opinion that the court erred in sustaining the demurrer. The judgment must be reversed, with costs, and the cause remanded, with directions to the court below to reinstate the case, overrule the demurrer, and proceed according to law. It is so ordered.

McCarty, J., concurs.

⁴⁵¹ BASKIN, C. J., concurring. As this is a transitory action, the venue was properly laid in the county in which the defendant resides and was served with process, and the demurrer on the ground that the trial court had no jurisdiction of the subject matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action, was improperly sustained. I concur in the reversal of the judgment.

For Cases bearing upon the question passed upon in the principal case, see Moore v. Appleton, 34 Ala. 147, 73 Am. Dec. 448; Jacobs v. Pollard, 10 Cush. 287, 57 Am. Dec. 105; Coventry v. Barton, 17 Johns. 142, 8 Am. Dec. 376; Culmer v. Wilson, 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833. The general principle that contribution or indemnity will not be awarded as between joint wrongdoers is limited to intentional, meditated wrongs, and has no just application when parties are acting in good faith in ignorance of facts rendering their conduct tortious: Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 South. 180.

CEREGHINO v. OREGON SHORT LINE R. R. CO.

[26 Utah, 467, 73 Pac. 634.]

MUNICIPAL CORPORATIONS—Railroad Switches in Street—Private Use.—A city council has no delegated power to grant a franchise which will burden the streets of a municipality with a switch track to be operated by a steam railway exclusively for the convenience and private use of a private corporation to the detriment of the citizens residing on such street and damage to their property abutting thereon. (p. 844.)

MUNICIPAL CORPORATIONS—Power to Grant Street Franchises.—If the statute provides that the power of a city council to grant franchises to railway companies to maintain tracks in a street can be exercised only by ordinance, resolution, or by-law duly passed and enacted, a resolution conferring such right, to be valid and effective, must be passed in accordance with all the formalities provided by law. (p. 845.)

NUISANCE—Injunction by Private Citizen.—A private citizen whose property abuts upon a street where a switch railroad track is proposed to be constructed without lawful authority and in such a way as to become a public and private nuisance and whose property would be specially damaged thereby, is entitled to an injunction to restrain and prevent such threatened injury. (pp. 846, 847.)

Richards & Varian, for the appellant.

P. L. Williams, G. H. Smith, and J. H. Moyle, for the respondents.

⁴⁷⁷ McCARTY, J. There are two questions involved, which are decisive of this case. The first is, Has a city council delegated power to grant a franchise which will burden the streets of a municipality with a switch track to be operated by a steam railway exclusively for the convenience and private use of a private corporation, to the detriment of the citizens residing on such street, and damage to their property abutting thereon? And the second is, Can a private citizen, whose property abuts upon the street where the switch is proposed to be constructed, and which property would be specially damaged thereby, invoke the equity power of a court to restrain and prevent the threatened injury?

The public streets of a city are dedicated to and held in trust for the use of the public, and, while there are many kinds of temporary uses of a private character that may be and are daily made of portions of them, it is well settled by the great weight of authority that a city council has no power to grant a franchise or a permit to an individual or corporation authorizing such person or corporation to make a permanent use of a public street for exclusively private purposes, to the detriment of the public and damage to ⁴⁷⁸ private property abutting upon such street: *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; ? *Dillon on Municipal Corporations*, 660; *Callahan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 840, 14 N. E. 264. The record shows that, while the railroad company applied to and obtained a permit from the city council to build the proposed switch, it did so at the request of the defendant Consolidated Wagon and Machine Company, and that the switch is intended for the sole and exclusive use, benefit, and convenience of the last-mentioned company. The petition on which the permit was granted recites in part as follows: "Said track so proposed to be constructed to be for the accommodation of the business transacted at said warehouse." The switch is not only intended exclusively for private purposes, but its construction and operation in connection with that of the main line and the three other switches now being operated in the vicinity of plaintiff's premises would be an unreasonable, and, we might add, an unlawful, use of the street, as it would, in effect, be almost entirely appropriated in aid of a strictly private enterprise, thereby diverting it from the uses for which it is held in trust, to the detriment of the public, and irreparable damage to plaintiff's property abutting thereon, which property, as shown by the record, would be greatly impaired, if not entirely ruined, for residence purposes.

The public at large have an interest in the construction and successful operation of railroads designed for the transportation of passengers and freight, and because of this interest the defendant railroad company, in common with all others, is given the right to invoke the law of eminent domain, and subject private property to its necessary public uses; but it has no right, either under the law of eminent domain or a pretended franchise from a municipality, to directly or indirectly take private property for the purpose of building a line of railway or a switch track designed and intended to be used exclusively for the convenience and accommodation of a private business. And as stated by counsel for the appellant in their brief: 470 "Neither can it subject the streets and sidewalks of a municipality, dedicated to public uses of the people, to additional servitudes or burdens in aid of private undertakings and enterprises." Mr. Elliott, in his work on Roads and Streets, second edition, section 744, thus tersely, and, as we think, correctly, states the rule: "A municipal corporation cannot grant a right to construct a railroad in a street for private use. We suppose it to be indispensable to the validity of a direct legislative grant that in every instance the use should be public, for highways are held in trust for the public, for public purposes, and no other. This rule is clearly the legitimate sequence of the fundamental principles that private property can never be seized under the power of eminent domain for merely private purposes, and that roads and streets are held for the public use, and never for permanent private purposes": Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 98, 50 N. E. 256; Commonwealth v. Frankfort, 92 Ky. 149, 17 S. W. 287; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629; Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608; Pittsburg etc. R. Co. v. Iron Works, 31 W. Va. 710, 8 S. E. 453; St. Louis etc. Ry. Co. v. Petty, 57 Ark. 359, 21 S. W. 885.

It appears from the record that the permit to construct the switch track in question was granted at the same session of the city council that the petition therefor was presented. The resolution granting the permit is as follows: "No. 717. Oregon Short Line Railroad Company. Permission to construct a track on Third West street and west to the warehouse of the Consolidated Wagon and Machine Company, between Seventh and Eighth South streets. On motion of Councilman Eardley the petition was granted." It will thus be observed that the

city council, by resolution, has, in effect, granted the defendant railroad company a permanent franchise to construct and operate a steam railway on one of the public streets of the city, without any conditions ⁴⁸⁰ imposed as to the grade of the track or the manner of construction, and without any regulations as to its maintenance and the operation of the trains and cars to be moved over it. This is not only an unreasonable exercise of discretion on the part of the city council, but is in violation of the provisions of section 206 of the Revised Statutes of 1898, as amended by Session Laws of 1901, page 133, chapter 124, and section 207 of the Revised Statutes of 1898, which provide that the power of a city council to grant franchises to railroad companies to maintain and operate railroad tracks in any of the public streets of a city can only be exercised by ordinance duly passed, or resolution or by-law enacted in the same way. The power thus granted being legislative in character, it follows that an ordinance, resolution, or by-law by which it is exercised must be passed in accordance with the formalities required by law. The reason and necessity for this legislative requirement are very apparent. It gives people residing on or owning property in the locality of the proposed railway an opportunity to be heard in the matter, and to furnish information to the council, and, if their interests or that of the public demand it, make objection, and enter such protest as the circumstances and conditions may warrant. An opportunity for the people interested to be heard in matters of this kind is a right that must be maintained and kept inviolate: *West Jersey Traction Co. v. Shivers*, 58 N. J. L. 124, 33 Atl. 55; *Indianapolis v. Miller*, 27 Ind. 394.

It is argued by counsel for respondents that "the injury to plaintiff is no greater nor in any way different whether the grant from the city is valid or invalid," and that the municipality alone can successfully make objection on this ground, and therefore plaintiff's only remedy is by an action at law for damages. There is a marked distinction between a railroad track about to be laid on a public street in pursuance of a franchise lawfully granted and one about to be constructed without lawful authority and in such a way as to become a public and private nuisance. In the one ⁴⁸¹ case the private citizen has no remedy save in an action at law for damages, but in the other, if he can show special damages, a court of equity will enjoin the threatened injury: 2 Dillon on Municipal Corpora-

tions, 4th ed., 708; 1 Lewis on Eminent Domain, 2d ed., sec. 117b; Henderson v. Ogden City Ry. Co., 7 Utah, 199, 26 Pac. 286; Ogden City Ry. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288; Dooly Block v. Rapid Transit Co., 9 Utah, 31, 33 Pac. 229; 23 Am. & Eng. Ency. of Law, 1st ed., 958, 959; Pennsylvania Ry. Co.'s Appeal (Pa.), 5 Atl. 876; Blanc v. Klumpke, 29 Cal. 160; Hargro v. Hodgdon, 89 Cal. 628, 26 Pac. 1106. Not only does the weight of judicial authority support this doctrine, but in this state we have a statute which gives the right of injunctive relief in cases such as the one under consideration. Section 3506 of the Revised Statutes of 1898 provides that: "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." Practically the same questions here presented were raised and decided in the case of Dooly Block v. Rapid Transit Co., 9 Utah, 207, 26 Pac. 286. In that case the Rapid Transit Company obtained a franchise to construct a track for a street railway on one of the public streets of Salt Lake City, upon which there already existed a double track owned and operated by another company which tracks furnished ample facilities for all cars necessary for public convenience. The plaintiffs in that case commenced an action in equity to enjoin the Rapid Transit Company from laying the track, alleging that an additional track upon that particular street, as contemplated, would materially depreciate the value of their property abutting thereon. The ⁴⁸² trial court found the issues in favor of the plaintiffs, and entered judgment perpetually restraining the defendant Rapid Transit Company from laying its track. On appeal, this court, after a very thorough and exhaustive discussion of the questions therein involved, affirmed the judgment of the trial court, holding that an additional track would be an unreasonable obstruction to and interference with the ordinary use of the street, and "that the act of the city council of Salt Lake City [granting the franchise] was unlawful, as being an unreasonable exercise of discretion." If the doctrine announced and conclusions reached in that case are sound and correct—and we think they are—it

necessarily follows that appellant must prevail herein, as the facts in the case now before us show a much more unwarrantable and indefensible invasion of public and private rights than was there attempted.

That part of the sixth finding of fact which reads "that the construction of said switch track is within the charter powers of the said railroad company," and the seventh, eighth, and ninth findings of fact, and the third conclusion of law are erroneous, as the same are not supported by evidence and the facts.

The case is reversed, with directions to the trial court to set aside the judgment rendered and enter judgment for appellant, perpetually enjoining respondent railroad company from constructing the switch track in question. Costs to be taxed against the respondent.

Baskin, C. J., and Barch, J., concur.

A Municipal Corporation cannot license the erection or commission of a nuisance in or on a public street; nor can it authorize a private individual, in his own interest, to obstruct the light and air from the street, to the injury of an abutting owner. And an injunction is the proper remedy to prevent the commission of such a wrong: *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629. See, too, *Long v. Wilson*, 119 Iowa, 267, 97 Am. St. Rep. 315, 93 N. W. 282; *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236; *O'Brien v. Central Iron etc. Co.*, 158 Ind. 218, 92 Am. St. Rep. 305, 63 N. E. 302; *Donovan v. Allert*, 11 N. Dak. 289, 95 Am. St. Rep. 720, 91 N. W. 441.

CASES

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

HUDSON v. BARHAM.

[101 Va. 63, 43 S. E. 189.]

TRUSTS AND TRUSTEES—Trust Deeds—Duty of Trustee in Making Sale.—A trustee in a deed of trust is the agent of both parties and must sell the property to the best possible advantage. He may, and ought, of his own motion, to apply to a court of equity to remove impediments to a fair execution of his trust, to remove any cloud to the title, and to adjust accounts, if necessary, in order to ascertain the actual debt which ought to be raised, by the sale, or the amount of prior encumbrances, and he may delay the sale for such purpose. If he fails to do this, any interested party injured by his default may apply to equity to have such steps taken as should have been taken by the trustee. (p. 852.)

TRUSTS AND TRUSTEES—Sales Under Deeds of Trust—Duty of Trustee.—It is not the duty of a trustee under a deed of trust in every case to invoke the aid of a court of equity before making sale of the trust estate, simply because there are liens thereon. Such duty devolves upon him only when such aid is necessary to remove some impediment to a fair execution of the trust. (p. 853.)

INJUNCTIONS—Motion to Dissolve—Practice.—On a motion to dissolve an injunction, statements of fact contained in a sworn answer must, in the absence of evidence, be taken to be true. (p. 853.)

LIENS—Rights of Holder of Mortgage Lien as Against Mechanic's Lien.—If a mechanic's lien is recorded against property on which there is a prior deed of trust, the trust creditor has the benefit of his lien upon the land only to the extent of its value, exclusive of the buildings or structures placed thereon since his lien was created, and the value of the land is to be ascertained by the court, either by itself or through a commissioner at the time that the liens are enforced. The prior encumbrancer, as to the sum so fixed, is to be preferred on the distribution of the proceeds of the sale, but this

amount is all he can obtain until the mechanic's lien is satisfied. (p. 853.)

EQUITY PRACTICE—Conflicting Liens on Trust Property.—If, when a bill is filed to enjoin a trustee from selling the trust property, it appears that such property, since the creation of the trust, has been divided into lots, and portions of it sold to purchasers who have erected buildings thereon, and against which there are recorded mechanics' liens and other impediments to a fair sale, the court should retain the case and have the trust executed under its supervision, to the end that the rights and priorities of the several lien creditors may be ascertained and established. (p. 853.)

INJUNCTIONS—Refusal to Grant—Appeal—Remedy.—No appeal lies from an order refusing an injunction, the remedy in such case being an application to the supreme court to grant the injunction refused. (p. 854.)

R. M. Hudson, for the appellant.

J. W. Friend, for the appellee.

⁶⁴ HARRISON, J. This is an injunction bill, alleging that on March 8, 1900, ⁶⁵ John H. Phillips and A. L. Weaver conveyed to J. T. Barham, trustee, ten and eighty-six hundredths acres of land in trust to secure W. E. Barrett the payment of a certain note for two thousand two hundred dollars; that the grantors had afterward divided the land, and had it laid off into one hundred and fifty-four town lots, with streets and alleys; and that this plat, entitled "Map of Freeman's Addition to the City of Newport News," had been duly acknowledged and recorded in the clerk's office of the county in which the land lay; that a number of these lots had been sold and conveyed to the complainant and other persons; that mechanics' liens had been acquired upon buildings erected upon some of the lots; and that judgments had also been obtained, which rested as liens on the property. It is further alleged that Barham, trustee, had advertised the land for sale as a whole, and that, if sold as advertised, it would not bring enough to pay off the liens, but that, if sold in lots, it would pay off the liens, and leave the parcels that had been alienated undisturbed. The prayer of the bill is that the trustee and the beneficiary under the trust deed be made parties defendant, and enjoined from selling the property until the further order of the court; that the lots not sold be first subjected, before selling the lots of complainant; that all necessary accounts be taken; and concluding with the usual prayer for general relief. The injunction was granted, whereupon the trustee and the beneficiary under the deed of trust each filed an answer in which they admit all the allegations of the bill, ex-

cept that they neither admit nor deny that the property, if sold in lots, will satisfy the liens, and leave undisturbed the lots that had been aliened. W. E. Barrett, the beneficiary under the deed of trust, further answering, says that the mechanics' and judgment liens referred to in the bill were acquired after the deed of trust had been executed and recorded, and were therefore not valid encumbrances as against the deed of trust. J. T. Barham, the trustee, further answering, says that before the property was advertised he did not know that anyone ^{or} other than the grantors in the deed of trust and the beneficiary thereunder had any interest in the subject; that he intended to sell the property according to law and the terms of the deed of trust; and that if anyone had requested him, before the sale, to sell the property in lots, he would have given such request due and impartial consideration, and would not intentionally have permitted any party to be prejudiced by his act, but that no such request was made of him.

On October 5, 1901, the defendants moved the circuit court, in vacation, to dissolve the injunction. At the same time the plaintiff asked leave to file an amended bill, which set forth more in detail the several parties to whom lots had been sold, and the several liens resting upon the property. Upon the motion to dissolve, the court declined to permit the amended bill, as such, to be filed, but allowed it to be used as an affidavit in support of the original bill.

An affidavit by John H. Phillips, one of the grantors in the deed of trust, was also filed, showing that the Virginia Lumber and Manufacturing Company had mechanics' liens on three houses built on the property advertised for sale. Affiant further says that, unless an account of the liens and their order of priority is taken, and the property sold by the lot or in parcels, the proceeds will be insufficient to pay all the liens without selling the lots purchased by the plaintiff and others. Thereupon a vacation order was entered, bringing the cause on to be heard upon the original bill, the answers of the defendants, and the affidavits filed, upon consideration whereof the injunction theretofore granted was so amended as to only enjoin the trustee from selling the property as a whole, and in all other respects it was dissolved.

From this decree the present appeal has been allowed.

A trustee in a deed of trust is the agent of both parties and bound to act impartially between them; nor ought he to permit the urgency of the creditor to force the sale, under circum-

stances ⁶⁷ injurious to the debtor, at an adequate price. He is bound to bring the estate to hammer under every possible advantage to his cestuis que trustent; and he should use all reasonable diligence to obtain the best price. He may and ought, of his own motion, to apply to a court of equity to remove impediments to a fair execution of his trust, to remove any cloud hanging over the title, and to adjust accounts, if necessary, in order to ascertain the actual debt which ought to be raised by the sale, or the amount of prior encumbrances. And he will be justified in delaying for these preliminary purposes the sale of the property until such resort may be had to a court of equity. If he should fail to do this, the party injured by his default has an unquestionable right to do it—whether such party be the creditor secured by the deed of trust, or a subsequent encumbrancer, or the debtor himself, or his assigns: *Rosset v. Fisher*, 11 Gratt. 492.

If a trustee in pais, with power to make sale of real estate for the payment of debts, attempts to make such sale while there is a cloud resting on the title to the property, or there is any doubt or uncertainty as to the debts secured or the amounts thereof, or a dispute or conflict among the creditors as to their respective claims, a court of equity, on a bill filed by the debtor, secured creditor, subsequent encumbrancer, or other person having an interest, will restrain the trustee until these impediments to a fair sale have by its aid been removed as far as it is practicable to do so: *Shultz v. Hansbrough*, 33 Gratt. 567; *Shickel v. Berryville etc. Imp. Co.*, 99 Va. 88, 37 S. E. 813.

But it is not the duty of a trustee in every case to invoke the aid of a court of equity before making a sale of the trust subject, where there are liens thereon; and to hold that it is, or that if he fails to do so an injunction will be awarded at the instance of any party in interest, as, of course, would be to impose serious delays, involving costs and expenses in the execution of deeds of trusts, which the law never contemplated, and ⁶⁸ without promoting the interests of either creditor or debtor. It is only when the aid of a court of equity is necessary that it ought to be applied for, and it is only in such a case that its aid will be extended. If there are no real impediments in the way of a fair execution of the trust, then its aid is not necessary, and the costs of a lawsuit ought not to be added to the ordinary cost of executing the trust: *Muller v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889, 6 S. E. 223.

In the light of these well-settled principles, we are of opinion that the lower court, in the exercise of a sound discretion, should have retained the cause, and had the trust executed under its superintendence and direction: *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107.

The answers admit the alleged alienations of portions of the property, and admit the existence of the liens as alleged. It is denied that the liens mentioned are prior in dignity to the deed of trust, and, so far as the judgment liens are concerned, this, on a motion to dissolve, must be taken as true, the answers being sworn to, and no proof adduced on the subject. The appellees insist that the deed of trust constitutes the first lien upon the several houses and lots upon which the mechanics' liens are admitted to have been taken out. This contention is not sound. The prior encumbrancer has the benefit of his lien upon the land to the extent of its value, exclusive of the buildings or structures placed thereon since the lien was created, and the value of the land is to be ascertained at the time the liens are enforced by the court. Nor can there be any doubt as to the manner whereby it is to be ascertained. It is to be fixed by the court either from evidence submitted directly to it, or through the finding of a commissioner, subject to review by the court, as in other chancery causes. But the value is to be estimated and fixed by the court before the property is sold, and the prior encumbrancer, as to the sum so fixed, is to be preferred in the distribution of the proceeds of sale. This amount, however, is ⁶⁰ all that he can obtain from the proceeds of sale until the mechanics having liens thereon are satisfied: *Fidelity etc. Trust Co. v. Dennis*, 93 Va. 504, 25 S. E. 546.

The decree appealed from restrains the trustee from selling the property as a whole. It leaves him, however, with unlimited power to sell the whole property in parcels. It is impossible that the houses and lots upon which the mechanics' liens rest can be brought to sale, without sacrifice, until the value of such lots, without the buildings, is ascertained, in order that the prior encumbrancer and the mechanic can know the extent of their respective interests in the subject.

Upon the whole case, we are of opinion that the conditions disclosed by the record make it proper that the appellant should be allowed to file an amended bill, bringing in all necessary additional parties, to the end that the whole matter may be administered under the orders and decrees of the court. That

before a sale is ordered an account be taken, showing what parts of the trust subject have been sold, and to whom aliened, with a view to selling the property in the inverse order of its alienation; and that the rights and priorities of the several lien creditors be ascertained and established.

Shortly after the decree of October 5th was entered, dissolving the injunction, the appellant presented another bill, praying for an injunction against the sale until an account was taken. This motion was overruled by a vacation order of October 26, 1901, which is also complained of in the petition for appeal. We have no power, however, to review that action, as no appeal lies to this court from an order refusing an injunction, the remedy in such case being by application to this court to grant the injunction refused. For the foregoing reasons, the decree appealed from, of October 5, 1901, must be reversed, and the cause remanded to the circuit court for further proceedings to be had in accordance with the views expressed in this opinion.

That a Trustee is considered as the agent of both parties, and bound to act impartially between them; that it is his duty to use every reasonable effort to sell the estate to the best advantage; and that it is his duty to apply to a court of equity, where there is a cloud upon the title, or where there is doubt or uncertainty as to the amount to be raised, or as to prior encumbrances on the trust subject, or where there is conflict between the creditors, or in any case in which the aid of a court of equity is necessary to remove impediments in the way of a fair execution of the trust, are well-established propositions: See the monographic note to Tyler v. Herring, 19 Am. St. Rep. 285, on sales by trustees. For a general discussion of sales under powers in mortgages and trust deeds, see the monographic note to Houston v. National etc. Loan Assn., 92 Am. St. Rep. 573-598.

FALLSBURG POWER AND MANUFACTURING COMPANY v. ALEXANDER.

[101 Va. 98, 43 S. E. 194.]

EMINENT DOMAIN.—Private Property cannot be Taken for Private Use, in any case or under any condition, with or without compensation. (p. 838.)

EMINENT DOMAIN.—Public Use.—Whenever the public use of property requires it, private rights therein must yield to the sovereign power to take it for the public use, and when so taken, it is the character of the use for which it is taken, and not the means or agencies employed which determines whether it is legally taken under the legitimate exercise of the right of eminent domain, but in all cases the use for which it is proposed to take private property in the exercise of this right, must be a public use, or for a public purpose. (p. 858.)

EMINENT DOMAIN.—Public Use.—To justify the exercise of the right of eminent domain, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or corporation in whom the title to the property, when condemned, will be vested, and such a public use as cannot be defeated by such private owner, but which continues to be guarded and controlled by the general public through the legislature; such public use must be clearly a needful one for the public, which cannot be given up without obvious general loss and inconvenience, and it must be impossible, or very difficult, at least, to secure the same public use and purpose otherwise than by authorizing the condemnation of the property. (pp. 859, 860.)

EMINENT DOMAIN.—Private Use.—Internal Improvement.—It is not within the constitutional authority of the legislature to confer upon an individual or corporation the right of eminent domain to acquire a site or location for a plant to manufacture or generate water power, electrical power, or other power, light and heat, and utilize, transmit and distribute such power, light or heat, to any place or places, for the individual's or corporation's own use, or for the use of other individuals or corporations. The interest or use of the public in such improvement, if any, is too vague, indefinite and uncertain to justify the exercise of the right of eminent domain, and besides, such use may at any time be denied or withdrawn by the corporation or individual controlling it. (pp. 863, 864.)

C. W. Allen and D. Harmon, for the plaintiff in error.

J. B. Moon, for the defendant in error.

99 **CARDWELL, J.** This is a writ of error to a judgment of the circuit court of Albermarle county affirming a judgment of the county court of that county dismissing a proceeding instituted by plaintiff in error to condemn certain lands of the defendants in error, alleged to be needed for the purposes of the corporation as an internal improvement company.

Among the many and comprehensive powers and privileges intended to be conferred by the act of the general assembly, entitled, "An act to incorporate the Fallsburg Power and Manufacturing Company" (Acts 1899-1900, p. 418), are the following:

"To erect, maintain and operate its plant or plants, acquire, own, develop, maintain, operate and use water power on the James river, and for this purpose it may erect and maintain a dam across said river from a point in Albermarle county to the Buckingham side, and to construct canals and other hydraulic and auxiliary steam works, and manufacture and generate water power, electrical or other power, light or heat, and utilize and transmit and distribute such power, light or heat to any place or places for its own use or for the use of other individuals or corporations; and may construct, own, maintain and operate telephone lines between any or all of its works or plants. And for the purpose of constructing its dam, canals and plants, and machinery necessary to develop and generate power, light or ¹⁰⁰ heat, and such pipe or wire lines as may be necessary to utilize or deliver the same and for the construction of a railroad or railroads and telephone lines, said company is given the power of eminent domain, with all the rights, powers and privileges given to internal improvement companies by the laws of this state, except in so far as such laws might be modified," etc.

Being unable to "agree on the terms of purchase with those entitled to lands wanted for the purposes of such company" (Code, sec. 1074), plaintiff in error, under its supposed powers as an internal improvement company, gave to defendants in error notice that it would proceed in the county court of Albermarle for the condemnation of their lands and water rights in the James river, or such of them as were needed for the company, under sections 1075, 1076, 1077, 1078 and 1079 of the code. The notice sets forth that the appointment of commissioners will be asked "who shall ascertain and report what will be a just compensation for so much of your land, and so much of water right in the James river, situated in the said county of Albermarle, Virginia, and described as follows: 'That tract of land conveyed to you by Mrs. Eliz. Rives, lying on the south side of Ballinger's creek, near Warren, and having a front on James river,' being the same tract of land upon which you now reside, as well as for the damages to the residue of your said tract beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed."

Upon the return of this notice, the defendants in error moved to quash it, on three grounds, two of which were sustained, one of them being that the proceeding is an attempt to take private property for private use. While, as we have stated, the charter of plaintiff in error confers upon it very extensive powers and privileges, this proceeding is under that portion of the charter quoted which authorizes it to acquire by condemnation the lands of defendants in error and so much of their water rights in the James river as may be needed for the ¹⁰¹ purposes of the company. In other words, the purpose is to acquire by condemnation so much of the lands and water rights of defendants in error as may be needed by the company to enable it to locate and establish its plant or plants for the "manufacture and generation of water power, electrical power, or other power, light or heat, to be utilized, transmitted and distributed to any place or places for the company's use, or for the use of other individuals or corporations."

The case has been ably argued for both plaintiff in error and defendants in error, though the discussion has taken a very much wider range than is necessary to a decision of the case, and it is conceded by counsel for the former that the sole question at issue is whether the power granted to plaintiff in error by the legislature is forbidden by the limitations of the constitution; that if the legislature has transcended its powers it cannot matter whether it has done so in violation of the federal or state constitution. Its act in either case is void, the prohibition in either case being based upon the assumption that the charter authorizes the taking of private property for private, and not public, purposes.

Neither in our constitution, nor in the constitutions of other states of the Union, is there any express provision forbidding the legislature to pass laws whereby the private property of one citizen may be taken and transferred to another for his private use. As has been well said by Green, J., in *Varner v. Martin*, 21 W. Va. 548: "It was doubtless regarded as unnecessary to insert such a provision in the constitution or bill of rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another, without his consent, was contrary to the fundamental principles of every republican government; and in a republican government neither the legislative, executive nor judicial department can possess unlimited power." In that case it is further said that there is an entire concurrence of all the ¹⁰² authorities in the proposition that

private property cannot be taken for private use, either with or without compensation.

In approaching the question presented, we recognize the well-established rule that every presumption is in favor of the right of plaintiff in error to exercise the powers distinctly granted in its charter, and that the right will not be abridged unless the legislature has clearly transcended its constitutional authority. In other words, unless the grant of the right of eminent domain is clearly in violation of the constitutional inhibition, the act will be upheld; and it is also true courts go no further in determining the constitutionality of an act of the legislature than is necessary to a decision of the particular question at issue. Therefore, the only question to be considered here is, whether it is within the constitutional authority of the legislature to confer upon an individual or corporation the right of eminent domain to acquire a site or location for a plant to manufacture or generate water power, electrical power, or other power, light or heat, and utilize, transmit and distribute such power, light or heat, to any place or places for the individual's or corporation's "own use or for the use of other individuals or corporations."

Section 14, article 5, of our state constitution, in force when this proceeding was begun, provides that no law shall be passed by the legislature "whereby private property shall be taken for public uses without just compensation."

Whenever the public use of property requires it, the private rights of property must yield to this paramount right of sovereign power to take it for the public use. When so taken, it is the character of the use for which the property is taken, and not the means or agencies by which it is taken, which determines the question whether it is legally taken under the legitimate exercise of the right of eminent domain, but in all cases the use for which it is proposed to take private property in the exercise of this right must be a public use, or for a public purpose,¹⁰³ and this, as is conceded, is a question for judicial determination.

No attempt has been made by the courts or law-writers to lay down a general rule for determining this question, and it would be impossible in an opinion of reasonable length to review all the cases in which courts have had occasion to decide what is and what is not a public use of property.

It is said in *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 674, 23 Am. Dec. 756: "The great principle remains that there

must be a public use or benefit. That is indispensable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to a general rule. What may be considered a public use may depend somewhat on the situation and wants of the community for the time being."

The cases decided by this court having any bearing upon the question are collated in the opinion in *Varner v. Martin*, 21 W. Va. 548, but they arose out of acts authorizing owners of millsites to condemn lands for the erection of dams to supply water power for gristmills, and also to condemn lands to be overflowed for the erection of such milldams. The right to condemn lands for such purposes was clearly recognized in those cases, and although the statute laws of Virginia have gone beyond authorizing the condemnation of lands for water gristmills alone, and have been extended so as to include not only water gristmills, but other purposes, useful to the public, there has been no condemnation of lands for mills or manufactories of any sort other than water gristmills, so far as the Virginia Reports show.

In *Varner v. Martin*, 21 W. Va. 548, referring to that class of cases, other than those in which the general public have the immediate use of the property condemned without charge, as in cases of public highways, where the property condemned is under the control of public officers, though the gratuitous use of it is enjoyed by the public at large, etc., the opinion demonstrates ¹⁰⁴ that where the property condemned is in the direct use and occupation of a private person, or of a private corporation, and the general public have only an indirect and qualified use of it, or perhaps no use of it of any kind, but simply derives from its use some indirect advantage, as by the promotion of the general prosperity of the community, to which belong railroads, ferries, gristmills, etc., in order that a person or corporation may be included in this class and have legislative authority to condemn lands, it must be shown that he or they are possessed of each and all of three qualifications: 1. The general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature; 2. This public use must be clearly a needful one for the public, one which cannot be given

up without obvious general loss an inconvenience; 3. It must be impossible, or very difficult at least, to secure the same public uses and purposes otherwise than by authorizing the condemnation of private property.

The opinion further says: "Upon the principles we have laid down it would follow that the legislature could not authorize lands to be condemned for the erection of dams, or for the overflowing of lands by dams erected for sawmills or manufactories generally, because they obviously want the first qualification we have laid down as necessary to confer this power on the legislature. The general public have no general and fixed use of any such mills and manufactories. They have no use of them which is independent of the owners of such mills and manufactories, and they can be defeated in any sort of use of such mills and manufactories at the pleasure of the owners of them."

In *Plecker v. Rhodes*, 30 Gratt. 798, it is said: "Authority ¹⁰⁸ given to an individual for the construction of a toll-bridge across a river is a franchise which is to benefit the individual to whom it is granted, else he would not undertake it; but it is granted to the individual in consideration of the convenience and benefit it will be to the public. All these exercises of the functions of sovereignty by the legislature and the bestowment of franchises upon individuals are designed to be for the public benefit.

"Undertakings which are sought to be promoted by the right of eminent domain are often of private benefit. The judicial practice in such cases is to approve the undertaking of it as capable of furthering a public use, and disregard the private benefit as a mere incident. This practice is correct where the public interest clearly dominates the private benefit, as for example, the public interest in railroad transportation dominates the private benefit from tolls. Even where the disproportion between public and private benefit is much less marked, the courts are justified in sustaining a legislative act by singling out the public use": *Randolph on Eminent Domain*, sec. 54. But this learned author says in section 55: "In placing works of partly private use, it is essential that the private use will be incidental and not exclusive. Thus where a company was authorized to build a basin and reserve a part of its use, the act was declared unconstitutional": *Citing In re Eureka Basin etc. Mfg. Co.*, 96 N. Y. 42. The opinion in the case cited says: "The taking of private property for private purposes cannot be authorized even by legislative acts, and the fact that the use

to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."

In *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564, it ¹⁰⁶ was held under the laws of Michigan, which imposed no public duties and responsibilities upon mills and their owners, but which authorized the condemnation of lands for the purpose of the establishment of mills, that the act authorizing the condemnation of lands for that purpose was void. The opinion by Cooley, J., says: "It is manifest that in such a case the proprietor (of a mill) can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him any more than could the manufacturer of shoes or the retailer of groceries."

"Indeed, the last two named would have far higher claims, for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to local trade.

"There is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use. Any sort of manufacture may be set up under it, and the proprietor is not obliged in any manner to carry it on for the benefit of the locality, or of the state at large."

In a more recent case decided by the same court in 1891, *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, it was said: "To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use. In *Gilmore v. Lime Point*, 18 Cal. 229, a public use is defined to be a use which concerns the whole community as distinguished from a particular individual. The use which the public is to have in such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice if the general prosperity of the community is promoted by the taking of private property ¹⁰⁷ from the owner and transferring its title and control to a

corporation, to be used by such corporation as its private property uncontrolled by law, as to its use; in other words, the use is 'private so long as the land is to remain under private ownership and control, and no right to its use, or to direct its management, is conferred upon the public."

Randolph on Eminent Domain, section 55, lays down the broad doctrine that manufacturing companies cannot condemn land for their purposes.

In Lewis on Eminent Domain, section 165, in discussing the meaning of the term "public use," and referring to the provision usually inserted in state constitutions on the subject, it is said: "'Public use' means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: 1. That it accords with the primary and more commonly understood meaning of the words; 2. It accords with the general practice in regard to taking private property for public use when the phrase was first brought into use in the earlier constitutions; 3. It is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application." In a note to this text it is said: "The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn by the owner"—citing *Farmers' Market Co. v. Philadelphia R. R. Co.*, 10 Pa. Co. Ct. 25, and a number of other authorities.

"Strictly speaking private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain well-defined rights to that use secured, as the right to use the public highway, the public ferry, the railroad and the like. But when it is so appropriated that the public have no right to its use secured, it is difficult to perceive ¹⁰⁸ how such an appropriation can be denominated a public use": *Jordan v. Woodward*, 40 Me. 317.

To the effect that the power of eminent domain to condemn a site for a manufacturing plant or for a railroad track to facilitate such a business undertaking, or for a plant some distance from its line to generate electricity to operate an electric railway, or for an elevator to be used in buying, selling or storing grain, cannot be conferred upon individuals or a corporation incorporated for no public purpose and charged with no public duties, are the cases of *Garbutt Lumber Co. v. Georgia etc. Ry.*

Co., 111 Ga. 714, 36 S. E. 942; *In re Rhode Island Sub. Ry. Co.*, 22 R. I. 455, 48 Atl. 590; *Chicago etc. R. R. Co. v. State Board of Transp.*, 50 Neb. 399, 69 N. W. 955; *Missouri Pac. Ry. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. Rep. 130. In those cases it was held that such a taking of private property would be for a purely private purpose.

In his work on *Constitutional Limitations*, 654, Judge Cooley says: "The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it in the hands of the owner and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it."

In the view which we take of the case at bar, it is wholly unnecessary to consider the question whether or not the proposed taking of the property of defendants in error is in violation of the fourteenth amendment of the constitution of the United States, providing that private property cannot be taken for any purpose without due process of law, since, if the proposed taking is for a private and not a public use, it is clearly in violation of our state constitution.

It is urged upon us that although the charter in question does not command the performance of the company's public ¹⁰⁰ duties, since it is "a public service corporation," the right of public control arises from the grant of the franchise of eminent domain, and when the company undertakes to devote its property and its products to the public use, it becomes subject to public regulations. This proposition is unquestionably sound and sustained by the authorities cited—*Munn v. People of Illinois*, 98 U. S. 113; *Budd v. New York*, 143 U. S. 538, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. Rep. 857—to which many others may be added; but this does not meet the difficulty in this case. The mere recognition of the corporation in its charter as an "internal improvement company" does not make it so, and bring it within the operation of the general laws of the state governing such companies and controlling their operations. The difficulty with the charter is that the purpose for which the property is authorized to be taken by the right of eminent domain in this instance does not clearly appear to be for a public use or a public purpose. On the contrary, the grounds of public benefit upon which the taking is proposed are vague, and the use which the public is to

have of the property, or the manner in which the public is to be benefited by the use of it by the company, is by no means fixed and definite. Not only is the public benefit to spring from the use to which the company proposes to devote the property vague, indefinite and uncertain, but, under the plain language of the charter, the public use of the property or any use of it by the public may be gainsaid or denied or withdrawn by the company at its will, since it is authorized to use, not only a part, but the entire product of the work or works it proposes to establish, for its own use or benefit. In such a case the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking of private property for a private use, against the will of the owner, which cannot be done in any case.

The difficulties confronting plaintiff in error in this particular ¹¹⁰ cannot be obviated by invoking the general laws of the state specifying and regulating the public duties and obligations of internal improvement companies. These statutes, contained in chapter 51 of the Code, impose no duty upon such a company that can be made to apply to this corporation in its manufacturing operations, to say nothing of the other uses to which it may, under its charter, put the land and water rights sought to be acquired by condemnation. We do not mean to say, however, that under no conditions can the right of eminent domain be conferred by the legislature in furtherance of the establishment of plants for the generation of electric power or other power, light or heat, where public necessity requires it, and the public use or benefit is apparent and safely guarded. To meet industrial progress, new conditions, and the ever increasing necessities of society, the courts have gone very far in sustaining legislation conferring the franchise of eminent domain, and it is not necessary for us, in this case, if we were so inclined, to question the soundness of the policy sustained in those decisions.

We are of opinion that the judgment complained of here is right, and it is, therefore, affirmed.

In a Recent Case in Vermont it is decided that the application of water power to the generation of electricity for use in the operation of a railway is not a public use for which the legislature may authorize the exercise of the power of eminent domain: *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179. And in a recent Illinois case it is held that a statute which authorizes the condemnation of private property for the purpose of public mills, and

machinery other than grist-mills, is unconstitutional, as permitting the taking of private property for private use: *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522. See, also, *Matter of Tuthill*, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 308, and *Healy Lumber Co. v. Morris*, 33 Wash. 490, post, p. 964, 74 Pac. 681, for a discussion of the meaning of "public use."

LEFTWICH v. WELLS.

[101 Va. 255, 43 S. E. 364.]

BENEFIT SOCIETIES—Payment of Dues by Husband on Wife's Certificate.—In the absence of contract, payment of dues by a husband on a certificate of membership in a benefit society issued to his wife is gratuitous, and creates no equities in his favor. (p. 867.)

BENEFIT SOCIETIES—Designation of Beneficiary—Delivery of Certificate.—If a member of a benefit society has appointed a beneficiary in any of the modes pointed out in the contract of insurance, it is not necessary that the certificate of membership should be delivered to the beneficiary so named, as the claim of such beneficiary is not based on a contract, but upon the appointment and direction for the payment of the fund. (p. 869.)

BENEFIT SOCIETIES—Designation of Beneficiary—Assignment—Delivery of Certificate.—If a member of a benefit society has power to designate or change his beneficiary under his certificate by an assignment thereof, such designation or change when made is not, in fact, an assignment of the certificate, but is the mere exercise of a power of appointment, and it is not necessary that either the certificate or the assignment thereof should be delivered to the beneficiary. On the contrary, the retention of the certificate by the member is a necessary incident of the power to change the beneficiary. (p. 869.)

J. E. Edmunds and L. Goodman, for the plaintiff in error.

J. H. Christian, for the defendant in error.

256 WHITTLE, J. The ownership of the proceeds of a five hundred dollar benefit certificate issued by "The Grand Fountain United Order of True Reformers," a corporation chartered by the circuit court of the city of Richmond, to Annie C. Leftwich, constitutes the subject of this litigation. The rival claimants of the certificate are plaintiff in error, Samuel Leftwich, the husband, and Ora A. Wells, the daughter of Annie C. Leftwich. The purposes for which the society was formed are declared in the charter to be, "to provide a place of burial

for deceased members, and to defray the expenses of their funerals; to assist in the support and education of their widows and orphans, and in this connection to provide what is known as an endowment or mutual benefit fund; and to give aid and assistance to its members in times of sickness and distress, and for such other benevolent objects as may be necessary."

Section 34 of the constitution provides for payment of the amount of the certificate "to the widow, orphan or orphans, or assigns of the deceased whose names appear in the policy."

And section 2 of the by-laws enlarges the beneficiary class so as to embrace the "heirs" of deceased members.

In the certificate issued to Annie C. Leftwich, the society promises "to pay the heirs or assigns of the deceased member above named the whole assessment of the benefited membership of class E, not to exceed five hundred dollars."

The prescribed form for designating a beneficiary under the certificate is a printed assignment annexed thereto. In the case under consideration it was filled out as follows:

"I, Annie C. Leftwich, do hereby assign all my claim above²⁵⁷ mentioned in this certificate, at my death, to Ora A. Wells, my daughter, of Lynchburg, state of Virginia, who bears to me the relationship of daughter.

"Done at Lynchburg, this 8th day of February, A. D. 1898.

her
(Signed) "ANNIE X C. LEFTWICH.
mark

"Witness: E. M. THOMPSON.

"Witness: W. D. THOMPSON."

"Members will please fill out the above, and sign in the presence of two witnesses."

Annie C. Leftwich departed this life on the twenty-ninth day of August, 1901, and defendant in error proceeded by motion against the society, in the corporation court of the city of Lynchburg, to recover the five hundred dollars due on the certificate.

The society is not an active party to the litigation, and claims no interest in the subject matter; but it filed an affidavit, in usual form, in the trial court, setting forth the fact that plaintiff in error asserted title to the fund, and asked that he be summoned to appear and required to interplead in the manner prescribed by section 2998 of the Code.

Thereupon the court, having summoned plaintiff in error, directed the following issues to be tried by a jury, to wit: "Whether or not the assignment of the policy of insurance in the Grand Fountain of the United Order of True Reformers on the life of Annie C. Leftwich to Ora A. Wells, is fraudulent and void as to Samuel Leftwich, and whether or not the proceeds, or any part thereof, is the property of said Samuel Leftwich." There was a verdict and judgment in behalf of defendant in error, which judgment is before this court for review.

The grounds upon which plaintiff in error bases his right to ²³⁸ demand the proceeds of the certificate are: 1. An alleged agreement between himself and Annie C. Leftwich, by the terms of which each was to take out a certificate for the benefit of the other; 2. Payment by him of two hundred and fifty dollars of dues and assessments on the certificate in question; 3. That the assignment to defendant in error was fraudulent and void; and 4. That said assignment was inoperative for the reason that neither it nor the certificate was ever delivered to Ora A. Wells.

It is not needful to invoke the rule that this case is here as on a demurrer to evidence in order to sustain the verdict and judgment complained of. The testimony on behalf of plaintiff in error is of a most unsatisfactory and inconclusive character. Vague and indefinite, it falls far short of what is necessary to sustain any one of the alleged grounds for recovery.

The alleged agreement for mutual insurance is not proved, nor does it appear that plaintiff in error ever took out a certificate in favor of his wife. The vague statements of witnesses on that subject do not establish either fact, and his failure to produce the certificate, the best evidence in support of the contention, justifies the conclusion that no such paper was in existence.

The second ground is likewise without evidence to sustain it. It does not appear that plaintiff in error paid any dues or assessments on the certificate in question. If he had done so, in the absence of contract, the payments would be regarded as gratuitous and would create no equities in his favor: *Joyce on Insurance*, secs. 869, 870, and notes; sec. 1148, note 239.

In respect to the assignment of the certificate, the regularity of its execution is established by the instrument itself and the testimony of the two subscribing witnesses, both of whom were officers of the society, and had been for eighteen years.

The objection that there was no delivery of the certificate or assignment to defendant in error, and that the transaction was ²⁵⁹ therefore incomplete and ineffectual to pass title to the proceeds of the certificate to her, is also without merit.

While the paper appended to the certificate and executed by the assured is called an assignment, it is in reality nothing more than the mode adopted by the society for designating a beneficiary from the selected class in accordance with the charter, constitution and by-laws of the society. Defendant in error is, therefore, in no proper sense an assignee of the certificate, but is an appointee of its benefits; and, by the rules and regulations of the society, is as much entitled to the proceeds as if her name had been written in the body of the certificate.

The assured has no property in the policy, but only the power of appointing a beneficiary, and a delivery of the certificate is no more necessary than would be the delivery of any other instrument creating the power.

The doctrine of *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, has no application to the case. The assured in that case held an ordinary policy on his own life and for his own benefit, which he undertook to give to a third party. He accordingly made an assignment of the policy in duplicate, whereby the benefit was assigned to the donee, but failed to deliver either the policy or assignment to the assignee. Subsequently, there was a contest over the proceeds of the policy between the creditors of the assured and the donee, and it was held that as neither the policy nor assignment had been delivered, the gift was inchoate and inoperative.

In this case, as remarked, defendant in error was not an assignee, but a beneficiary by virtue of the exercise of a power of appointment in her favor with which the assured was invested by the terms of the certificate, and the element of delivery was not an essential factor in the transaction.

"Where a member of a society has appointed a beneficiary in any of the modes pointed out in the contract of insurance, it is not necessary that the certificate of membership should be ²⁶⁰ delivered to the beneficiary so named. The claim of the beneficiary in such case is not based on a contract, but upon the appointment and direction for the payment of the fund": *Niblack on Benefit Societies*, sec. 149; *Joyce on Insurance*, sec. 743, 849.

The assured has the power to change the beneficiary at pleasure, provided the appointee is selected from the authorized

class, and the retention of the certificate is a necessary incident to that power. This power of appointment or right to dispose of the fund may be exercised in any manner agreed on in the contract of insurance. If the contract provides that it may be done by an assignment of the certificate, that method should be pursued. But by such an assignment, the member does not transfer his right or estate in the certificate or the fund to his beneficiary, but only executes a power: Niblack on Benefit Societies, secs. 173, 227, 229, and notes; Bacon on Benefit Societies, sec. 244.

The case does not fall within the principle of that class of cases which holds that where the assured is under contractual obligations to a particular beneficiary and exercises the power of appointment in his favor, he cannot defeat the equities of the first appointee by selecting a second beneficiary, who is a mere volunteer, or acquires his interest with notice of the pre-existing equities: *Jory v. Supreme Council A. L. of H.*, 105 Cal. 20, 45 Am. St. Rep. 17, 38 Pac. 524; *Adams v. Grand Lodge*, 105 Cal. 321, 45 Am. St. Rep. 45, 38 Pac. 914; *Grimbley v. Harrold*, 125 Cal. 24, 73 Am. St. Rep. 19, 57 Pac. 558.

The effort of plaintiff in error was to bring his case within the influence of that line of authorities, but he has signally failed of his purpose. He was never the appointee in the certificate, and his wife rested under no contractual obligation to exercise the power in his favor.

It is needless to consider the alleged grounds of error in the instructions. Without conceding that they are amenable to objection, ²⁶¹ they could not have operated to the prejudice of plaintiff in error, who, in no aspect of the case, is entitled to a verdict.

The judgment of the corporation court is without error, and is affirmed.

The Right of a Member of a mutual benefit society to change his beneficiary is considered in the monographic notes to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 561-564, and *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 786-790. While this right is generally recognized, it must be effected, as a rule, in the manner pointed out by the rules and by-laws of the society: *Independent Foresters v. Keliber*, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 60 Pac. 563. The better rule is, although there is some difference of opinion on the question, that a beneficiary has no vested interest during the lifetime of the member, but only an expectancy, subject to defeat by the power of the appointment vested in him: *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263, 61 N. E. 127; *Schmidt v. Northern Life Assn.*, 112 Iowa, 41, 84 Am. St. Rep. 323, 83 N. W. 800. Com-

pare *United States Casualty Co. v. Kacer*, 169 Mo. 301, 92 Am. St. Rep. 641, 69 S. W. 370.

The Assignment of Benefit Certificates in a mutual benefit association is discussed in the monographic note to *Chamberlain v. Butler*, 87 Am. St. Rep. 514-519. No actual manual delivery is necessary to the assignment of a life insurance policy: *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139; note to *Chamberlain v. Butler*, 87 Am. St. Rep. 491-494.

The Payment of the Premiums on a life insurance policy does not entitle the payer to sue thereon: *Lewis v. Metropolitan Life Ins. Co.*, 178 Mass. 52, 86 Am. St. Rep. 463, 59 N. E. 439.

COUNCIL OF FARMVILLE v. WALKER.

[101 Va. 323, 43 S. E. 558.]

CONSTITUTIONAL LAW—Sale of Intoxicating Liquor.—The regulation of the sale of intoxicating liquor is wholly within the police power of the state to be exercised in such manner as it deems proper, as such sale is not one of the privileges or immunities of citizenship guaranteed by constitutional provisions. (p. 873.)

INTOXICATING LIQUORS—Sale of—Delegation of Police Power to Municipality.—The state may delegate its police power to regulate the sale of intoxicating liquors to a municipality, and may authorize it to establish a dispensary for the sale thereof, although in so doing it may render necessary the expenditure of money and ultimately the imposition of a tax. (pp. 877, 878.)

INTOXICATING LIQUORS, Sale of.—Public money may be lawfully expended in the regulation and control of the sale of intoxicating liquors. (pp. 877, 878.)

A. D. Watkins and W. H. Mann, for the appellant.

Caskie & Coleman, for the appellee.

³²³ KEITH, P. The legislature, at the extra session in 1901, passed an act entitled "An act to establish a dispensary for the sale of intoxicating liquors in Farmville magisterial district, Prince Edward ³²⁴ county, Virginia, to prohibit all persons, firms, corporations to sell, barter, or exchange such liquors in said district, and to repeal all laws in conflict with this act, so far as they apply to the said magisterial district."

The first section of the act makes the sale of intoxicating liquors of any kind in Farmville district, except as therein provided, a misdemeanor punishable by fine and imprisonment.

By the second section the town of Farmville is authorized to elect three of its citizens who shall constitute a dispensary board,

and fixes their term of office and compensation; and the sections following authorize the purchase of spirituous, vinous and malt liquors in such quantities as the board shall order; require the treasurer of the town of Farmville to pay all bills for the establishment and maintenance of the dispensary and the purchase of stock; prescribe the terms upon which sales shall be made; empower the board from time to time to make rules and regulations for the operation of the dispensary; prohibit the sale of wines and liquors to any person known to be an habitual drunkard, to minors, or persons intoxicated, except upon the prescription of a regularly licensed physician; direct that the dispensary shall not be opened before sunrise, and that it shall be closed at sunset each day, and on Sundays, election days and such other days, and under the same circumstances, as make the sale of liquors unlawful under the laws of this state. It is provided that the room in which the business shall be conducted shall front upon one of the principal streets of the town, and shall have no other means of ingress or egress except the front door thereof. The price at which liquors, etc., shall be sold is to be fixed by the dispensary board, provided that the same shall not be sold for a profit exceeding eighty per centum above the actual cost thereof.

There are other provisions of the statute which need not be specifically mentioned.

The twelfth section enacts that: "The council of the said ³²⁵ town shall appropriate from the treasury of the town a sufficient amount to establish the dispensary as provided for in this act, which amount shall be paid into the town treasury from the profits arising from said dispensary as they shall accrue, and no profit shall be paid out in any other direction until said amount is so repaid, and thereafter said dispensary shall be supported and maintained out of the profits accruing out of said business; provided, however, that the said town council may allow said board to borrow money or buy goods on the credit of the dispensary alone, if it be necessary to keep said dispensary in operation."

By the sixteenth section it is provided: "The net profits accruing from said dispensary under this act shall be disposed of in the following manner: One-fourth to the state of Virginia; three-eighths to the town of Farmville for the purpose of building and maintaining its streets and alleys, and three-eighths to the Farmville magisterial district outside of said town for its

public roads. Such distribution shall be made when ordered by said board, and at least once a year."

In May, 1901, C. M. Walker, a citizen of the town of Farmville, exhibited his bill in the circuit court of Prince Edward county, in which, after reciting in detail the various provisions of the above act, he insists that it is void as being in many respects repugnant to the constitution of the state, and of the United States.

In accordance with the prayer of the bill, an injunction was awarded "enjoining the council of the town of Farmville from taking any steps whatever looking toward the enforcement of the act known as the dispensary act for Farmville magisterial district," and at the September term, 1901, a final decree was entered perpetuating that injunction, and that decree is now before us for review.

The act in question is not a tax law. Its purpose is not to raise revenue, but to regulate the sale of intoxicating liquors. ³²⁶ Its constitutionality, therefore, is to be determined by referring not to the taxing power of the legislature, but to its police power. Its enforcement may or may not result in raising revenue. If the conduct of the dispensary should prove to be remunerative, it will bring revenue into the treasury of the county, the town, and the state; should it prove unprofitable, it would deplete the treasury of the town of Farmville.

The act does, however, authorize the expenditure of money by the council of the town of Farmville, which was raised by taxation, and this can only be properly expended for some public use.

As was said by Justice Miller in *Savings etc. Assn. v. Topeka*, 20 Wall. 655: "It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear, and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government. The objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acqui-

escence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

That the regulation of the sale of intoxicating liquors is within the police power of the state is established, if not literally, by all the cases where the subject has been considered, certainly by an overwhelming array of authority.

³²⁷ In *Tragesser v. Gray*, 73 Md. 250, 25 Am. St. Rep. 587, 20 Atl. 905, it is held that: "The legislature may prohibit or restrict the sale of spirituous liquors in any manner which its discretion may dictate. No one can claim as a right any power whatever to sell such liquors; if he sells at all, it must be on such terms as the legislature sees fit to impose. . . .

"The validity of an exercise by a state of its police power in regulating the sale of spirituous liquors does not in the least degree depend on any question as to the presence or absence of discrimination for or against particular persons or classes of persons. The legislature may lawfully grant the right to sell to a certain class or classes of persons and withhold it from all others."

In the notes to that case, decisions from many states are collated which are to the same effect, among them *Bartemeyer v. Iowa*, 14 Wall. 129, which holds that "the usual and ordinary legislation of the states, regulating or prohibiting the sale of intoxicating liquors, raises no question under the constitution of the United States.

"The right to sell intoxicating liquors is not one of the privileges and immunities of the citizens of the United States which, by the fourteenth amendment to the United States constitution, the states were forbidden to abridge."

In *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, it was held that: "A state has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits; to prohibit all sale and traffic in them in the state; to inflict penalties for their manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes.

"Whether a state, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors except for certain purposes is no longer an open question before this court."

³²⁸ In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, it was held: "Legislation by a state prohibiting the manufacture

within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States.

"It belongs to the legislative department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety—subject to the power of the court to adjudge whether any particular law is an invasion of rights secured by the constitution.

"Government does not interfere with, nor impair, anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

That case, indeed, seems to have reached the limit in maintaining the police power of the state when exercised for the safety, health or morals of the community; and a prohibition upon the use of property in the manufacture, sale or barter of intoxicating liquors, declared by the legislature to be injurious to the health, morals and safety of the community, was not deemed a taking or appropriation for the public use, nor could the state be stayed from providing for "the discontinuance of any manufacture or traffic which is injurious to the public morals, by any incidental inconvenience which individuals or corporations may suffer."

Two cases growing out of the receivability of coupons for taxes, which at one period so gravely interested the people of this state, illustrate the limitation upon the legislature, when ³²⁹ acting under the power to levy taxes in order to raise revenue, and practically the unlimited power of the legislature in the exercise of its police power for the protection of the health, safety and morals of the community.

In *Royal v. State of Virginia*, 116 U. S. 572, 6 Sup. Ct. Rep. 510, the constitutionality of an act which required lawyers to pay the license taxes assessed upon them in money and not in coupons was held to be void, because in violation of the contract of the state to receive coupons in payment of all "taxes, debts, dues and demands due the state."

In *Huckless v. Childrey*, 135 U. S. 662, 10 Sup. Ct. Rep. 972, the Virginia statute which required a license for the sale

of intoxicating liquors to be paid in money and not in coupons was held to be constitutional.

In *Royal v. Virginia*, 116 U. S. 572, 6 Sup. Ct. Rep. 510, the license was imposed not for the purpose of regulating the privilege or occupation of practicing law, but in order to raise revenue; in *Huckless v. Childrey*, 135 U. S. 662, 10 Sup. Ct. Rep. 972, the object was held to be the regulation of the sale of intoxicating liquors, and the requirement that the license imposed should be paid in money and not in coupons was maintained upon the ground that the object in view was the regulation of the traffic in liquor, and came within the police power of the state.

In concluding the opinion in *Huckless v. Childrey*, 135 U. S. 662, 10 Sup. Ct. Rep. 972, it is said: "It is conceded that the state might, in her discretion, absolutely abolish the sale of spirituous liquors, or prescribe on what terms they shall be sold. In this view, there does not seem to be any violation of the obligation of the state in requiring the tax which is imposed to be paid in any manner whatever—in gold, in silver, in bank notes, or in diamonds. The manner of payment is part of the condition of the license intended as a regulation of the traffic. It would be very different if the business sought to be followed was one of the ordinary pursuits of life, in which all persons are entitled to engage. License taxes imposed upon such pursuits and professions ³²⁰ are imposed purely for the purpose of revenue, and not for the purpose of regulating the traffic or the pursuit."

Enough has been said to show that, in dealing with the sale of intoxicating liquors, the legislature is fulfilling a public duty; that it is striving to promote the health, safety and morals of the community, and that in the exercise not of its taxing, but of its police power. If the power exists in the legislature, it is not for us to question the manner of its exercise.

It is true that it is not always necessary, in order to declare an act unconstitutional, to point out the precise provision which it violates if it be repugnant to the spirit of the constitution, or of the institutions which the constitution creates.

As was said by Justice Miller in *Savings etc. Assn. v. Topeka*, 20 Wall. 655: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should be no longer his, but should henceforth be the property of B."

The illustrations here given are extreme, and it is wholly improbable that such cases will arise. It is indeed possible that we might be driven to invoke the maxim that the safety of the republic is the supreme law in order to protect society from the exercise of governmental power not directly within the ³³¹ limitations of the constitution, but such a contingency is remote and improbable. As a rule of action the power and duty of the courts is sufficiently defined in the case of *Prison Assn. v. Ashby*, 93 Va. 670, 25 S. E. 893, where it is said: "The courts have nothing to do with the question whether or not the legislation contained in its provisions is wise and proper. The only question they have to deal with is one of power. The legislature of the state has plenary power except where it is restricted by the constitution of the state or of the United States.

"If the statute, the validity of which is attacked, is not in conflict with the state or federal constitution, the courts have no power to declare it invalid, however well satisfied they may be that it is unwise or vicious legislation."

The cases which we have reviewed show the practically unlimited control which the legislature may exercise with respect to the sale of intoxicating liquor. The usual mode in which the legislature has hitherto sought to regulate it has been by the imposition of a license tax which, while operating in some degree to control the traffic, has had the incidental effect of bringing money into the treasury. The legislature, however, being in the exercise of a public duty when dealing with the subject may, in its choice of means, deem it wise to expend money upon its control or suppression rather than to make it a source of revenue.

The dispensary law is a recent innovation. It may yet be considered as in its experimental stage. It may result in

profit or loss according as it is discreetly or unwisely enforced. But with that the court has nothing to do. The end being legitimate, the legislature is left to choose the means.

The act under consideration does not require the town of Farmville to expend its money, or to contract a debt. It permits it to make an experiment in regulating the sale of intoxicating liquors which may result in a profit or loss, in the increase ³³² of the revenue, or in the imposition of a tax. Should the latter alternative become necessary, whatever tax is imposed must be in accordance with the constitution and laws; but a discussion of those details may with propriety be waived until the necessity for their consideration shall arise. For the present, we deem it sufficient to say that the council of the town of Farmville is here as an appellant asking this court to reverse the decree by which it was enjoined from enforcing the law. Whether the legislature can require a municipality against its will to incur a debt, or to expend money already in its treasury is a question not presented to us upon this record. The town of Farmville seeks to be permitted to establish a dispensary, in the hope that it may thereby so regulate the sale and use of ardent spirits in that community as to promote the health, safety and morals of its people.

Similar laws have been enacted in other states and passed upon by the courts. In *State v. City of Aiken*, 42 S. C. 222, 20 S. E. 221, it was claimed that the act violated the constitution of South Carolina in numerous respects, most of which are of merely local interest, but the court held, among other things, "that the act was not unconstitutional because it empowers the state to engage in traffic in liquors, as such traffic by the state is a mere incident of the regulation of the sale, and not the object of it."

In *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759, it was held that: "The general assembly of this state, by virtue of its police powers, has the authority to regulate and control the sale of all intoxicating liquors, and can establish dispensaries for an exclusive sale of such liquors, under the management of agents or officials created for this purpose."

We conclude, therefore, that it is within the province of the legislature to pass laws for the promotion of the safety, health and morals of the people; that the regulation and control of ³³³ the traffic in ardent spirits is within the discretion of the legislature under the police power of the state: that it constitutes a public object, use or purpose in the promotion in which

public money may be lawfully expended, and that while it is unnecessary to decide whether or not it may require, it is plain that the legislature may permit the town of Farmville to establish a dispensary, though in doing so it may render necessary the expenditure of money and ultimately the imposition of a tax; and, finally, that the act in question is not repugnant to the letter or the spirit of the constitution in force when it was passed.

We are of opinion that the act establishing a dispensary in the town of Farmville is constitutional, and that the decree of of the circuit court must be reversed.

In the Subsequent Case of City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723, it was decided on the authority of the principal case and case therein cited, that "the regulation of the sale of intoxicating liquors is completely within the police power of the state, and may be exercised in such manner as the legislature deems proper. It may be entirely prohibited, or such restraints may be placed upon it as the legislature thinks wise without supervision or control by the courts. The traffic is not one of the privileges or immunities of citizenship guaranteed by the constitution of the United States or the fourteenth amendment thereto, and, in the absence of constitutional restrictions, the legislature may confer such police power upon municipal corporations in such measure as it deems expedient, and, when fully conferred, the courts can no more interfere with the manner of its exercise, than they could with the state which confers it." Hence a grant by the legislature to a city council of the right to grant or refuse licenses to all sellers of intoxicating liquors, under such regulations as it may prescribe, confers upon such council absolute control of such subject, with power to wholly suppress the privilege of sale, or to grant it under such restrictions as it may deem proper without interference from the courts.

The Dispensary Law of Alabama is pronounced constitutional in Sheppard v. Dowling, 127 Ala. 1, 85 Am. St. Rep. 68, 28 South. 791; and the constitutionality of the South Carolina law seems to be assumed in State v. McGee, 55 S. C. 247, 74 Am. St. Rep. 741, 33 S. E. 353. It seems, however, that a municipal corporation cannot establish and operate a dispensary for selling liquors, without express legislative authority: Mayor etc. of Leesburg v. Putnam, 103 Ga. 110, 68 Am. St. Rep. 80, 29 S. E. 602. See this case for the essential features of the dispensary system.

How Far the Sale of Liquors may be regulated or prohibited is discussed in the monographic notes to Commonwealth v. Kimball, 35 Am. Dec. 331-339; Booth v. People, 78 Am. St. Rep. 253-255.

CITY OF RICHMOND v. SITTERDING.

[101 Va. 354, 43 S. E. 562.]

JUDGMENTS—Res Judicata—Joint Tort-feasors.—If a city and a property owner are sued jointly for injury resulting from an improper use of a street, and judgment is rendered in favor of such owner on his plea of the statute of limitations, and against the city, and the city then brings an action against such owner to recover the amount it has been compelled to pay under the judgment, the property owner is not estopped from showing therein that the injury happened through no fault of his, nor is the question of his ultimate liability res judicata by reason of the judgment against the city. (p. 881.)

JUDGMENTS—Res Judicata.—A judgment, to be evidence against a party in another suit upon a different cause of action, must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases, and must have been determined upon its merits in the first action. (p. 881.)

INDEMNITY—Action Over to Recover—Evidence of Non-liability.—In an action by a city against a land owner to recover damages it has been compelled to pay for his assumed negligent use of a street, the defendant is entitled to show that he was under no obligation to keep the street in a safe condition, and that it was not through his default that the accident happened and the injury resulted. (p. 881.)

INDEPENDENT CONTRACTOR.—A general contractor and bricklayer employed to do all the brick work on a house, who employs and pays for all labor necessary to the fulfillment of his contract, and exercises entire supervision over that part of the work and over his employes, is a general and independent contractor, although the owner of the house is a carpenter and has the carpenter work done by his own employes. (p. 882.)

NEGLIGENCE OF INDEPENDENT CONTRACTOR—Liability of Owner.—If a property owner employs a careful, skillful and competent builder or contractor to erect a building for him, and surrenders possession of the premises for that purpose, he is not liable for an injury occurring to a stranger by the negligence or default of such contractor or his immediate employes engaged in doing the work. (p. 882.)

NEGLIGENCE OF INDEPENDENT CONTRACTOR—Liability of Owner—Dangerous Work.—The building of a house on a lot abutting upon a public street is not inherently and necessarily dangerous, nor does danger and hazard necessarily attend its erection, so as to make the prosecution of the work unlawful, and the lot owner personally liable for the negligence of an independent contractor employed to do the work. (pp. 882, 883.)

H. R. Pollard, for the plaintiff in error.

S. L. Bloomberg and H. S. Bloomberg, for the defendant in error.

³⁵⁵ HARRISON, J. It appears from the record that one John J. Leaker sustained personal injuries by falling over a plank negligently extended over the sidewalk on Leigh street, in the city of Richmond, by laborers engaged in building four houses for one Fritz Sitterding. Suit was brought by Leaker against the city, and subsequently, by an amended declaration, Sitterding was made a party defendant, the amended declaration charging ³⁵⁶ that the city and Sitterding were jointly liable in damages to Leaker for the injuries suffered by him. The result of this suit was a judgment in favor of Sitterding, upon the plea of the statute of limitations—he having been brought into the suit more than one year after the date of the accident—and a judgment against the city for one thousand dollars. The city of Richmond having paid this judgment, amounting, principal, interest and cost, to the sum of one thousand seventy-nine dollars and twenty-four cents, brings the suit now before us, to recover over against Fritz Sitterding the sum so paid by it, alleging that it was by his wrongful and negligent act that the sidewalk was rendered unsafe, thereby causing the injury for which Leaker had recovered his judgment against the city.

The whole matter of law and fact having been submitted to the court, judgment was rendered in favor of the defendant, Sitterding. This action of the lower court we are now asked to review.

It appears from the evidence that Fritz Sitterding, a general builder and contractor, was erecting for himself four buildings on a lot owned by him at the corner of Leigh and Fourth streets, in the city of Richmond, and that he did all of the carpenter work by his employés. It further appears that the firm of Jones & Green were general contractors and bricklayers, and as such, under contract in writing, undertook to do and did all of the brickwork on said houses; that Jones & Green were competent contractors; that they employed and paid all labor necessary for the fulfillment of their contract, and exercised entire supervision over the same, and over their employés. It further appears that a plank walkway at the end of the mortar-bed in the driveway of the street, across the gutter and extending some distance into or over the sidewalk, and above the level thereof, was so placed by the brick contractors or their employés for the use of their laborers in carrying brick and mortar into the buildings.

It is contended on behalf of plaintiff in error that the defendant ³⁵⁷ Sitterding, having had notice of the pendency of the suit of "Leaker v. City of Richmond," and opportunity to make his defense in that suit, and having failed to do so, is now estopped from showing that it was not through his fault that the accident happened.

It is further insisted that the question of Sitterding's ultimate liability was *res adjudicata* by reason of the judgment in the Leaker case.

Both these contentions are without merit. This is not a suit between the same parties or their privies that were litigants in the case of Leaker v. City of Richmond. So far as Sitterding is concerned, that case was not heard on its merits, but went off under an instruction of the court on the plea of the statute of limitations. The judgment in the former case is conclusive only of the fact that Leaker was injured by falling over a plank walkway; that the city was guilty of negligence; and that Leaker recovered damages to the amount of one thousand dollars, but upon well-settled principles it cannot be held to be conclusive of Sitterding's negligence, or of his liability to the city. Those questions were left open, and are now for the first time brought to issue.

The general rule is that for a judgment to be evidence against a party in another suit upon a different cause of action, it must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases and must have been determined upon its merits. If the first action is disposed of upon any ground that does not go to its merits, the judgment rendered will not conclude the party: *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

In cases like that under consideration, it is well established that a municipal corporation has a remedy over against a person who has so used the streets as to produce the injury, unless the corporation concurred in the wrong. But in such an action to recover back the damages the city has been compelled to ³⁵⁸ pay for his assumed neglect, it is competent for the defendant to show that he was under no obligation to keep the street in safe condition, and that it not through his default that the accident happened: *City of Chicago v. Robins*, 2 Black (U. S.), 418; *City of Boston v. Worthington*, 10 Gray (Mass.), 496, 71 Am. Dec. 678; *Catterlin v. City of Frankfort*, 79 Ind.

547, 4 Am. Rep. 627; 2 Dillon on Municipal Corporations, sec. 1035.

The further contention on behalf of the plaintiff in error, that the firm of Jones & Green, contractors for the brickwork, were not independent contractors, is also without merit. This question is concluded by the recent decision of this court in *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386. It is there said that where a person is employed to perform a certain kind of work which requires the exercise of skill and judgment as a mechanic, the execution of which is, because of his superior skill, left to his discretion, without restriction upon the means to be employed in doing the work, and employs his own labor, which is subject alone to his own control and direction, the work being executed either according to his own ideas, or in accordance with plans furnished him by the person for whom the work is done, such a person is not a servant under the control of a master, but an independent contractor; and hence it was held that one employed to do the woodwork on certain dry kilns was an independent contractor, notwithstanding the fact that his compensation was measured by a per diem, and the further circumstance that the employer was to furnish the material.

The general rule is that where the owner employs a careful, skillful and competent builder or contractor to erect his building, and surrenders the possession of the premises for that purpose, then in such case the owner is not liable for an injury occurring to a stranger by the negligence or default of the contractor or his immediate servants or employes engaged in doing the work: *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386; ³⁵⁹ *City of Moline v. McKinnie*, 30 Ill. App. 419; *Hilliard v. Richardson*, 3 Gray (Mass.), 349, 63 Am. Dec. 743.

The contention on behalf of plaintiff in error is that the case at bar is not governed by the general rule, but comes within an exception as well established as the rule itself. The exception relied upon is fully recognized by all the authorities that we have examined; the doctrine being that if the enterprise entered upon by the owner of the premises is inherently and necessarily dangerous, or where danger and hazard must necessarily accompany the work, or where the doing of the work will necessarily create a nuisance, then the prosecution of the work becomes unlawful, and in such cases the owner cannot escape personal liability by contracting with another to do the work.

It cannot be successfully maintained that building a house on a lot abutting upon a street is inherently and necessarily

dangerous, or that danger and hazard must necessarily attend its erection. It is a lawful work and of necessity engaged in by thousands every day, and if carefully and properly done involves no danger to anyone. The negligence of the employes of the brick contractor in leaving their plank walkway extended upon the sidewalk after night was not a necessary incident of the work or even to be anticipated by anyone. The case of *Hilliard v. Richardson*, 3 Gray (Mass.), 349, 63 Am. Dec. 743, is in all essential particulars like the case at bar, and it is there held in an able opinion, in which the authorities are reviewed, that the owner of land, who employs a carpenter to alter and repair a building thereon, and to furnish all the materials for the purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair.

In the case of *City of Moline v. McKinnie*, 30 Ill. App. 419, it is held that the employer of a skillful and competent person, under a contract to perform a certain labor, of which he will have exclusive ³⁰⁰ control until completion, cannot be made liable for injuries arising from the negligence of such contractor or his employes. The erection of buildings adjacent to a highway, with the usual and necessary excavations, and the consequent obstructions to the sidewalk and street, is held not to be within the exception to the general rule, which attaches liability to employers where the work in hand is inherently dangerous, or will necessarily create a nuisance. Authorities to the same effect might be multiplied, but it is not necessary to go beyond our own jurisdiction, the case of *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386, being conclusive of the view that the case at bar does not come within the exception relied on.

For these reasons the judgment complained of must be affirmed.

A Judgment is not Res Judicata if it does not go to the merits of the case: *Hoover v. King*, 43 Or. 281, ante, p. 754. 72 Pac. 880; note *o Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 565.

As to the Joint Liability of a City and the abutting property owner for injuries suffered by a traveler because of a defective street, see *Button v. Landsdowne Borough*, 198 Pa. St. 563, 48 Atl. 494, 82 Am. St. Rep. 814, and cases cited in the cross-reference note thereto. And as to the conclusiveness of a judgment, which has been reversed against a city for an injury caused by a defect in the highway, in an action by the city against the author of the defect,

see *Pawtucket v. Bray*, 20 R. I. 17, 37 Atl. 1, 78 Am. St. Rep. 837, and cases cited in the cross-reference note thereto.

The Negligence of Independent Contractors and the liability therefor are discussed in the monographic note to *Covington etc. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 382-428.

JOHNSON v. COLLEY.

[101 Va. 414, 44 S. E. 721.]

GIFTS CAUSA MORTIS—Essentials.—Attributes of a gift causa mortis are that it must be of personal property and made in the last illness of the donor while the apprehension of death is imminent, and subject to the implied condition that if he recovers, or if the donee die first, the gift shall be void and possession of the property must be delivered at the time of the gift to the donee, or to some one for him, and the gift must be accepted by the donee. (pp. 885, 886.)

GIFTS CAUSA MORTIS—Revocation or Defeat.—The title to every gift causa mortis must vest in the donee at the time of the gift, but the donor may revoke the gift during his life, or it may be defeated by operation of law if the donor recovers from the illness which induced the gift or survives the donee. If it is not revoked, or defeated by operation of law, it becomes absolute at the donor's death, but not until then. (p. 886.)

GIFTS CAUSA MORTIS—Condition.—A gift causa mortis, otherwise valid, is not vitiated because accompanied by the words, "If I die, or anything happens to me." (p. 887.)

GIFTS CAUSA MORTIS—Delivery to Third Person.—If one, in view of impending dissolution, clearly and intelligently manifests an intention to make a present gift of personal property to another, and, in consummation of his intention makes such delivery to a third person for the use of the intended donee as he is then capable of making, considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not as agent of the donor. (p. 889.)

A. K. and D. H. Lake, for the appellant.

L. O. Haden and A. A. Gray, for the appellees.

⁴¹⁵ **HARRISON, J.** The question presented by this record is the validity of an alleged gift causa mortis. The facts are few, simple, and uncontradicted.

It appears that Joseph Newton Johnson, a bachelor advanced in life, lived in the county of Goochland in comfortable circumstances, being the owner of valuable real and personal property.

The only persons living with him at the time of his death and for some time prior thereto were Lizzie Johnson, a negro woman, and her two illegitimate children, one of whom was Libby Carter Johnson, a little girl about eleven years of age, who, by her next friend and guardian ad litem, is the appellant here. These persons, Lizzie Johnson and her two children, attended to the domestic affairs of Joseph Newton Johnson, doing his cooking and washing, and waiting on him generally. It appears that the deceased was warmly attached to the appellant, saying that "he thought as much of her as if she were his own dear child, and that he would provide for her well at his death." The evidence is abundant that the deceased attempted to accomplish this cherished purpose. In August, 1901, he had prepared by his friend and neighbor, George P. Cowherd, the treasurer of the county, a will by which he made this child his sole legatee and devisee except to the extent of providing ⁴¹⁶ a home for her mother with her. On the day before his death he sent for his friend, Mr. Cowherd, and had him read over the will prepared in August, 1901, which had not been executed. After reading the paper, Cowherd asked him if he wished any changes made. He replied that he did not, that the will was as he wanted it. He then asked that Marcus Smith be called in, and that he and Cowherd would witness the will. Cowherd suggested that, as he had been named as executor, some one else had better act as witness. Thus the execution of the will was temporarily postponed. As Cowherd was leaving the room, the deceased handed him a bundle of money, with the injunction that, if he died, or anything happened to him, Cowherd must give it to the little colored girl, Libby Carter Johnson, and see that she got it. Mr. Cowherd then left the room with the money in his possession, and did not again see the deceased, who died the next day, without having perfected the execution of the will which had been prepared in accordance with his wishes.

After the death of Johnson, the money placed in the hands of Cowherd for the appellant was counted in the presence of the witnesses, and found to amount to the sum of \$1,758.43, and then deposited in bank by Cowherd for safekeeping, until he should be advised as to its proper disposition.

Briefly stated, the essential attributes of a gift causa mortis are: 1. It must be of personal property; 2. The gift must be made in the last illness of the donor, while under the appre-

hension of death as imminent, and subject to the implied condition that if the donor recover of the illness, or if the donee die first, the gift shall be void; and 3. Possession of the property given must be delivered at the time of the gift to the donee, or to some one for him, and the gift must be accepted by the donee.

These propositions are so well established that citation of authority is not necessary in support of them.

⁴¹⁷ In the case at bar the factum of the gift is clearly established. It is also indisputably shown that the gift was of personal property, and that it was made during the last illness of the donor, and under the apprehension of death as imminent, the donor having died of his then existing disorder the following day.

It is contended that the delivery of the package of money to Cowherd was not an absolute surrender of dominion and control over the property; that it was not a complete transfer of present title and possession to the donee; that the gift was testamentary in character, and therefore void.

By "testamentary" is meant that no title whatever was to vest in the donee until the donor's death; that thus the gift was in the nature of a testament, and, not being executed in the mode prescribed by the statute of wills, it was inoperative.

The title to every gift *causa mortis* must vest in the donee at the time of the gift. It vests, however, subject to certain conditions subsequent. The donor may revoke the gift during his life, or it will be defeated by operation of law if the donor should recover from the illness which induced the gift, or should survive the donee. If it is not revoked or defeated by operation of law, it becomes absolute at the donor's death, but not until then: 3 *Minor's Institutes*, 606; 2 *Kent's Commentaries*, 444; 3 *Redfield on Wills*, 2d ed., 322, etc.; 1 *Story's Equity*, sec. 606; 3 *Pomeroy's Equity Jurisprudence*, sec. 1146.

Subject to these conditions, which are incident to every gift *causa mortis*, and may arise to defeat the title vested in the donee, there was certainly a delivery of the package of money to George P. Cowherd, who took complete physical possession of it, and at once removed it from the house of the donor to his own home for safekeeping. As already seen, the donor had the right to revoke the gift, or it may have been defeated, in the manner indicated, by operation of law, but apart from these conditions, to which the gift was subject, it is difficult to per-

ceive what control the donor could have exercised over current ⁴¹⁸ money in the hands of another at some distance from his dying bed. From the time of the delivery until the death of the donor the money was in the exclusive possession and control of Cowherd, the donor having transferred to the donee a present title to the inchoate, imperfect, and defeasible interest contemplated by every gift *causa mortis*.

It is insisted that the language of the donor, "if I die, or anything happen to me," which accompanied the delivery of the money, was a condition attached to the gift that it was not to take effect until the donor's death, and shows that a testamentary disposition was intended, and not a gift *causa mortis*. The language used by the donor is but the expression of the condition attached by implication of law to every gift *causa mortis*—that it does not take effect absolutely and irrevocably except in case of the death of the donor. It is not necessary that the donor should express the condition, but, if he does so, it tends to make plain the character of the gift, rather than to cast doubt upon it. So far as we have had access to the authorities, they are practically unanimous in holding that the language "if I die," when used by the donor in making the gift, is but an inference of law from the circumstances, and does not impair the gift: *Wells v. Tucker*, 3 Binn. 370; *Snellgrove v. Bailey*, 3 Atk. 214; notes to *Ward v. Turner*, 1 Lead. Cas. Eq. 1222; *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389.

The language "if anything happens to me" was but another mode of expressing the donor's apprehension of death, and was not intended to annex some condition other than death to the gift. Under the circumstances in which the words were employed, they commonly mean "if I die," their use being repetition, adding nothing to the last-mentioned expression: *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389; *Shackelford v. Brown*, 89 Mo. 546, 1 S. W. 390; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313. In the last-named case Judge Peckham, in delivering the opinion of ⁴¹⁹ the court, referring to the words of the gift, said: "The declaration of the donor that his wife should keep the assignment, and not hand it over to the donee till after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law as to the gift, whether the declaration was or was not made. Clearly, he could not tell whether he should

die or recover from that ailment. If he did recover, the law holds the gift void."

The case of *Basket v. Hassell*, 107 U. S. 622, 2 Sup. Ct. Rep. 415, is much relied on in support of the contention that the gift in question was testamentary in character, but we fail to appreciate its pertinency as authority. The facts are wholly different, and the case is clearly distinguishable from the case under consideration. Chaney held a bank certificate of deposit payable to his order or demand. During his last illness he indorsed the certificate as follows: "Pay to Martin Basket, of Henderson, Kentucky; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself." He delivered the certificate thus indorsed to Basket, and afterward died. It was held that this was not a valid gift *causa mortis* of the money represented by the certificate. The decision turned on the construction and legal effect of the indorsement, "Pay to Martin Basket; to no one else; then not till my death." It was held that under the restrictive terms of this indorsement the title to the property did not vest in Basket at the time of the gift, subject to be divested by revocation or by the operation of law during the donor's life, but by the express terms of the assignment no title was to vest until the death of the donor. That being a disposition of property to take effect only after the death of the donor, it came within the ordinary definition of a will, and, not being executed in conformity with the law regulating testamentary dispositions of property, it was inoperative.

We will not prolong this opinion to review in detail several
420 other cases relied on by the appellees. They have been fully considered, and are not regarded as at all affecting the soundness of the conclusion reached in the case at bar.

Judge Lewis spoke for this court in *Yancey v. Field*, 85 Va. 756, 8 S. E. 721, and he has demonstrated the inaptness of that case as authority for this in an opinion filed by him in the case of *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389.

It is further contended that George P. Cowherd was merely the agent of the donor to deliver the package of money to the appellant after the donor's death; that the agency ceased with the death of the donor; and that Cowherd was left without authority to act or carry out the instructions of his principal with respect to the money placed in his hands. Delivery may

be made to a third person under such circumstances as to create an agency merely; as where the donor retains dominion or control over the thing given. If, however, the delivery is made to a third person for the use of the donee, or under such circumstances as indicate that the donor relinquishes all right to or control of the thing given, and intends to vest a present title in the donee, the gift will be sustained.

Where one, in view of impending dissolution, clearly and intelligently manifests an intention to make a present gift of personal property to another, and in consummation of his intention makes such a delivery to a third person for the use of the intended donee as he is then capable of making considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not as the agent of the donor: *Wells v. Tucker*, 3 Binn. 370; *Deval v. Dye*, 123 Ind. 321, 24 N. E. 246, *Shackleford v. Brown*, 89 Mo. 546, 1 S. W. 390; *Sessions v. Moseley*, 4 Cush. 87; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; 3 *Minor's Institutes*, 603; 1 *Roper on Legacies*, 5; 2 *Schouler on Personal Property*, 1645.

⁴²¹ In the case at bar the object of the donor's bounty was a child of tender years. He was a man of intelligence and business experience, and doubtless knew that this child was too young to be intrusted with the large sum of money he desired to give her, and for this reason he turned to his friend and adviser, in whom he appears to have had great confidence, and placed the money in his hands as the surest means of securing the same for the use and benefit of this little child upon whom his last earthly solicitude was lavished. There being no countervailing circumstances, one who thus receives property for another must be held to be the trustee of the intended donee, and not the agent, merely, of the donor.

We are not unmindful of the great danger of fraud in this sort of gift, and that courts cannot be too cautious in requiring clear proof of the transaction. Nor are we prepared to dispute the wisdom of Lord Eldon's observation that "it would be quite as well if this *donatio causa mortis* were struck out of our law altogether." So long, however, as the law remains unchanged by competent authority, imbedded as it is in our jurisprudence, and sanctioned by the experience of centuries, the courts must give it effect in cases like this, where the evidence is clear and convincing.

For these reasons the decree complained of must be reversed, and the cause remanded for further proceedings to be had therein not in conflict with the views expressed in this opinion.

GIFTS CAUSA MORTIS.*

- I. Definition and Requisites.
- II. When Title Passes.
- III. Distinguished from Other Transactions.
 - a. Legacies.
 - b. Gifts Inter Vivos.
- IV. Delivery of Subject Matter.
 - a. Must Part with Possession and Control.
 - b. Actual or Constructive Delivery Essential.
 - c. Delivery by Deed or Other Writing.
 - d. Instances of Delivery.
 1. Generally.
 2. Constructive Delivery by Giving Key to Receptacle.
 - e. After-acquired and Previously Acquired Possession No Good.
 - f. Personal Delivery by Donor not Necessary.
 - g. To Whom Delivery may be Made for Donee.
 - h. Effect of Mistake or Partial Delivery.
 - i. Delivery of Bank-book as Passing Money on Deposit.
 1. Difference Between Savings and Commercial Banks.
 2. Effect of Rule of Bank.
 3. Deposit by Donor in Donee's Name.
 4. Deposit in Joint Names of Donor and Donee.
- V. Expectation of Death.
 - a. Must be Made in Contemplation Thereof.
 - b. What is Sufficient to Fulfill Requirement.
 1. Not General Impression of Death.
 2. Illness.
 3. Contemplation of Suicide.
- VI. Condition that Donor does not Recover Annexed to Gift.
- VII. What Property may be Subject of Gift Mortis Causa.
 - a. Not Fixed in Amount.
 - b. Not Apply to Real Property.
 - c. Choses in Action.
 1. Negotiable Instruments.
 2. Donor's Own Promissory Note No Good.
 3. Lack of Indorsement.
 4. Bonds.
 - d. Certificate of Stock—Life Insurance Policy.
 - e. Donor's Check.
 - f. Certificates of Deposit.
 - g. Security Passes with Delivery of Instrument Secured.
 - h. Debt Owed Donor by Donee.
- VIII. Annexing Conditions to Gifts Causa Mortis.
- IX. Revocation.

*REFERENCE TO MONOGRAPHIC NOTES.

Gifts causa mortis: 23 Am. Dec. 603; 51 Am. Dec. 362; 48 Am. Rep. 506.

- a. How It may be Effected.
- b. Effect of Subsequent Will.
- c. Subsequent Acts of Ownership by Donor.
- d. Birth of Child.
- e. Recovery.

X. What Law Determines the Validity of Gifts *Causa Mortis*.

XI. Rights of Creditors.

XII. Widows' Dower Right.

XIII. Evidence.

- a. Clear and Convincing Evidence Required.
- b. Burden of Proof.
- c. What Witnesses Required.
- d. Declarations of Donor.
- e. Letters of Donor.
- f. Ill-treatment of Donor by Husband.
- g. Illness as Presumptive that Gift was Made *Mortis Causa*.
- h. Declarations of Donee.

I. Definition and Requisites.

A gift *causa mortis* is defined as a gift of personal property, made by a party in expectation of death then imminent, and upon an essential condition that the property shall belong fully to the donee in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not in the meantime revoked: *Roberts v. Draper*, 18 Ill. App. 167. For other cases defining this kind of gift, see *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641; *Raymond v. Sellick*, 10 Conn. 480; *Kilby v. Godwin*, 2 Del. Ch. 61; *Taylor v. Harmison*, 79 Ill. App. 380; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Michener v. Dale*, 23 Pa. St. 59; *Dickeshied v. Exchange Bank*, 28 W. Va. 346; *Henschel v. Maurer*, 69 Wis. 576, 2 Am. St. Rep. 757, 34 N. W. 926.

The essential requisites to a valid gift *causa mortis* are that it must be made in contemplation of death, to take effect upon the donor's death by his existing disorder, revocable at the will of the donor, of no avail if he should recover from his illness or the donee predecease him, and a delivery by the donor to the donee or someone for him: *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587; *Robson v. Jones*, 3 Del. Ch. 51; *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575; *Raymond v. Sellick*, 10 Conn. 480; *Barnes v. People*, 25 Ill. App. 136; *Calvin v. Free*, 66 Kan. 466, 71 Pac. 823; *Hebb v. Hebb*, 5 Gill (Md.), 506; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Kenistons v. Sceva*, 54 N. H. 24; *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601; *Priester v. Priester*, 1 Rich. Eq. (S. C.) 26, 18 Am. Dec. 191; *French v. Raymond*, 39 Vt. 623; *Claytor v. Pierson* (W. Va.), 46 S. E. 935; *Grattan v. Appleton*, 3 Story, 755, Fed. Cas. No. 5707.

No particular form of words is necessary to give effect to the transaction, if the evidence of what was said and done establishes the requisites for its validity: *Vandor v. Boach*, 73 Cal. 614, 15 Pac. 354; *Kenistons v. Sceva*, 54 N. H. 24.

The assent of the donee to the gift need not be proved, but his acceptance will be presumed where it is beneficial to him: *Forbes v. Jason*, 6 Ill. App. 395; *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246; *Blazo v. Cochrane*, 71 N. H. 585, 53 Atl. 1026. That acceptance is not necessary under the Spanish law, see *Fuselier v. Masse*, 4 La. 423.

The same degree of mental competency is required to make a gift *causa mortis* as is required to make a will: *Sass v. McCormack*, 63 Minn. 234, 64 N. W. 385; *In re Hall's Estate*, 16 Misc. Rep. 174, 38 N. Y. Supp. 1135.

II. When Title Passes.

When the title to the property given passes, presents a question upon which the authorities are in conflict. The opposing views are well set forth in *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641, in the following language: "We are aware that there is conflict and confusion in the authorities upon this point, doubtless growing out of the modes of *donatio causa mortis* recognized originally by the Roman jurisprudence, whence the doctrine is derived. Under one of these, the subject matter of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery. Under another, the gift was made upon condition that the thing given should become the property of the donee only in the event of the donor's death. Under the former, delivery was essential; under the latter, it was not: *Thornton on Gifts*, 44; *Ward v. Turner*, 2 Ves. Sr. 431; *Abbott on Descent, Wills and Administration*, 169. . . .

"Those authorities which hold that the property in the thing given passes upon delivery and during the life of the donor, have obviously followed the kind of *donatio causa mortis* referred to *supra*, existing under the Roman law prior to Justinian's definition, which recognized the subject matter of the gift as becoming at once the property of the donee, defeasible upon a condition subsequent, and under which delivery was essential. This is a formidable position, and supported by high authority: *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. Rep. 415; *Chase v. Redding*, 13 Gray, 418; *Marshall v. Berry*, 13 Allen, 43; *Thornton on Gifts*, sec. 46; *Nicholas v. Adams*, 2 Whart. (Pa.) 17; *Daniel v. Smith*, 64 Cal. 346, 30 Am. St. Rep. 575; *Emery v. Clough*, 63 N. H. 552, 56 Am. St. Rep. 543, 4 Atl. 796; *Schouler on Personal Property*, sec. 137; *Dole v. Lincoln*, 31 Me. 422.

"Since the decision of Lord Harwicke in *Ward v. Turner*, 2 Ves. Sr. 431, it has been the settled law of England that delivery is essential in gifts *causa mortis*. And there has never been any controversy upon that point in this country. As delivery is an essential element to complete the transfer of title or property in personalty (*Schouler on Personal Property*, sec. 87), the authorities holding to the view that the title passes, and becomes vested in the subject matter of a *donatio causa mortis* during the life of the donor, are

dominated by the idea of delivery. But, while delivery is a prerequisite to the transfer of title, it does not follow that there is always a transfer of title where there is a delivery, nor that the delivery of the chattel and the transfer of the title are coeval in cases where the title is transferred.

"We think the better doctrine upon the transfer of the title to gifts *causa mortis* is that which accords with Justinian's definition, and recognizes the subject matter of the gift as becoming the property of the donee in the event of the donor's death; i. e., the donor's death is a condition precedent to the vesting of the title to the thing given in the donee. This seems to be the rule adopted by the English courts of chancery, and is supported also by eminent American courts and text-writers: 1 Williams on Executions, 782; 3 Pomeroy's Equity Jurisprudence, sec. 1146; Baker v. Smith, 66 N. H. 422, 23 Atl. 82; Merchant v. Merchant, 2 Bradf. Sur. (N. Y.) 432; Gardner v. Parker, 3 Madd. 102; Edwards v. Jones, 1 Mylne & C. 226; Staniland v. Willott, 2 Macn. & G. 664; Wells v. Tucker, 3 Binn. (Pa.) 370. This view is certainly more consonant with the conditions which all the authorities agree attach to gifts of this kind, viz., that the reclamation of the donor, or his recovery from existing illness, or escape from peril apprehended, or the death of the donee before that of the donor, will each, ipso facto, revoke the gift: Conser v. Snowden, 54 Md. 175, 39 Am. Rep. 368; Merchant v. Merchant, 2 Bradf. Sur. (N. Y.), 432." See, also, Buecker v. Carr, 60 N. J. Eq. 300, 47 Atl. 34; Bedell v. Carll, 38 N. Y. 581, to the effect that title does not pass immediately, and Seybold v. Bank, 5 N. Dak. 460. 67 N. W. 682; Deneff v. Helms, 42 Or. 161, 70 Pac. 390, holding that it does.

There is the same conflict apparent as to the exact nature of a gift *causa mortis*, whether it is in reality a gift or a testamentary disposition. In Emery v. Clough, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796, it was held in its essential characteristics to be a gift, though resembling a testamentary disposition; while in Bloomer v. Bloomer, 2 Bradf. Sur. (N. Y.) 339, it was considered in fact a legacy, though in form a gift. In accord with the later view, see Robson v. Jones, 3 Del. Ch. 51; Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819, 3 N. E. 532; Rhodes v. Childs, 64 Pa. St. 18. So where a married woman cannot so dispose of her estate as to deprive her husband of his distributive share therein, by means of a will, she cannot do so by a gift *causa mortis*, which is merely another form of testamentary disposition: Baker v. Smith, 66 N. H. 422, 23 Atl. 82. Nor can she make a good gift *causa mortis* without the assent of her husband, where his acquiescence is required to a will made by her to render it effectual: Jones v. Brown, 34 N. H. 439. See, contra, Marshall v. Berry, 95 Mass. (13 Allen) 43.

III. Distinguished from Other Transactions.

a. **Legacies.**—How far a gift of this character resembles and differs from a legacy is stated in *Raymond v. Sellick*, 10 Conn. 490, where it is said: "It is ambulatory, incomplete and revocable during the donor's life. The revocation may be effected, either by the recovery of the donor from his disorder, or by taking back the possession of the property. It can be made to the wife of the donor. On the other hand, it differs from a legacy in several particulars. The claim need not be proved in a court of probate. The title of the donee becomes, by relation, complete and absolute from the time of the delivery. No consent or other act, on the part of the executor or administrator, is necessary to perfect the title of the donee. It is a claim against the executor; a legacy is a claim from the executor." See, also, *Dole v. Lincoln*, 31 Me. 422; *Gass v. Simpson*, 44 Tenn. (4 Cold.) 288.

b. **Gifts Inter Vivos.**—A gift *causa mortis* differs from a gift *inter vivos* in one respect, namely, that the former is revocable; while the latter is not: *Barnum v. Reed*, 136 Ill. 388, 26 N. E. 572; *Hagemann v. Hagemann*, 90 Ill. App. 251; appeal dismissed, 188 Ill. 363, 58 N. E. 950; *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246; *Scamione v. Moreley*, 58 Mass. (4 Cush.) 87; *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071; *Partridge v. Kearns*, 32 App. Div. 483, 53 N. Y. Supp. 154; *Deneff v. Helms*, 42 Or. 161, 70 Pac. 390; *Sheegog v. Perkins*, 63 Tenn. (4 Baxt.) 273; *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508. It therefore becomes of primary importance to determine in each case where the donor has recovered under which of these two classes the gift falls, for if made in view of death, the gift is revoked and the property is in the donor, whereas, if made *inter vivos*, the title passed absolutely, and is not affected by a subsequent recovery of the giver.

Where a woman was ill, and, believing that she might die therefrom, surrendered a certificate of railroad stock which she held, and had a new one therefor issued in the name of her daughter, which she retained, and collected the dividends in the name of her daughter, this was held a gift *causa mortis*, which she had a right to revoke: *Collins v. Collins*, 11 Misc. Rep. 28, 31 N. Y. Supp. 1017.

In an action to recover a deposit in a savings bank, under an allegation of a gift to the plaintiff, proof is admissible of a gift *causa mortis*: *Walsh v. Bowery Sav. Bank*, 15 Daly, 403, 7 N. Y. Supp. 669, 8 N. Y. Supp. 344.

Where a statute provided that if a donor and donee resided together at the time of the gift, the possession of the latter at their place of residence should not be a sufficient possession to support the gift, it was held to apply only to gifts *inter vivos*, and not *causa mortis*: *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389.

IV. Delivery of Subject Matter.

a. **Must Part with Possession and Control.**—It is absolutely necessary that there be a delivery of the subject matter of a gift causa mortis during the donor's lifetime, and in this respect it does not differ from a gift inter vivos: *Jones v. Deyer*, 16 Ala. 221; *Ragan v. Hill* (Ark.), 80 S. W. 150; *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575; *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39; *McMahon v. Newton Sav. Bank*, 67 Conn. 78, 34 Atl. 709; *Kilby v. Godurn*, 2 Del. Ch. 61; *Powell v. Leonard*, 9 Fla. 359; *Singleton v. Cotton*, 23 Ga. 261; *McKenzie v. Downing*, 25 Ga. 669; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Stokes v. Sprague*, 110 Iowa, 89, 81 N. W. 195; *Duncan v. Duncan*, 15 Ky. (5 Litt.) 12; *Roche v. George*, 18 Ky. Law Rep. 493; *Carleton v. Lovejoy*, 54 Me. 445; *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368; *Bowers v. Hurd*, 10 Mass. 427; *Fearing v. Jones*, 149 Mass. 12, 14 Am. St. Rep. 392, 20 N. E. 199; *Edgerton v. Edgerton*, 7 N. J. Eq. 419; *Roberts v. Wills*, 20 N. J. L. 591; *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352; affirming 2 Barb. 94; *Huntington v. Gilmore*, 14 Barb. 243; *McCraw v. Edwards*, 41 N. C. (6 Ired. Eq.) 202; *Hamor v. Moore*, 8 Ohio St. 239; *Wells v. Tucker*, 3 Binn. (Pa.) 366; *Michener v. Dale*, 23 Pa. St. 59; *McDowell v. Murdock*, 1 Nott & McC. (S. C.) 237, 9 Am. Dec. 684; *Trenholm v. Morgan*, 28 S. C. 268, 5 S. E. 721; *Sims v. Walker*, 27 Tenn. (8 Humph.) 503; *Chevallier v. Wilson*, 1 Tex. 161; *Carpenter v. Dodge*, 20 Vt. 595; *French v. Raymond*, 39 Vt. 623; *Miller v. Jeffress*, 4 Gratt. 472; *Lee v. Boak*, 11 Gratt. 182; *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653; *Wilcox v. Matteson*, 53 Wis. 23, 40 Am. Rep. 754, 9 N. W. 314; *Miller v. Miller*, 3 P. Wms. 356; *Ward v. Turner*, 2 Ves. Sr. 431.

Not only must there be a delivery, but the possession of the donee must be a continued one, and the donor have parted with all control and dominion over the subject matter of the gift in favor of the donee, so as to put it out of his power to repossess himself thereof, and no further act be required on his part to vest the title in the donee: *Jones v. Weakley*, 99 Ala. 441, 42 Am. St. Rep. 24, 12 South. 420; *Daniel v. Smith*, 75 Cal. 548, 17 Pac. 683; *Knight v. Tripp* (Cal.), 49 Pac. 838; *Calvin v. Free*, 66 Kan. 466, 71 Pac. 823; *Dole v. Lincoln*, 31 Me. 422; *Hatch v. Atkinson*, 56 Me. 324, 46 Am. Dec. 464; *Bradley v. Hunt*, 5 Gill & J. (Md.) 54, 23 Am. Dec. 597; *Hitch v. Davis*, 3 Md. Ch. 266; *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368; *Grover v. Grover*, 41 Mass. (24 Pick.) 261, 35 Am. Dec. 319; *Hamilton v. Clark*, 25 Mo. App. 428; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775; *Craig v. Craig*, 3 Barb. Ch. 76; *Kirk v. McCusker*, 3 Misc. Rep. 277, 22 N. Y. Supp. 780; *In re Hemphill's Estate*, 180 Pa. St. 87, 36 Atl. 406; *Hall v. Howard*, 1 Rice (S. C.) 310, 33 Am. Dec. 115; *Treasury Solicitor v. Lewis*, [1900] 2 Ch. 812, 63 L. T., N. S., 139. But see *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071.

Where the owner of promissory notes, being ill and in fear of death, indorsed thereon that the within sums were to be paid after his death to his grandchild, to whom he then delivered the notes, the grandchild was held, upon the death of the owner, to have acquired no title to the notes or the sums payable thereon because the donor had power to control the fund till his death, prior to which the donee could not have collected the proceeds of the notes: *Logan v. Richter*, 60 Minn. 49, 61 N. W. 826. See, also, *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. Rep. 415. So where a woman, in apprehension of death, gave her son a pocket-book containing money and told him where he could find more, which he was to use for her illness and funeral expenses and retain the balance, and he left the money where it was till after her death, it was not a gift *causa mortis*, the son not having taken and retained possession: *Dunbar v. Dunbar*, 80 Me. 162, 6 Am. St. Rep. 166, 13 Atl. 578.

The delivery must be such as to invest the donee with title, and not be by way of bailment. So where a father in his last illness placed in his son's possession a sum of money to take care of, a few days afterward directing his son, if he should not recover, to pay the funeral expenses and divide the residue between himself and certain others, this was held to be by way of bailment, and not in contemplation of a gift, and hence there was no *donatio causa mortis*: *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9.

b. *Actual or Constructive Delivery Essential.*—It may be stated to be the law that there must be an actual delivery of the thing given, if it is possible, otherwise a constructive delivery, or, in other words, the delivery must be according to the manner in which the particular thing is susceptible of being delivered: *Hart v. Ketchum*, 121 Cal. 426, 53 Pac. 931; *Lamson v. Monroe (Me.)*, 5 Atl. 313; *Hitch v. Davis*, 3 Md. Ch. 266; *Cutting v. Gilman*, 41 N. H. 147; *Miller v. Jeffress*, 4 Gratt. 472; *Chaney v. Basket*, Fed. Cas. No. 2595; *Ward v. Turner*, 2 Ves. Sr. 431.

If the delivery is constructive, it must be more than mere words or symbolic act. It must be something which completely terminates the donor's custody and control of the article donated, and which places it wholly under the donee's power, and enables him without further act on the donor's part to reduce it to his own manual possession: *Trenholm v. Morgan*, 28 S. C. 268, 5 S. E. 721.

It has been said that a mere symbolical delivery is not sufficient, it being necessary that the donee have either possession of the article or the means of obtaining it: *McGrath v. Reynolds*, 116 Mass. 366; *Van Fleet v. McCarn*, 2 N. Y. Supp. 675. But in *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173, it is held that there must be either an actual, constructive or symbolical delivery. That this apparent conflict is due to an inaccuracy in the use of terms, see *Powell v. Leonard*, 9 Fla. 359.

To determine the sufficiency of a delivery, reference must be had both to the nature of the property and to its locality. So where a female slave was in the chamber of her master, who was in extremis, and he directed a deed to be drawn up, giving her and her children to a person present at the time, this was a good delivery of them, although the children were absent from the room: *Powell v. Leonard*, 9 Fla. 359, and in *Waring v. Edmonds*, 11 Md. 424, a party in her last illness gave to her sister then present, a negro girl, who was also present, by telling the girl: "There is your mistress," indicating her sister; "you must be a good girl, and be obedient to her," and this was considered a sufficient delivery.

In a recent case, *Clayton v. Pierson* (W. Va.), 46 S. E. 935, the court quotes from *Elam v. Keen*, 4 Leigh, 335, 26 Am. Dec. 322, where it is said: "There are many things of which actual manual tradition cannot be made, either from their nature or their situation at the time. It is not the intention of the law to take from the owner the power of giving these; it merely requires that he shall do what, under the circumstances, will in reason be considered equivalent to an actual delivery." So where a donor delivers that which is the evidence of his right to property in the possession of his agent, and actual delivery of the thing itself is impossible by reason of the possession being in another, it is a good delivery: *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173.

A verbal order by a creditor to his debtor, to pay the debt to a third person, the debtor agreeing and promising the donee to pay him, constitutes a good delivery: *Castle v. Persons*, 117 Fed. 835, 54 C. C. A. 133, the court saying: "We understand that a mere request on a bailee, depository, or debtor to pay money to the donee is not a sufficient delivery of a chose in action so as to validate a gift causa mortis. Yet where the request or order is accepted by the person upon whom it is made during the lifetime of the donor this is a good delivery. A check upon a bank is in itself, though delivered to the donee, no delivery, but if accepted by the bank during the lifetime of the donor the delivery is good: *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. Rep. 415, and cases cited.

"We see no difference between a verbal order or request and a written order or request, there being no law requiring either to be in writing. Neither need the acceptance be in writing."

c. Delivery by Deed or Other Writing.—In *Singleton v. Cotton*, 23 Ga. 261, the court held that where actual delivery was impossible, as in the case of a ship at sea, it should be manifested by writing; and in *Meach v. Meach*, 24 Vt. 591, a deed of stock on a farm was considered a good delivery: See, also, *Kenistons v. Sceva*, 54 N. H. 24, and *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178.

Other cases, however, consider such writing as of no avail. In *McGrath v. Reynolds*, 116 Mass. 566, the court used the following

language: "As a gift *causa mortis*, it is not aided by the execution of the written instrument, except so far as that may contribute to greater certainty in the proofs. Such gifts cannot be effected by formal instruments of conveyance or assignment. They are manifested by, and take their effect from, delivery. They can therefore only be of such articles of personal property as are capable of transmission by delivery alone, so far at least as to confer a right or title which equity will protect and enforce. They require actual delivery or its equivalent. Symbolical or constructive delivery is not enough." See, also, *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Smith v. Downey*, 37 N. C. (3 Ired Eq.) 268; *Case v. Dennison*, 9 R. I. 88, 11 Am. Rep. 222; *Royston v. McCulley* (Tenn. Ch. App.), 59 S. W. 725.

That an imperfect will will not be sustained as a gift *causa mortis*, see *Trenholm v. Morgan*, 28 S. C. 268, 5 S. E. 721.

d. Instances of Delivery.

1. Generally.—Whether a sufficient delivery has been made must depend upon the particular facts and circumstances of each case. Where a woman, a short time before her death, called for her nephew and, being informed that he was not present, told her husband that she gave her nephew all of her property, which was then in the husband's possession, directing him to deliver the same to the nephew, which he promised to do, this was a sufficient delivery: *Caylor v. Caylor's Estate*, 22 Ind. App. 666, 72 Am. St. Rep. 331, 52 N. E. 465. Where a sick woman sent for two friends, to one of whom she had intrusted her bank-book for safekeeping, demanding it on their arrival, examining it, and calling on them to witness that it belonged to the plaintiff and that she gave it to her, after which she handed it to the plaintiff, and then told her to let the witness take it back with her until called for after her death, this constituted a good delivery: *Callanan v. Clement*, 18 Misc. Rep. 621, 42 N. Y. Supp. 514.

Changing securities from one drawer of a bureau to another, by direction of the donor, is not a sufficient delivery: *Bryson v. Brownrigg*, 9 Ves. 1. Nor is the placing of an envelope, containing securities and directed to a friend, upon a table, by one about to kill himself, a good delivery: *Liebe v. Battman*, 33 Or. 241, 72 Am. St. Rep. 705, 54 Pac. 179.

In *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178, a woman was found dead in her house, with a slate by her bedside, on which she had written: "I wish Dr. L. S. Ellis to take possession of all, both personal, real and mixed. I am so sick I believe I shall die. Look in valise," and then signed her name. In the valise was found a memorandum written by her directing Dr. Ellis to take all of her property. This was held a good gift *causa mortis*, the court saying: "There can be no doubt concerning the meaning of the memorandum

left by the deceased. It is unconditional and unequivocal. We think it clear that Rachael Hill [the deceased] did all that she could to create a gift *causa mortis*, and fully intended it, and that her written declaration should prevail as a valid appointment to the uses indicated, as fully as if there had been a manual delivery of the securities."

2. **Constructive Delivery by Giving Key to Receptacle.**—It is a common form of constructive delivery of property kept in a receptacle, such as a trunk or bureau, to deliver the key thereto, with the purpose of passing title to the goods therein contained; and such has been held to be a sufficient delivery: *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706; *Keepers v. Fidelity etc. Co.*, 56 N. J. L. 302, 44 Am. St. Rep. 397, 28 Atl. 585; *Turner v. Brown*, 6 Hun, 331.

It is insufficient, however, where the receptacle itself is present and capable of delivery, such not being the best delivery possible: *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464.

The taking of a key of a trunk from the place where it is kept, putting goods into it, and returning the key to its place, at the owner's request, is not a sufficient delivery, there being no change in the possession of the key: *Coleman v. Parker*, 114 Mass. 30.

In *Keepers v. Fidelity etc. Co.*, 56 N. J. L. 302, 44 Am. St. Rep. 397, 28 Atl. 585, it is held that the delivery of a key to a locked box containing valuable papers and securities is not a sufficient delivery to constitute a valid gift *causa mortis* of the contents of the box when the latter is not in the presence or immediate control of the donor, but in another room, in a locked closet, the key to which a third person has, and does not pass into the actual possession of the donee, during the lifetime of the donor.

a. **After-acquired and Previously Acquired Possession No Good.**—The fact that the donee has possession is not sufficient to establish a gift *causa mortis*. "It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*; the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better": *Miller v. Jeffress*, 4 Gratt. 472. To the same effect, see *Drew v. Hagerty*, 81 Me. 231, 10 Am. St. Rep. 255, 17 Atl. 63; *Allen v. Allen*, 75 Minn. 116, 74 Am. St. Rep. 442, 77 N. W. 567; *Cutting v. Gilman*, 41 N. H. 147; *Buecker v. Carr*, 60 N. J. Eq. 300, 47 Atl. 34; *Delmotte v. Taylor*, 1 Redf. Sur. (N. Y.) 417; *Podmore v. Dime Sav. Bank*, 29 Misc. Rep. 393, 60 N. Y. Supp. 533; *Smith v. Zumber*, 41 W. Va. 623, 24 S. E. 653; and especially is it true that possession does not prove delivery where the claimant has had an opportunity of obtaining possession wrongfully: *Kenney v. Public Administrator*, 2

Bradf. Sur. (N. Y.) 319. That the merely manual possession of a deceased husband's property by his widow, at his residence where he died, is not prima facie evidence of change of title to her, see *Conklin v. Conklin*, 20 Hun, 278.

The reasons for being so strict in requiring delivery are excellently presented in the opinion of Judge Walton, in *Drew v. Hagerty*, 81 Me. 231, 10 Am. St. Rep. 255, 17 Atl. 63, in the following language: "If the act of delivery was for no other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with, when the donee already had possession. But such is not its only purpose. It is essential in order to distinguish a gift causa mortis from a legacy. Without an act of delivery, an oral disposition of property, in contemplation of death, could be sustained only as a nuncupative will, and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliberation and intent. It is a test of sincerity and distinguishes idle talk from serious purposes. And it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey a meaning different from what the speaker intended. Not so of an act of delivery."

It has been held in England that a delivery, antecedent to the gift itself, is valid: *Cain v. Moon* (1896), 2 Q. B. 283; *In re Weston* [1902] 1 Ch. 680, 86 L. T. 551.

f. **Personal Delivery by Donor not Necessary.**—It is stated as a general rule that delivery must be made by the donor, and not by his executor or administrator to constitute a good gift mortis causa: *Huntington v. Gilmore*, 14 Barb. 243. This does not mean that it is essential that the donor personally must make the delivery. So a note, the title and possession of which were held by a trustee, was held to have passed as a gift causa mortis to the donee from her husband, the beneficiary of the note, although there was no actual delivery by the donor's own hands, but he expressed a wish that she have, and the trustee soon afterward assigned and delivered to her the note, saying the donor had given it to her: *Southerland v. Southerland*, 68 Ky. (5 Bush) 591.

It is immaterial, if the possession pass from the donor to the donee in his presence and with his consent, whether it be delivered by his hand or only by his direction: *McDowell v. Murdock*, 1 Nett & McC. (S. C.) 237, 9 Am. Dec. 684.

g. **To Whom Delivery may be Made for Donee.**—Delivery need not be to the donee in person, but the requirement is satisfied if it be to some one for him: *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587; *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575; *Sorrells v. Collins* (Ga.), 36 S. E. 74; *Woodburn v. Woodburn*, 123 Ill. 603, 14 N. E. 58, 16 N. E. 209; *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246; *Kemper*

v. Kemper, 62 Ky. (1 Duvall) 401, 25 Am. Dec. 636; Borneman v. Sidlinger, 15 Me. 429, 33 Am. Dec. 626; Dole v. Lincoln, 31 Me. 422; Rockwood v. Wiggin, 82 Mass. (16 Gray) 402; Trorlicht v. Weizenecker, 1 Mo. App. 482; Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026; Wells v. Tucker, 3 Binn. (Pa.) 366; and it makes no difference that the donor dies before the intermediary hands over the property to the donee: *In re Hall's Estate*, 16 Misc. Rep. 174, 38 N. Y. Supp. 1135. But see *Dickeshied v. Exchange Bank*, 28 W. Va. 340. A trust may thus be created by gift causa mortis, but where neither the persons who are to take nor their proportions are clearly designated, the trust fails, and the donee cannot take for his own benefit: *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 680.

The person to whom the property is intrusted for the benefit of the donee must not be under the control of the donor, for he will be regarded as the latter's agent, and a delivery by him after the death of the donor will be of no avail: *Hart v. Ketchum*, 121 Cal. 426, 53 Pac. 931; *Barnes v. People*, 25 Ill. App. 136; *Duryea v. Harvey*, 183 Mass. 429, 67 N. E. 351; *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201; *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139; *Appeal of Fross*, 105 Pa. St. 258. See, also, *Peck v. Rees*, 7 Utah, 467, 27 Pac. 581, a case involving the delivery of a deed to realty. So where property was delivered to an agent with directions to deliver it to the donee after the death of the donor, and if he should recover to return it to the latter, it is insufficient: *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312; *Bieber v. Boeckmann*, 70 Mo. App. 503.

h. Effect of Mistake or Partial Delivery.—Where a donor, sick unto death, expressed a desire to reward an old family servant by a gift of five hundred dollars, and the next morning, in order to complete his gift, certificates of bank stock, of an aggregate value of four thousand five hundred dollars, were procured and by him indorsed to the servant, it was held that the latter could take five hundred dollars only, the donor intending to give no more than that sum: *Crippen v. Adams* (Mich.), 92 N. W. 496.

Where there is an intention to deliver certain property by way of gift causa mortis as a whole, it is not sufficient that a smaller portion thereof be delivered and the whole gift must fail: *McGrath v. Reynolds*, 116 Mass. 566.

Where a donor, a few hours before death, desiring to give money to certain parties, gave her check to the defendant, and assigned to him two bank accounts, at the same time giving him directions as to the disposition of the greater part of the money, but not mentioning the balance, and the defendant reduced the money into possession during the donor's lifetime, and made the payments directed by her after her death, it was held that the gift was complete, as to the specific persons named, but as to the residue there was no

gift, and the administrator was entitled to recover it: *Beals v. Cwley*, 59 Cal. 665.

1. Delivery of Bank-book as Passing Money on Deposit.

1. **Difference Between Savings and Commercial Banks.**—How far the delivery of a bank-book will operate to pass title to the money deposited in a bank, by way of gift *causa mortis*, presents an interesting and important question, in view of the fact that large sums of money are seldom kept close at hand, but are usually deposited in banking institutions.

A distinction is made in this connection between the delivery of a pass-book of a savings bank and that of an ordinary bank, a delivery of the former being sufficient to pass title to the money in the bank, but not a delivery of the latter. "A pass-book," said the court in *Jones v. Weakley*, 99 Ala. 441, 42 Am. St. Rep. 84, 12 South. 420, "issued by a savings bank, it is held, rests on a peculiar footing. Such book is the record of the customer's account, and its production authorizes control of the deposit. Like the key of a locked box, its delivery is treated as a delivery of all it contains. It follows that the delivery in this case, accompanied by the declared intention to give, if the deposit had been in a savings bank, would have been a valid gift *causa mortis* of the money on deposit, of which it was the evidence: 8 Am. & Eng. Ency. of Law, 1824, 1825; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371; *Curtis v. Portland Sav. Bank*, 77 Me. 151, 52 Am. Rep. 750; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39.

"Not so, however, with the present book. The First National Bank, as we have seen, was a bank of issue, discount and deposit. The money could be withdrawn from the bank, not by the production of the pass-book, but on the check of the depositor. It was not the best delivery available under the circumstances. It did not give dominion and control of the money, the thing claimed to have been given; for the money was as subject to check without the production of the book as with it: *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389; *Dole v. Lincoln*, 31 Me. 422; *Hillebrand v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757; *Noble v. Smith*, 2 Johns. 52; *Jones v. Brown*, 34 N. H. 445; *Beak v. Beak*, L. R. 13 Eq. 499."

There have been decisions, however, holding a delivery of a pass-book of a savings bank not sufficient to constitute a good delivery of the fund: *Ashbrook v. Ryon*, 65 Ky. (2 Cush.) 228, 92 Am. Dec. 481; *Appeal of Walsh*, 122 Pa. St. 177, 9 Am. St. Rep. 83, 15 Atl. 470; *McGonnell v. Murray*, 3 I. R. Eq. 460. In *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 172, speaking of the former case, the court stated that if the pass-book was equivalent to a certificate of deposit, no reason was seen why it should not have been a complete gift.

In *Appeal of Walsh*, 122 Pa. St. 177, 9 Am. St. Rep. 83, 15 Atl. 470, a depositor in a savings bank handed her bank-book, during her last illness, to a person, saying that the money there was for her sister, but if the donor did not die, she wished it back. The court held this not a sufficient delivery, saying: "Our question is, whether this passed the title to the fund in the hands of the bank as a *donatio mortis causa*. This depends, to some extent, upon the character of a depositor's bank-book.

"Where a deposit is made in bank, the depositor is credited upon the books of the bank with the amount deposited, and a duplicate entry of credit is made upon the bank-book in his hands. He thus has at all times a statement of his credits in his account with the bank. His debits he may keep in any convenient manner, or, if the rules of the bank require it, he may present his book with each check, that the debits may be entered by the officers of the bank. The book is, at most, a statement of an account, showing how much has been deposited by the customer to be held by the bank upon the terms which the law or the agreement between the parties has provided. When withdrawn, it is by means of checks, orders, or such other form of voucher as the terms of the deposit or the usages of the institution may provide for. The mere possession of the book by the bank would afford no evidence of the payment of the money to the depositor. An assignment of such a book, like an assignment of a book of original entries, will operate to transfer the entire balance remaining due upon the account; but a delivery of it will no more transfer the fund than will a delivery of a book of original entries transfer the balances due upon the several accounts contained therein."

The weight of authority is, however, in accordance with the law as stated above in *Jones v. Weakley*, 99 Ala. 441, 42 Am. St. Rep. 84, 12 South. 420, namely, that the delivery of a savings bank pass-book is a good delivery of the funds deposited. In addition to the authorities there cited, see *Whalen v. Milholland*, 89 Md. 149, 43 Atl. 45; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. 627; *Loucks v. Johnson*, 70 Hun, 565, 24 N. Y. Supp. 267; *Tillinghast v. Wheaton*, 8 R. I. 536, 94 Am. Dec. 126, 5 Am. Rep. 621. See, also, *Cosgriff v. Hudson City Sav. Inst.*, 24 Misc. Rep. 4, 52 N. Y. Supp. 189.

2. Effect of Rule of Bank.—It makes no difference that a by-law of the bank, printed in the bank-book, required an order or power of attorney to authorize anyone, other than the depositor, to draw out the deposits: *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. 627. It is there said: "But the depositor can draw the money without making an order simply by the presentation of the deposit-book, and so can any owner of the book. Suppose the plaintiff had purchased the book, and had thus become the absolute

owner thereof; he could have drawn the money as owner on presentation of the book, and the bank could not have required as a condition of payment that he should procure a power of attorney or an order from one having no interest, legal or equitable, in the deposit. The owner in such a case should produce satisfactory evidence of his ownership of the book, and if the bank refused to pay he would be obliged to establish such ownership by any competent evidence, and nothing more; and his rights as purchaser would be no greater than his rights as donee. He has the same right to enforce a payment that he would have had if he had been the donee of any non-negotiable chose in action, or a certificate of deposit, or unindorsed note. He could establish his right to payment in such a case by any proof showing that he was the absolute legal or equitable owner."

That a gift *causa mortis* of money deposited in a savings bank may be proved by a delivery of the bank-book, accompanied by an assignment to the donee, see *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 680.

3. **Deposit by Donor in Donee's Name.**—In some instances, the money has been deposited by the donor in the name of the donee. Where this was done, and the donor left the box containing the bank-book with a friend, with express injunction to give it to the donee and no one else, in case of his death, this was held a valid gift, though he retained the key to the box: *Vandermark v. Vandermark*, 55 How. Pr. 408.

In *Hogan v. Sullivan*, 114 Iowa, 456, 87 N. W. 447, C., about two years before his death, took the defendant to a bank, deposited a sum of money, and had the certificate made payable to the defendant. Two weeks before his death, C., then suffering with the malady from which he died, gave directions to defendant with regard to disposing of the money among certain beneficiaries. The court held that there was a sufficient delivery to make a valid gift *causa mortis* in favor of the beneficiaries, saying: "It is true that, when the money in question was first deposited payable to defendant, there was no designation of beneficiaries, but the subsequent designation, with the assent of defendant, of the persons to whom the money was to be paid, was just as effectual as though the money had been then for the first time placed in the possession and control of defendant without the reservation on the part of C. of any further power of disposition. . . . It was not essential to the validity of the gift that the money be returned by defendant to C., and then redelivered by C. to the defendant, with directions for its disposition."

4. **Deposit in Joint Names of Donor and Donee.**—Where money is deposited in a savings bank jointly in the names of the donor and donee, payable to the survivor, a delivery of the pass-book is a good delivery of the fund: *Dennin v. Hilton* (N. J. Eq.), 50 Atl. 600.

But if the donor retain the pass-book, the gift fails for want of delivery: *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45. See, also, *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486. In the former case, where the money was payable to the order of either and survivor, it is said: "Much stress was laid on the words 'joint owners,' which were subsequently stamped on the pass-book. Of themselves, these two words, as we said in *Gorman v. Gorman*, 87 Md. 338, 39 Atl. 1038, are not sufficient in a deposit made in a savings bank, to transfer title to the fund—that is, they are not sufficient to convert the fund from being the property of the person to whom it belongs into the property of the original owner and another individual. Whatever their technical import may be when employed in other instruments, they cannot operate to vest an ownership to the extent of one-half of the fund in some one else, when, under the terms and according to the legal effect of the very paper in which they are used, the depositor retains such a dominion over the fund deposited that he may at any moment withdraw the whole of it. If these two words do not restrict the authority of the depositor to draw the money, they do not limit or curtail his control over it; and if his control over it is not limited or curtailed, there is obviously left to him a locus penitentiae, and there is, consequently, no perfected donation. That the words 'joint owners' do not, and were not intended to restrain the depositor from forthwith drawing out of bank the whole fund deposited, is apparent; because, in spite of their use, the other words of the entry expressly declare that the fund shall be payable to either of the parties named, and therefore, to the one to whom it originally belonged and who caused the entry to be made in that particular form. Always bearing in mind that the fund belonged to only one of the parties named as joint owners, and that you are searching for evidence tending to show a gift of that fund, or of a part of it, to a person who confessedly in the first instance owned none of it, the control retained over the whole of it by the original owner under the very terms of the deposit which he makes, is of great significance in repelling any inference that he intended to part with his ownership in any way whatever. Particularly is this so when the original owner retains possession of the pass-book and when the deposit is made in a savings bank, by the rules of which the book must be produced before the deposit can be withdrawn."

V. Expectation of Death.

a. **Must be Made in Contemplation Thereof.**—It is absolutely essential to the existence of a gift *causa mortis* that it be made in expectation or contemplation of the near approach of the death of the donor at the time of the gift, and death must ensue: *Zeller v. Jordan*, 105 Cal. 143, 38 Pac. 640; *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256; *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255; *Knott*

v. Hogan, 61 Ky. (4 Met.) 99; Dole v. Lincoln, 31 Me. 422; Parcher v. Saco etc. Sav. Inst., 78 Me. 470, 7 Atl. 266; Keyl v. Westerham, 42 Mo. App. 49; Crue v. Caldwell, 52 N. J. L. 215, 19 Atl. 183; Snyder v. Harris, 61 N. J. Eq. 480, 48 Atl. 329; Kirk v. McCusker, 8 Misc. Rep. 277, 22 N. Y. Supp. 780; Dimon v. Keery, 31 Misc. Rep. 231, 64 N. Y. Supp. 1091; affirmed, 66 N. Y. Supp. 817; Rhodes v. Childs, 64 Pa. St. 18; Thompson v. Thompson, 12 Tex. 327.

b. What is Sufficient to Fulfill Requirement.

1. Not General Impression of Death.—A vague and general impression that death may occur is not sufficient, but it must arise from an impending peril or sickness: Sheegog v. Perkins, 63 Tenn. (4 Bart.) 273; Smith v. Kittridge, 21 Vt. 238. So the fact that the donor is old and will soon die, in the natural course of events, will not fulfill the requirements: Taylor v. Harmison, 79 Ill. App. 330; nor will the fact that he has entered the army and is going to war be considered as in extremis so as to validate such a gift: Smith v. Dorsey, 38 Ind. 451, 10 Am. Rep. 118; Dexheimer v. Gantier, 28 N. Y. Super. Ct. (5 Rob.) 216, 34 How. Pr. 472; Irish v. Nutting, 47 Barb. 370; Sheldon v. Button, 5 Hun, 110; Gourley v. Linsenbighler, 51 Pa. St. 345. See, however, Gass v. Simpson, 44 Tenn. (4 Cold.) 288.

2. Illness.—The moving cause for gifts made in view of death is usually illness. It is difficult, in this connection, to determine from the authorities whether death must be apprehended as presently imminent, or whether it is sufficient if it be contemplated as the probable result of the sickness, which may not occur for a long period of time, as in the case of chronic diseases: Robson v. Jones, 3 Del. Ch. 51, in which case the court favored a narrower construction.

The New York courts have adopted a more liberal construction, and they hold that it is not necessary that the donor should have been in extremis, but only that his death, when it occurs, should be from the disorder which afflicted him: Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Williams v. Guile, 117 N. Y. 343, 22 N. E. 1071, the court saying: "The rule of law in such cases of gifts made in prospect of death, demands for their validity that the proof shall show the existence of a bodily disorder, or of an illness, which imperils the donor's life and which eventually terminates it. But that he should be confined to his bed, or his room, or that he should die within a certain limited time, are not essential circumstances to support such a gift. It is a matter within the experience and common knowledge of all, and one requiring no evidence to show, that paralysis is a symptom of a disease which does terminate human life. Its strokes are known to cause to the victim a loss of bodily functions, or senses, and point to the existence of some grave ailment of the bodily system. It is quite a matter of common supposition

or belief that the third stroke is followed by death. I think we are bound to presume that, when death has occurred from disease, indicated by paralysis, a transaction, such as we have here, and which took place after the individual had been admonished by two paralytic strokes, was conducted with a view to death."

It is not essential that the donor die from the very disease apprehended, but it is sufficient if he die from some other disease existing at the same time: *Blazo v. Cochrane*, 71 N. H. 585, 53 Atl. 1026; *Langworthy v. Crissy*, 10 Misc. Rep. 450, 81 N. Y. Supp. 85; and death from a surgical operation made necessary by a present disease is death from the disease: *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. 627.

Death must be from the very disorder from which he is then suffering, and there should be no intervening recovery: *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368. So where a gift was made while the donor was in expectation of immediate death from consumption, but he afterward recovered, but finally died from the same disease, this was not sufficient to support a gift as one *causa mortis*: *Weston v. Hight*, 17 Me. 287, 35 Am. Dec. 250.

It has been held that while a delivery of personal property by the owner to another for a third person, with the intention of making a gift *causa mortis*, was not sufficient if the donor was not in his last illness, still, if while in his last illness, he reaffirmed the gift, and requested the person receiving the property to retain possession and deliver it after the donor's death, this would be equivalent to a new delivery, taking effect from the time such request was made: *Sorrells v. Collins* (Ga.), 36 S. E. 74.

3. *Contemplation of Suicide*.—A gift made in contemplation of suicide is not a good gift *causa mortis*: *Agnew v. Belfast Bank Co.* [1896] 2 I. K. 204, and the reason for so holding is there set forth by Porter, M. R., in the following words: "A *donatio causa mortis* is incomplete till death, and depends upon it. If the sick man recovers it is of no avail. No property passes until death. In the case of felonious suicide, therefore, the accrual of the right depends upon the committal of a felony; and the intent to commit that felony is a necessary constituent of the gift. In my opinion, it is fundamentally opposed to the first principles of our law, or of any law which treats suicide as a crime, that legal rights should be created by the intention to commit suicide to be followed by the actual commission of it."

VI. Condition that Donor does not Recover Annexed to Gift.

To every gift *causa mortis* is attached the condition that if the donor recover from the illness of which he is then suffering and by which he believes his life to be endangered, the gift shall fail and the property revert in the donor. It is not necessary that this condition be expressed in words, but it is sufficient if it may be implied

from the circumstances: *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Rhodes v. Childs*, 64 Pa. St. 18; *Thompson v. Thompson*, 12 Tex. 327; *Gardner v. Parker*, 3 Madd. 184. The fact that the donor used the words: "In case of my death, the property is yours," or words of like import, does not make a testamentary disposition, but merely expresses the condition which the law annexes to every gift causa mortis: *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389.

VII. What Property may be Subject of Gift Mortis Causa.

a. **Not Fixed in Amount.**—The whole of the donor's personal estate may be disposed of by gift causa mortis, the law fixing no limit to the amount: *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389.

Some cases have attempted to limit this. So, in *Marshall v. Berry*, 95 Mass. (13 Allen) 43, it was held that a person could not in this manner dispose of all his estate, but only of specific articles, following *Headley v. Kirby*, 18 Pa. St. 326, where it was decided that a gift of all a party's personalty, although accompanied by delivery, was invalid as in contravention of the statute of wills. That such a view is an innovation in the law, and difficult of application, see *Meach v. Meach*, 24 Vt. 591. In Pennsylvania, however, the fact that the donation consists of the principal part of the donor's property does not invalidate it: *Michener v. Dale*, 23 Pa. St. 59.

b. **Not Apply to Real Property.**—A gift of real property cannot be sustained as a donatio causa mortis, such applying only to personalty: *Caylor v. Caylor's Estate*, 22 Ind. App. 666, 72 Am. St. Rep. 331, 52 N. E. 465; *Reeves v. Howard*, 118 Iowa, 121, 91 N. W. 896; *Wentworth v. Shibles*, 89 Me. 167, 36 Atl. 108; *Meach v. Meach*, 24 Vt. 591. But in spite of this simple and universally recognized proposition, several cases involving real estate have been discussed as though it were capable of passing as such a gift: *McCarty v. Kearnan*, 86 Ill. 291; *Peck v. Rees*, 7 Utah, 467, 27 Pac. 581; and one case has even gone so far as to hold that land passed as a gift causa mortis: *Curtiss v. Barrus*, 38 Hun, 165.

c. Choses in Action.

1. **Negotiable Instruments.**—Choses in action were formerly not subjects of gifts causa mortis, because they merely represented rights, and were not themselves intrinsically valuable; but since the equitable doctrine has prevailed that they can be assigned by delivery, they are regarded as subject to gift, the same as all other chattels: *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178.

Originally only such choses in action as passed by delivery could be subjects of such gift, if not indorsed as notes payable to bearer, or if payable to order, indorsed in blank: *Bradley v. Hunt*, 5 Gill

& J. (Md.) 54, 23 Am. Dec. 597; Overton v. Sawyer, 52 N. C. (7 Jones) 6, 75 Am. Dec. 444; Miller v. Miller, 3 P. Wms. 356. The later authorities, however, make no distinction. "It is now perfectly well settled, at least in this country," said the court in Seabright v. Seabright, 28 W. Va. 412, "that a promissory note, a bond or any instrument in writing, which creates a liability against a third person, and which is held by the donor and is his property, either legal or equitable, is the subject of a valid donatio causa mortis. It is a matter of no importance whether the chose in action, the subject of the donatio causa mortis, be the note or bond of a third person, or whether, if a note, it be payable to bearer or be indorsed in blank, or whether it be payable to the donor only, and he does not indorse it; it not being now regarded as at all necessary that the legal title to the chose in action should pass by the delivery of it by the donor to the donee as a gift causa mortis, but it being sufficient that by the delivery of the chose in action by the donor to the donee as a gift causa mortis the equitable title to such chose in action passes and vests in the donee by delivery: Lee v. Boak, 11 Gratt. 182; Wells v. Tucker, 3 Binn. (Pa.) 366; Waring v. Edmonds, 11 Md. 424; Coutant v. Schuyler, 1 Paige, 316; Westerlo v. De Witt, 36 N. Y. 341, 93 Am. Dec. 517; Holly v. Adams, 16 Vt. 206, 42 Am. Dec. 508; Smith v. Kittridge, 21 Vt. 238; Grover v. Grover, 41 Mass. (24 Pick.) 261, 35 Am. Dec. 319; Sessions v. Moseley, 58 Mass. (4 Cush.) 87; Borneman v. Sidlinger, 15 Me. 429, 33 Am. Dec. 626; Parker v. Marston, 27 Me. 196; Brown v. Brown, 18 Conn. 410, 46 Am. Dec. 328; Jones v. Deyer, 16 Ala. 221; Rhodes v. Childs, 64 Pa. St. 18; Gourley v. Linsensbigler, 51 Pa. St. 345." For additional authorities to the same effect, see Druke v. Heiken, 61 Cal. 346, 44 Am. Rep. 553; Turpin v. Thompson, 53 Ky. (2 Met.) 420; Ashbrook v. Byon, 65 Ky. (2 Cush.) 228, 92 Am. Dec. 481; Bates v. Kempton, 73 Mass. (7 Gray) 382; Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026; Cornell v. Cornell, 12 Hun, 312; Kiff v. Weaver, 94 N. C. 274, 55 Am. Rep. 601; Tillinghast v. Wheaton, 8 R. I. 536, 94 Am. Dec. 126, 5 Am. Rep. 621; Veal v. Veal, 27 Beav. 303. So a bill of exchange, payable to the testator or order, and not falling due till after his death, nor indorsed by him, was held a valid gift mortis causa: In re Mead, 15 Ch. Div. 651.

The donee may maintain an action on such choses in action in the name of the executor or administrator, without the latter's consent: Bates v. Kempton, 73 Mass. (7 Gray) 382; Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026.

2. Donor's Own Promissory Note No Good.—The donor's own promissory note, delivered as a gift causa mortis, there being no valid consideration to support it, cannot be the subject of a gift causa mortis: Parish v. Stone, 31 Mass. (14 Pick.) 198, 25 Am. Dec. 378, where it is said, speaking of such a note: "It was not an ex-

isting available promissory note to anyone; it was not a chose in action. We have already seen that it was not a binding contract by the promisor to the promisee; and if it were, it would be open to another objection as a *donatio causa mortis*, namely, that it would not be revocable by the donor. It was simply a promise to pay money, and as such and as a gift of a sum of money, it wants the essential requisite of an actual delivery." To the same effect are *Flint v. Pattee*, 33 N. H. 520, 66 Am. Dec. 742; *Sanborn v. Sanborn*, 65 N. H. 172, 18 Atl. 233; *Edgerton v. Edgerton*, 17 N. J. Eq. 419; *Craig v. Craig*, 3 Barb. Ch. 76; *Hamor v. Moore*, 8 Ohio St. 239; *Hall v. Howard*, 1 Rice (S. C.), 310, 33 Am. Dec. 115; *Brown v. Moore*, 40 Tenn. (8 Head) 671; *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508; *Smith v. Kittridge*, 21 Vt. 238; *Caldwell v. Renfrew*, 23 Vt. 216.

The case of *Wright v. Wright*, 1 Cow. 598, is contrary to these, and held that the donor's own promissory note might be the subject of a gift *causa mortis*; but it has been since overruled: *Craig v. Craig*, 3 Barb. Ch. 76; *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352.

3. **Lack of Indorsement.**—While a written assignment of a chose in action is necessary to pass title thereto, except when made in view of death, the absence of such written assignment, where there was knowledge of its importance and opportunity to make it, should raise a strong presumption against the gift: *Varick v. Hitt* (N. J. Eq.), 55 Atl. 139.

If the delivery of an instrument is relied on to establish the gift, the burden is on the donee clearly to establish that the delivery was with the intention and for the purpose of making the gift. So where, a few minutes before his death, a father asked his daughter to hand him a certain promissory note, which she did, and he tried to write something on the back of it, but was not able to do so, so he folded the note, returned it to his daughter, and then fell back dead, it was held that, conceding it was his intention to indorse the note to his daughter, this unexecuted intention did not establish the gift, but the daughter must show that when he could not make the written indorsement, he handed it back to her with the design of making that act answer the unexecuted purpose of the indorsement: *Watson v. Carman*, 7 Ky. Law Rep. 522.

4. **Bonds.**—A bond may be the subject of a gift *causa mortis*, and may take effect without an assignment in writing: *Robeson v. Jones*, 3 Del. Ch. 51; *Waring v. Edmonds*, 11 Md. 424; *Wells v. Tucker*, 3 Binn. (Pa.) 366; *Lee v. Boak*, 11 Gratt. 182; *Snelgrove v. Bailey*, 3 Atk. 214; *Gardner v. Parker*, 3 Madd. 184.

Lord Hardwicke, in *Snelgrove v. Bailey*, 3 Atk. 214, attempted to distinguish between bonds and other choses in action, holding that the former passed by delivery, but the latter did not. This attempted distinction has been the subject of much adverse criticism:

Brown v. Brown, 18 Conn. 410, 46 Am. Dec. 328; *Contant v. Schuyler*, 1 Paige, 316; *Brunson v. Brunson*, 19 Tenn. (Meigs) 630. In the former of those cases it is said, speaking of Lord Hardwicke: 'He said that, though a bond was a chose in action, yet it was itself the only evidence of the debt; that it could not be sued without a profert of it in court; and the delivery of it, therefore, put it in the power of the donee, by destroying it, to prevent the donor from ever using it; and, therefore, some property passed to the donee by its delivery: *Snelgrove v. Bailey*, 3 Atk. 214; *Ward v. Turner*, 2 Ves. Sr. 481. This reasoning seems at best to be artificial. It does not show any real distinction between bonds and other choses in action in the particulars mentioned. Undoubtedly, it is in the power of a donee to destroy a bond, or any other paper evidence of debt; and in regard to the necessity of making profert of the instrument when sued upon, Lord Eldon, in *Duffield v. Elwes*, 1 Bligh, N. S., 542, says that the great judge who gave that reason did not then foresee the change in the law in regard to suits on lost instruments, by which a person may now bring an action on a bond without making profert of it.'

To make a valid gift *causa mortis* of a chose in action by the delivery of some document relating to it, the document must be essential to its recovery, as a bond and mortgage, or a receipt for money loaned: *Randall v. Peckham*, 11 R. I. 600.

d. Certificates of Stock—Life Insurance Policy.—Certificates of stock and coupon government bonds are the subjects of a gift *causa mortis*: *Walsh v. Sexton*, 55 Barb. 251; as is also bank stock: *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; and this is so, though the stock was not indorsed or assigned, and not transferred on the books of the bank: *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775.

That a policy of life insurance may be the subject of a gift of this kind, see *Witt v. Amis*, 1 Best & S. 109, affirmed, 33 Beav. 619.

e. Donor's Check.—A check drawn by the donor, unaccepted by the bank, is not valid as a gift *causa mortis*; in order to render it valid as such, it must be presented and paid before the death of the donor: *Second Nat. Bank v. Williams*, 13 Mich. 282; *In re Smither*, 30 Hun, 632; *Hewitt v. Kaye*, L. R. 6 Eq. 198, 37 L. J. Ch. 633; *Beak v. Beak*, L. R. 13 Eq. 489, 41 L. J. Ch. 470; *In re Beaumont*, [1902] 1 Ch. 889, 71 L. J. Ch. 478. Accordingly, a check not payable till a time when the testator died is no good as such gift: *In re Mead*, 15 Ch. Div. 651, 50 L. J. Ch. 30.

The doctrine that a donor's own check may not be the subject of a gift *causa mortis* does not apply when such check is given for a valuable consideration received by the donor in his lifetime: *Whitehouse v. Whitehouse*, 90 Me. 468, 60 Am. St. Rep. 278, 38 Atl. 374.

In *Rolls v. Pearce*, 5 Ch. Div. 730, 46 L. J. Ch. 791, a check, drawn by a testator, payable to his wife or order, given shortly before his

death, indorsed by her and paid into a foreign bank, against the amount of which she drew, was a good gift in view of death, although the check was not presented for payment at the bank on which it was drawn till after the testator's death.

A check drawn by a third person, payable to the testator or order, is good as a gift *causa mortis*, though not indorsed, and stands on the same footing as a promissory note or bill of exchange, payable to donor or order: *Clement v. Cheesman*, 27 Ch. Div. 631, 54 L. J. Ch. 152.

f. Certificates of Deposit.—Certificates of deposit, belonging to the donor, may pass as gifts *causa mortis*, and it is not necessary that they be indorsed, though payable to order, if they have been actually delivered: *Conner v. Root*, 11 Cole. 183, 17 Pac. 773; *Westerlo v. De Witt*, 36 N. Y. 341, 98 Am. Dec. 517; *In re Hall's Estate*, 16 Misc. Rep. 174, 38 N. Y. Supp. 1135; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. Rep. 415; *Chaney v. Basket*, Fed. Cas. No. 2595; *In re Dillon*, 44 Ch. Div. 716, 59 L. J. Ch. 420; *Moore v. Moore*, L. R. 18 Eq. 474; *Porter v. Walsh*, [1895] 1 I. R. 284, affirmed, [1896] 1 I. R. 148. It makes no difference that the deposit receipt is expressed to be not transferable: *Cassidy v. Belfast Banking Co.*, L. R. 22 I. R. 68.

g. Security Passes with Delivery of Instrument Secured.—Where the instrument given is secured by a mortgage, the latter passes along with the former, though it alone be delivered: *Druke v. Heiken*, 61 Cal. 346, 44 Am. Rep. 553; *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601. In *Caufield v. Davenport*, 75 Hun, 541, 27 N. Y. Supp. 494, where a mortgage was delivered, but not the bond, a question of fact was held to be presented as to whether it was the intention to give the bond as well as the mortgage.

h. Debt Owning Donor by Donee.—A debt, owing from the donee to the donor, may be the subject of a gift *causa mortis*. An unexecuted intention to discharge from the debt does not cancel it, where it is not accompanied by such acts and circumstances as to amount to a *donatio causa mortis*: *Nelson v. Cartmel*, 36 Ky. (6 Dana) 7. See, also, *In re Campbell's Estate*, 7 Pa. St. 100, 47 Am. Dec. 503.

A delivery of the evidence of the debt is as valid a delivery of the debt itself where given to the debtor, as where given to a third person; and such a donation has been more favored by courts of equity than a gift to a stranger: *Lee v. Boak*, 11 Gratt. 182.

In *Brinckerhoff v. Lawrence*, 2 Sand. Ch. (N. Y.) 400, it is said: "A debt may be forgiven and discharged in effect by parol, as by means of a confession of payment; and it is never required that it shall be evidenced by so formal and authentic an act or instrument, as a donation of property, or the transfer of a thing in action." Where a woman who held her grandson's promissory notes destroyed them, stating that she did not expect to live long, and that she did

not desire that he should be compelled to pay them if she died, it was held a valid gift *causa mortis* on her death: *Dorland v. Taylor*, 52 Iowa, 503, 35 Am. Rep. 285, 8 N. W. 510.

VIII. Annexing Conditions to Gifts *Causa Mortis*.

A *donatio causa mortis* may be coupled with a trust or a condition, but the expression of the trust or condition must form a part of the donation, and be either contemporaneous with it, or be so coupled with it by contemporaneous words of reference as in effect to be incorporated with it: *Dunne v. Boyd*, 8 I. E. Eq. 609.

Where a testator, whose will was being drawn up a few days before his death, handed a note held by him on his son to the executor, who was writing the will, telling him to give the note to his son in case he did not contest the will, but if he did, he should collect the same, it was held a valid gift *causa mortis*, where it was delivered to the son and he did not contest the will: *Woodburn v. Woodburn*, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209. Where a condition is annexed to a gift that the donee shall receive no more of the estate, but she overturns the disposal of the estate and comes in to share it, she will be required to account for the amount of the donation: *Currie v. Steele*, 4 N. Y. Super. Ct. (2 Sand.) 542.

The fact that the gift is coupled with a trust that the donee shall provide and pay for the funeral of the donor does not defeat it: *Curtis v. Portland Sav. Bank*, 77 Me. 151, 52 Am. Rep. 750; *Podmore v. South Brooklyn Sav. Inst.*, 48 App. Div. 218, 62 N. Y. Supp. 961; *Dickinson v. Hoes*, 84 N. Y. Supp. 152, 83 N. Y. Civ. Proc. R. 101; *Hills v. Hills*, 8 Mees. & W. 401.

IX. Revocation.

a. *How It may be Effected.*—There are three ways in which a gift *mortis causa* may be revoked: 1. By the recovery of the donor from his supposed fatal illness; 2. By his own voluntary revocation of the gift; and 3. By the death of the donee before the donor: *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432; *Seabright v. Seabright*, 28 W. Va. 412.

Most of the cases involving the question of revocation have arisen under the second subdivision above mentioned. There is no doubt that the donor may revoke the gift at will: *Parker v. Marston*, 27 Me. 196; but in most instances the revocation is not an express one, but is implied from subsequent acts on his part.

b. *Effect of Subsequent Will.*—According to the weight of authority, the making of a will, subsequent to the gift *mortis causa*, bequeathing the same property as was donated, does not operate as a revocation of the latter, as the will speaks only from the time of the testator's death, and at his death the gift, which before was ambulatory, like the will, becomes absolute: *Brunson v. Henry*, 140

Ind. 455, 39 N. E. 256; *Hoehn v. Struttman*, 71 Mo. App. 399; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796; *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432; *Darling v. Emery*, 74 Vt. 167, 52 Atl. 517. See contra, *Jayne v. Murphy*, 31 Ill. App. 28. In California, by statute, a subsequent will will revoke a previous gift, if it expresses an intention so to do: *Adams v. Atherton*, 132 Cal. 164, 64 Pac. 283.

c. **Subsequent Acts of Ownership by Donor.**—An appropriation by the donor, after the gift of the property donated, whether showing an ineffectual delivery or a revocation, is fatal to its validity: *Kirk v. McCusker*, 3 Misc. Rep. 277, 22 N. Y. Supp. 780; *Wigle v. Wigle*, 6 Watts (Pa.), 522.

It is not essential to a revocation that the donor should again acquire actual possession of the property, but the intention to revoke is sufficiently manifested by bringing and prosecuting an action to revoke the gift: *Adams v. Atherton*, 132 Cal. 164, 64 Pac. 283. Where the donor assigned a bank-book to his brother, *causa mortis*, and several days afterward told his brother to hurry to the bank, get out the money and bring it up to him, this showed a revocation of the gift: *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929.

That the consent of the donee is not necessary to revoke a gift *causa mortis*, see *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432.

d. **Birth of Child.**—Where by law a will is revoked by the subsequent birth of a child, if no provision has been made in the instrument therefor, it has been held that a *donatio causa mortis* would be revoked under the same circumstances: *Bloomer v. Bloomer*, 3 Bradf. (N. Y.) 339.

e. **Recovery.**—Where the evidence showed that after making a gift *causa mortis*, the donor, a very old man, partially recovered, living for almost a year after making the gift, and being able to walk a short distance, but the nature of his illness was not disclosed, it was held error for the court to charge that the donor's partial recovery operated, as a matter of law, to revoke the gift: *Castle v. Persons*, 117 Fed. 835, 54 C. C. A. 133.

If the donor recovers, or if the donee predeceases him, the donor is entitled to recover it at any time from the donee or his representatives, and mere delay to demand it, short of the statutory period of limitations, will not prevent the donor from demanding and recovering it: *Lisle v. Tribble*, 92 Ky. 304, 17 S. W. 742, 13 Ky. Law Rep. 595.

X. What Law Determines the Validity of Gifts *Causa Mortis*.

The validity of a gift *causa mortis* is to be determined by the law of the place where it is made, and not of the domicile of the donor: *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796.

XI. Rights of Creditors.

A gift causa mortis may be defeated for the benefit of creditors of the donor: *Borneman v. Sidlinger*, 15 Me. 429, 33 Am. Dec. 626; *Chase v. Redding*, 79 Mass. (13 Gray) 418; *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139; *House v. Grant*, 4 Lans. 296; *Huntington v. Gilmore*, 14 Barb. 243. Until the donation is needed to satisfy creditors, the donee is entitled to enjoy it, and a deficiency of assets must be shown: *Seybold v. Bank*, 5 N. Dak. 460, 67 N. W. 682; *Michener v. Dale*, 23 Pa. St. 59. Where the donee sues to obtain the gift, it is no defense that he is also a creditor of the estate, and that the estate is insufficient to pay his claim, without including the gift in the assets, if he is the only unpaid creditor: *Pierce v. Boston etc. Bank*, 129 Mass. 425, 37 Am. Rep. 371.

XII. Widow's Dower Right.

A gift causa mortis, made with a view to deprive the widow of her dower in the personalty, is invalid: *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139. In *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641, it was held that where a statute provided that the widow should be entitled, as part of her dower, to one-third of the personal estate of which the husband died seised or possessed, property conveyed causa mortis by a husband was subject to the widow's right of dower, it being considered that the title did not vest in the donee until the donor's death.

XIII. Evidence.

a. Clear and Convincing Evidence Required.—On account of the ease with which fraud may be perpetrated in gifts of this class, it has been stated in a great many decisions that they are not favored in law: *Caylor v. Caylor's Estate*, 22 Ind. App. 666, 72 Am. St. Rep. 331, 52 N. E. 465; *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Parcher v. Saco etc. Sav. Inst.*, 78 Me. 470, 7 Atl. 266; *Buecker v. Carr* (N. J. Eq.), 47 Atl. 34; *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352, affirming 2 Barb. 94; *Delmotte v. Taylor*, 1 Redf. (N. Y.) 417; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819, 3 N. E. 532; and the evidence to support them must be clear, unequivocal and convincing: *Conner v. Root*, 11 Colo. 183, 17 Pac. 773; *Albro v. Albro*, 65 S. W. 592, 23 Ky. Law Rep. 1555; *Lamson v. Monroe* (Me.), 5 Atl. 313; *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45; *Rockwood v. Wiggin*, 82 Mass. (16 Gray) 402; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 813; *Devlin v. Greenwich Sav. Bank*, 125 N. Y. 756, 26 N. E. 744; *Farian v. Wiegel*, 76 Hun. 462, 28 N. Y. Supp. 95, 31 Abb. N. C. 159; *Tilford v. Bank for Savings*, 31 App. Div. 565, 52 N. Y. Supp. 142; *Shirley v. Whitehead*, 36 N. C. (1 Ired. Eq.) 130; *Citizens' Sav. Bank v. Mitchell*, 18 R. I. 739, 30 Atl. 626; *Royston v. McCulley* (Tenn. Ch. App.), 59 S. W. 725; *Smith v. Smith*, 92 Va. 696, 24 S. E. 280; *Dunne v. Boyd*, 8 I. R. Eq. 609.

Gifts *causa mortis* are, however, not against public policy, and if the essential conditions are fulfilled, will be sustained: *Ellis v. Seecer*, 31 Mich. 185, 18 Am. Rep. 178; *Champney v. Blanchard*, 39 N. Y. 111; *Deneff v. Helms*, 42 Or. 161, 70 Pac. 390. Accordingly, it has been held error to charge the jury that the presumptions of law are against gifts *mortis causa*, and that the fact of the gift must be proved beyond suspicion: *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141, reversing 42 Hun, 161. The true rule requires only a preponderance of the evidence to sustain such a gift: *Gibbs v. Carnahan*, 4 Misc. Rep. 564, 25 N. Y. Supp. 786; *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601.

b. **Burden of Proof.**—The burden of proving the gift is on the party claiming it: *People's Sav. Bank v. Look*, 95 Mich. 7, 54 N. W. 629; *Conklin v. Conklin*, 20 Hun, 278; *Lehr v. Jones*, 74 App. Div. 54, 77 N. Y. Supp. 213; *Dickeshied v. Exchange Bank*, 28 W. Va. 340; *Seabright v. Seabright*, 28 W. Va. 412. The claimant need not, however, show absence of fraud, or that the deceased was of sound and disposing mind at the time of the gift: *Vandor v. Roach*, 73 Cal. 614, 15 Pac. 354, quoting with approval from *Bedell v. Carl*, 33 N. Y. 581, where it is said: "He establishes a *prima facie* case when he shows that the disposition has been attended by all the requisites which the common law prescribes to give it validity. Certainly he is not required to prove affirmatively that the donor was of sound, disposing mind and memory when he made the gift, and that the delivery of the subject was his free and voluntary act. These are matters of defense equally applicable to gifts *inter vivos* and *causa mortis*."

c. **What Witnesses Required.**—The Roman law, from which the doctrine of donations *mortis causa* is borrowed, required them to be made in the presence of five witnesses, in order effectually to guard against fraud: *Delmotte v. Taylor*, 1 Redf. (N. Y.) 417; *Ward v. Turner*, 2 Ves. Sr. 431. But the common law did not adopt this precaution, and under it the gift need not be executed in the presence of any stated number of witnesses: *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464. In New Hampshire, by statute, two indifferent witnesses are required to the delivery: *Kenistons v. Seeva*, 54 N. H. 24; *Blazo v. Cochrane*, 71 N. H. 585, 53 Atl. 1026.

In *McGonnell v. Murray*, 3 I. R. Eq. 460, it is held that there is no rule of law declaring that such a gift may not be established by evidence of the donee alone. But evidence by the donee alone, uncorroborated by circumstances, was held in *Kenney v. Public Administrator*, 2 Braf. (N. Y.) 319, to be insufficient.

d. **Declaration of Donor.**—The declarations of the donor, after he had given property to the donee, are admissible as tending to prove a gift; and evidence of his previous declarations of his intention to give the donee such property, is also admissible, where there is am-

biguity in the language employed by the donor in making the gift, such tending to show the *quo animo* with which he delivered the property: *Smith v. Maine*, 25 Barb. 33. But in *Rockwood v. Wiggin*, 82 Mass. (16 Gray) 402, it is held that delivery of the property cannot be proved by subsequent declarations of the deceased, shortly before death, to a person disconnected with the transaction.

That the donor's declaration as to the contents of a packet are competent as part of the *res gestae*, see *In re Swade*, 65 App. Div. 592, 72 N. Y. Supp. 1030.

e. Letters of Donor.—In *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 753, 26 N. E. 827, one who had money deposited in various savings banks delivered to the plaintiff a box containing his bank-books, telling him that he was going to the hospital to have an operation performed, of which he might die, and if he did not return, he gave to the plaintiff the box and its contents. Before he went, he left a letter directed to plaintiff, stated to be his last will, in case he did not survive, and contained a clause telling him to take full charge of his effects, and to hold the same for himself, his heirs and assigns forever, and that he would find his papers and all his accounts in the box. It was held that while the letter alone might not be sufficient to establish a gift, it was competent as corroborating evidence that the gift was consummated by the delivery of the bank-books.

f. Ill-treatment of Donor by Husband.—The fact that the donor's illness was caused by her husband's ill-treatment is admissible to show a motive and reason for making a gift *causa mortis* to a person, other than her husband, and thus prevent the property from descending to him: *Conner v. Root*, 11 Colo. 183, 17 Pac. 773.

g. Illness as Presumptive that Gift was Made Mortis Causa.—The fact that the donor is near death is not of controlling importance in determining whether the gift is *causa mortis* or *inter vivos*: *Carthy v. Connolly*, 91 Cal. 15, 27 Pac. 599; *Gilligan v. Lord*, 51 Conn. 562; *Henschel v. Maurer*, 69 Wis. 576, 2 Am. St. Rep. 757, 34 N. W. 926. This is clearly brought out in *Wilson v. Jourdan*, 79 Miss. 133, 29 South. 823, in the following words: "The evidence shows clearly that it was the intention of the donor that the gifts of property, both real and personal, should take effect immediately and irrevocably, and that the gifts were fully executed by a complete and unconditional delivery at the time. Whenever this is the case, the mere fact that the donor is in *extremis*, expects to die, and does die of that illness even, does not affect the validity of the gifts, because they were, in such case, gifts *inter vivos*, and not gifts *causa mortis*. To hold otherwise would be to declare that no one could make a deed to land when sick of his last illness, no matter how clear the intention to make a deed conveying a present interest absolutely and unconditionally. The test whether the gift is one *inter vivos* or one

causa mortis is not the mere fact that the donor is in extremis, and expects to die, and does die of that illness, but whether he intended the gift to take effect in praesenti, irrevocably and unconditionally, whether he lives or dies."

But where such intention is not manifest, and the donor is in extremis and dies soon after, it will be presumed to be a gift *causa mortis*: *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432; *Delmotte v. Taylor*, 1 Redf. (N. Y.) 417; *Sheegog v. Perkins*, 63 Tenn. (4 Bart.) 273; *Seabright v. Seabright*, 28 W. Va. 412; *Henschel v. Mauer*, 69 Wis. 576, 2 Am. St. Rep. 757, 34 N. W. 926. So where an invalid woman, about to undergo a surgical operation, assigned all her property in favor of one who had no claim upon her, and who was under no obligation to supply her wants, and there was no direct evidence of her intention to make a gift thereof *inter vivos*, it was held that it must be presumed to have been in contemplation of death from the operation: *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267.

h. Declarations of Donee.—The declaration of a donee of a gift *causa mortis*, made during the donor's life, to the effect that the gift had been made by him to her, is admissible in her favor to rebut other testimony tending to prove that at a later day she did not claim the making of such gift: *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389.

CITY OF NORFOLK v. FLYNN.

[101 Va. 473, 44 S. E. 717.]

CONSTITUTIONAL LAW—Delegation of Police Power.—The police power of the state may be delegated to a municipal corporation to enable it to enact reasonable ordinances to secure to its inhabitants pure and unadulterated milk. (p. 920.)

MUNICIPAL CORPORATIONS—Milk Inspection Ordinance.—A municipal ordinance requiring the inspection of all milk sold within the city limits, and providing that venders thereof shall pay a license fee, is not extraterritorial in its effect, nor void as affecting persons beyond the city limits, when it only touches those who come within the limits of the city to dispose of their milk. (p. 921.)

MUNICIPAL CORPORATIONS—Milk Inspection Ordinance.—A municipal ordinance requiring the payment of a license fee by milk venders to pay the salary and expenses of a milk inspector, is not in conflict with a statute forbidding a municipality to impose any tax, fine, or penalty on persons selling their own farm or domestic products in the city. Charges thus imposed are in no sense a tax, fine or penalty, but a legitimate fee charged for services rendered. (p. 923.)

W. H. Taylor, for the plaintiff in error.

Burroughs & Brother, for the defendant in error.

⁴⁷⁴ KEITH, P. The police justice of the city of Norfolk issued a warrant against Joseph E. Flynn for violation of an ordinance creating the office of milk inspector, defining his duties, and regulating the sale of milk in the city of Norfolk. The police justice entered a judgment against Flynn, from which an appeal was taken to the circuit court of the city of Norfolk, where it was reversed, and the case is now before us upon a writ of error to the judgment of that court.

The ordinance in question prohibits the sale of impure, diluted, or unwholesome milk, prescribes a test of what constitutes pure milk, creates the office of milk inspector, prescribes his duties, requires him to make frequent inspection and analysis of the milk sold in the city, and directs him to report all violations of the ordinance to the board of health.

By section 344, chapter 43, of the Norfolk City Code, it is provided that "every person who conveys milk in carriages or otherwise for the purpose of selling the same, and those who sell or offer it for sale in a store, booth, stand or market place in the city of Norfolk, shall register annually in the books of said inspector, on the first day of May of each year, or within thirty days thereafter, and be licensed by said inspector to sell milk within the limits of the city for one year. Before said license is granted the applicant shall be required to pay fifty cents per cow, if he keeps cows, and two dollars for each stand or depot, if he has a stand or depot, for the sale of milk. The amount so collected shall be used exclusively for the purpose of paying the salary and expenses of said inspector. And whoever ⁴⁷⁵ neglects so to register or violates any of the provisions of this section shall be punished for each offense by a fine of not less than five nor more than twenty dollars. The inspector shall pay over monthly to the treasurer of the city all sums collected by him."

Defendant contends that this section is invalid because: 1. No ordinance of the city of Norfolk can have the force of law beyond the corporate limits of the city; and 2. Because it is in violation of an act approved March 3, 1896 (Acts 1895-96, p. 685, c. 625), which is as follows: "It shall be unlawful for any city or town of this state, or of any agent or officer of any such city or town, to impose or collect any tax, fine or other

penalty upon any person selling their farm and domestic products within the limits of any such town or city outside of and not within the regular market-houses and sheds of such cities and towns."

The police power of the state, so far as it is necessary to protect the health of its inhabitants, has been delegated to the city of Norfolk. The general nature, character, and extent of the police power has been so recently investigated by this court that we deem it unnecessary to do more than refer to the cases: *Town of Farmville v. Walker*, 101 Va. 323, ante, p. 870, 43 S. E. 558; *City of Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723.

It is manifest upon the face of the ordinance in question that it was passed in the exercise of the police power of the city, and that its sole object was to secure to the people of Norfolk pure and unadulterated milk. It is a matter of common knowledge that milk is a necessary food of the sick and of the infirm, of the old and of the young; that through the agency of impure milk the germs of many diseases are disseminated; and even where there is the absence of any deleterious impurity or the germs of specific diseases, adulterated or diluted milk is not wholesome and nutritious, and its sale in its least injurious ⁴⁷⁶ aspect is a fraud upon the community. Against such practices it is the duty of the constituted authorities to protect the communities under their control. The ordinance in question is not extraterritorial in its effect. It is not intended to operate beyond the limits of the city of Norfolk. It only touches those who come within the limits of the city to dispose of their milk.

This subject was considered in the case of *State v. Nelson*, 66 Minn. 166, 61 Am. St. Rep. 399, 68 N. W. 1066. In that case the objection was made "that the provisions of the ordinance are not within the limits prescribed for it by the statute, for the reason that it is attempted to make its operation extraterritorial, in that it provides for the inspection of dairies and dairy herds outside the city limits. There is no merit in this point.

"The manifest purpose of the statute under which this ordinance was passed was to enable the city council to adopt such reasonable police regulations as would prevent the sale of unwholesome milk within the city, and not merely to prevent the keeping of unhealthy dairy herds within the city limits. It is a matter of common knowledge that much of the milk sold in

a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of its citizens. It is also a matter of common knowledge, as well as of proof in this case, that the wholesomeness of milk cannot always be determined by an examination of the milk itself. To determine it does or does not contain germs of any contagious or infectious disease, it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits, provided for by this ordinance, applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to ⁴⁷⁷ prevent the milk of diseased cows being sold within the city. This inspection is wholly voluntary on the part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is that he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extraterritorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city."

We do not think that there is any merit in the first contention.

The city of Norfolk has no power to impose any tax, fine, or penalty on persons selling their own farm and domestic products in contravention of the act of assembly of March, 1896, already quoted. The ordinance of the city under consideration does not, in our judgment, levy a tax or impose a fine or penalty within the purview of that act. We are of opinion that it was not the purpose of the legislature in that act to impose any restriction upon the city in the exercise of the police power delegated to it for the protection of the health of its citizens; and, unless plainly required so to do, we should be indisposed to adopt a construction which would render the city powerless to protect the health of its citizens from the sale of impure or adulterated milk. The means adopted seem to us to be reasonable. It was necessary to the end in view that there should be an inspector, that he should have the power to take samples of the milk and have them analyzed, and his duties involved expenses which it was proper that those engaged in

the sale of milk should bear. A license from the inspector was evidence to the community that they could with safety purchase milk from the dealer to whom it was issued. He who is licensed should not complain, because he derives a direct and important benefit from it, from which he is required to pay a reasonable compensation. The dealer discovered in improper ⁴⁷⁸ practices in the effort to foist upon the community milk unfit for use has no right to complain if he has been detected in such practices. What the dealers are required to pay by the ordinance is not for purposes of revenue, and is not a tax, but is an inspection fee, designed as a compensation for the service rendered.

The supreme court of the United States is jealous to guard against any encroachment by the states upon the power of the federal government to regulate commerce, yet it has been held that fees for the sanitary examination of vessels under the quarantine laws of the states, though they may in some degree tend to regulate commerce with foreign nations and among the states, are a valid exercise of the police power.

In *Morgan R. R. Co. v. Board of Health of Louisiana*, 118 U. S. 455, 6 Sup. Ct. Rep. 1114, the court, after discussing the quarantine laws of the state of Louisiana and their various charges for services rendered incident thereto, in answer to the claim that the sums thus exacted were in effect a tonnage tax, forbidden by the constitution of the United States, and exclusively within the power of Congress to regulate, said: "In the present case we are of opinion that the fee complained of is not a tonnage tax; that, in fact, it is not a 'tax,' within the true meaning of that word as used in the constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel, which receives the certificate that declares it free from further quarantine requirements."

Paraphrasing the language of the court in that case, the city of Norfolk says to the dealer: If you appear free from objection, you are relieved by the officer's certificate of all responsibility on that subject. For this examination you must pay. The danger comes from you, and, though it may turn out in your case there is no danger, yet, as you belong to a class from which this kind of injury comes, you must pay for the examination which distinguishes you from others of that class.

479 We are of opinion that the ordinance under investigation does not, and was not designed to, act beyond the limits of the city of Norfolk, but operates only upon those who undertake to sell milk within the jurisdiction of the city.

We are of opinion that it is a reasonable exercise of the police power, and that the charges which it imposes are in no sense a tax, penalty, or fine, but fees for services rendered; and it is therefore not repugnant to the act of assembly relied upon by defendant in error.

The judgment of the circuit court must be reversed, and this court will enter such judgment as the circuit court should have entered.

An Ordinance Providing for the Inspection of Milk and requiring milk vendors to take out a license, is valid as a legitimate exercise of the police power: *Deems v. Mayor*, 80 Md. 164, 45 Am. St. Rep. 339, 30 Atl. 648; *Littlefield v. State*, 42 Neb. 223, 47 Am. St. Rep. 697, 60 N. W. 724. And in *State v. Nelson*, 66 Minn. 166, 61 Am. St. Rep. 399, 68 N. W. 1066, it is held that a city may require that any person desirous of selling milk within its limits shall procure a license, and submit to inspection the herd from which he supplies milk, whether it is kept in the city or not.

UNION ASSURANCE SOCIETY v. NALLS.

[101 Va. 613, 44 S. E. 896.]

INSURANCE—Sole Ownership.—Deed of Trust on insured personal property is not an estate in or title to property, within the meaning of a provision in the policy that, if the interest of the insured be other than an unconditional or sole ownership, the policy shall be void. Such trust deed constitutes a mere lien upon the property, which may be discharged at any time by the payment of the amount secured thereby. (p. 925.)

INSURANCE—Undisclosed Encumbrance.—If an insurance company elects to issue its policy without any application, or without any representation by the insured as to the title to the property to be insured, it cannot complain after loss has ensued, that the interest of the insured was not correctly stated, or that an existing encumbrance was not disclosed, although the policy provides that if the subject of insurance is personal property, the policy shall become void, if the property be or become encumbered by a chattel mortgage. (p. 926.)

Watts, Robertson & Robertson, for the plaintiff in error.

Scott & Staples and Cocke & Glasgow, for the defendant in error.

614 WHITTLE, J. This is an action of assumpsit on a policy issued by the plaintiff in error, insuring the machinery and stock in the canning factory of the defendant in error, situated in the city of Roanoke, against loss by fire, to the amount to five thousand dollars.

The jury found a verdict for the plaintiff for four thousand and eighty-four dollars and eighty-six cents, with interest. Whereupon the defendant moved the court to set aside the verdict, and for a new trial, upon the ground that the verdict was contrary to the law and the evidence, and that the court, by its instructions, had misdirected the jury as to the law. The motion was overruled, and judgment rendered upon the verdict, which judgment is now here for review.

The plaintiff in error denies liability on two grounds: 1. Because the interest of the insured in the property covered by the policy was other than an unconditional and sole ownership; and 2. Because the subject of insurance was personal property, and, at the time of the issuance of the policy, was encumbered by a chattel mortgage.

The conditions of the policy upon which these defenses are based are as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be personal property, and be or become encumbered by chattel mortgage."

Both contentions rest upon the fact that at the time the policy was taken out there was a deed of trust or chattel mortgage on the property covered thereby.

The insurance was effected through the medium of the Century Banking and Deposit Company, a company conducting a 615 regular insurance agency in the city of Roanoke, which received the premium and delivered the policy.

It is insisted that in placing this particular risk the company acted in the capacity of insurance brokers, and not as the agent of the insurance company. and the secretary and treasurer of the Century Banking and Deposit Company and the general agent of the insurance company at Richmond both testified to that effect. Nevertheless, the fact remains that the insured sought and obtained the insurance from that company, and was not advised of any limitations on their powers as representatives of the insurance company. As, however, the case will have to

be disposed of on other grounds, it is unnecessary to decide what relation the intermediary bore to the contracting parties. See, on that subject, *Queen Ins. Co. of America v. Union Bank & Trust Co.*, 111 Fed. 697, 49 C. C. A. 555; 2 Beach on Insurance, sec. 1326.

The policy was issued without the usual printed or written application, and there was no representation made, or required to be made, by the insured, either as to the character of his title or interest in the property, or as to the existence of any deed of trust or chattel mortgage thereon.

As observed, the only representative of the insurance company known to the insured, or with whom he came in contact or had any dealings in respect to the insurance, was the Century Banking and Deposit Company, which company was fully informed of the state of his title, and had actual knowledge of the deed of trust on the property, before and at the time of the payment of the premium and delivery of the policy. There was no evidence tending to show a fraudulent concealment of the encumbrance, nor is there any suggestion of bad faith on the part of the insured.

On the 26th of January, 1901, a fire occurred, which occasioned a total loss of the property; and the appraisers fixed the proportion of the loss to be borne by the plaintiff in error at \$16 four thousand and eighty-four dollars and eighty-six cents, the amount of the verdict. That amount is conceded to be the true measure of the insurance company's responsibility, if liable at all.

Considering the grounds of defense relied on, in the order stated, it would seem clear that the first contention interposes no bar to a recovery. Indeed, the authorities are practically unanimous to the effect that an encumbrance is not an estate in or title to property, within the meaning of the provision that, if the interest of the insured be other than an unconditional or sole ownership, the policy shall be void. To the contrary, an encumbrance constitutes a mere lien upon property, which may be discharged at any time by payment of the sum for which the lien attaches.

In the case of *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 53 Am. St. Rep. 846, 24 S. E. 393, this court, in construing the effect of the existence of an encumbrance, in a policy containing identically the same conditions, and upon essentially the same facts, as exist in this case, said:

"It was next claimed that the existence of the mortgage violated the condition of the policy that the interest of the insured in the property shall be 'unconditional and sole ownership.' This condition did not have reference to the legal title, but to the interest of the insured in the property, and was not a warranty against liens and encumbrances. The interest of the insured in the property was, and continued to be unconditional and sole ownership, notwithstanding the mortgage they had given upon it": *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732; *Clay etc. Ins. Co. v. Beck*, 43 Md. 358; *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

In respect to the second contention, the case of *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 53 Am. St. Rep. 846, 24 S. E. 393, is equally conclusive. That case holds that where an insurance company elects to issue a policy of insurance against loss by fire without any application, ⁶¹⁷ or without any representation in regard to the title to the property to be insured, it cannot complain, after loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing encumbrance was not disclosed. In that case, as in this, there was a condition in the policy, "If the subject of insurance be personal property," the policy shall be void if the property "be or become encumbered by a chattel mortgage." Yet the court said: "There is nothing in the policy which required a disclosure by the insured of the liens on the property, except the disclosure of any chattel mortgage, where personal property was the subject of insurance; and, if the company neglected to make the proper inquiry, it cannot now be permitted, after loss has happened, to defeat a recovery because the insured did not voluntarily disclose the existence of the said mortgage. If an insurance company elects to issue its policy without an application, or any representation in regard to the title to the property upon which the insurance is effected, the company cannot complain, after a loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing encumbrance was not disclosed": *West etc. Mut. Ins. Co. v. Sheets*, 26 Gratt. 854; *Manhattan Fire Ins. Co. v. Weill & Uhlman*, 28 Gratt. 389, 26 Am. Rep. 364; *Wood on Fire Insurance*, secs. 151, 162; *Gilmore's Notes on Smith's Mercantile Law*, 293.

In *Wood on Fire Insurance*, section 162, the doctrine is stated thus: "When a policy is issued on a verbal application, with-

out any representation in reference thereto, all information relative to the risk, except such as is unusual and extraordinary, is waived, and the policy is valid, even though it contains a clause or stipulation that "the insured covenants that the representations given in the application for insurance contain a just, full, and true exposition of all facts and circumstances in respect to the condition, situation, value and risk of the property insured; and, although the policy professes to be issued ~~and~~ upon the faith of representations made by the insured, yet it is valid, even though no representations whatever were made in reference to the risk, and the lack thereof is not a matter of defense. The insurer cannot charge the assured with laches induced by its own conduct."

The reasonableness and fairness of the doctrine must commend it to the judicial mind.

It is said that persons applying for insurance are usually not aware of the necessity of making disclosures, the importance of which underwriters have learned by long experience, or what disclosure are necessary. Insurance companies, on the other hand, cannot only protect themselves by making inquiries in regard to such matters as they consider material; but, as is well known, their habit is to do so.

It is also a matter of common knowledge that insurance companies are provided with blank forms of application for insurance, and fair dealing demands that they shall use these forms, and apprise the insured of the subjects upon which they desire information, before they will be allowed to visit upon him the consequences of silence induced by their own conduct.

The practical operation of a contrary rule would be to convert these salutary contracts of indemnity into pitfalls for the unwary, and to deny protection in many instances where the insured had acted in good faith, and was consciously guilty of no dereliction.

The authorities cited are conclusive of the case in both aspects, and render a consideration of other questions relied on and argued by counsel unnecessary.

The judgment is plainly right, and it must be affirmed.

On an Application for Fire Insurance, a warranty of ownership of the premises is not broken by the encumbrance of a mortgage: *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584. And a condition in an insurance policy that any interest in the property not absolute, or less than a perfect title, must be represented and expressed in the policy is not broken by the existence of a

lien for the purchase money reserved in the deed of the premises: *Woody v. Old Dominion Ins. Co.*, 81 Gratt. 362, 31 Am. Rep. 732. As to the meaning of "entire, unconditional, and sole" ownership as the term is used in insurance policies, see *Clawson v. Citizens' Mut. Fire Ins. Co.*, 121 Mich. 591, 80 Am. St. Rep. 538, 80 N. W. 573; *Liverpool etc. Ins. Co. v. Cochran*, 77 Miss. 348, 78 Am. St. Rep. 524, 26 South. 932; *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136, 56 S. W. 44; *Yost v. McKee*, 179 Pa. St. 381, 57 Am. St. Rep. 604, 36 Atl. 317; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29; *Burson v. Fire Assn.*, 136 Pa. St. 267, 20 Am. St. Rep. 919, 20 Atl. 401; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620, 19 Am. St. Rep. 326, 7 South. 596; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 18 Am. St. Rep. 324, 24 N. E. 9; *Johannes v. Standard Fire Office*, 70 Wis. 196, 5 Am. St. Rep. 159, 35 N. W. 298. Although a policy declares that it shall be void if the interest of the insured is other than unconditional or sole ownership, such condition is waived if there is no written application made for a policy and no questions concerning the title are asked: *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 58 Am. St. Rep. 26, 47 Pac. 507.

The Existence of Encumbrances or Liens on property does not render a contract insuring it void, if the application for insurance is oral and no inquiries are made as to the condition of the title: *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 76 Am. St. Rep. 450, 57 Pac. 62; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774.

ROBINETT v. MITCHELL.

[101 Va. 762, 45 S. E. 286.]

LIMITATION OF ACTIONS—*Estates of Decedents*.—A decree for an account of debts against the estate of a deceased person in a suit brought by one creditor stops the running of the statute of limitations against the claims of all creditors whose demands are asserted in that suit. (p. 929.)

JUDGMENT Against Deceased Persons.—A judgment of a court of general jurisdiction rendered against a defendant after service of process, but before judgment, is not void but voidable only. It is valid until set aside in a direct proceeding for that purpose, and cannot be collaterally attacked. (p. 929.)

VOIDABLE JUDGMENTS Until Set Aside in a proper proceeding for the purpose, possess all the attributes of valid judgments and cannot be collaterally attacked. (p. 929.)

ESTATES OF DECEDENTS—*Suits Against Practise*.—Courts will not encumber suits for the administration of the assets of decedent's estates with collateral issues, affecting the adjustment of equities between persons as to whom and many of the creditors there is no sort of privity, who are not necessary parties and whose object is delay. (p. 930.)

S. W. Williams and F. Kegley, for the appellant.

W. J. Henson, for the appellees.

764 WHITTLE, J. This appeal is from two decrees of the circuit court of Bland county—the first pronounced at the May term, 1902, establishing certain demands on behalf of appellees against the estate of James Robinett, deceased, and the second at the November term following, dismissing the petition of appellant for a rehearing of the former decree. These claims are evidenced by a personal decree, which was rendered December 28, 1886, in favor of appellees, who were legatees of Samuel Wohford, deceased, against James Robinett and Harvey R. Mustard, joint executors of said testator, for their interests in the estate.

Subsequently, other creditors of James Robinett's estate instituted suits in equity in the circuit court of Bland county against his administrator and heirs, for the purpose, among others, of subjecting his assets to the payment of debts.

765 In those cases an account of the outstanding indebtedness of the estate was ordered on October 1, 1891, which, under the rule of practice of courts of equity in this state, suspended the running of the statute of limitations as to all creditors whose demands were asserted therein: *Repass v. Moore*, 96 Va. 147, 30 S. E. 458; *Gunnell v. Dixon*, 101 Va. 174, 43 S. E. 340.

It appears from the agreed facts that the decree of December 2, 1886, was entered against James Robinett after his death, and appellant insists that it was therefore void, and should have been so declared by the circuit court.

While the decisions are irreconcilably in conflict as to the effect of a judgment rendered for or against a party after his death, the decided weight of authority seems to be that where a court of general jurisdiction renders such judgment, it is not for that reason void.

The judgment, though erroneous and voidable, if assailed in a direct proceeding for that purpose, is effective unless and until set aside, and may not be collaterally attacked. That is the settled doctrine of this court, and a different rule would lead to great inconvenience and mischief.

As was said in *Lancaster v. Wilson*, 27 Gratt. 629, with respect to collateral attacks on judgments: "It is not merely an arbitrary rule of law, established by the courts, but is a doc-

trine founded upon reason and the soundest principles of public policy. It is one which has been adopted in the interest of the peace of society, and the permanent security of titles": *Hooe v. Barber*, 4 Hen. & M. 439; *Evans v. Spurgin*, 6 Gratt. 107, 52 Am. Dec. 105; *Neale v. Utz*, 75 Va. 480; *Wilcher v. Robertson*, 78 Va. 602.

It was likewise insisted by appellant that if the decree of appellees be not void, it was, nevertheless, barred by the statute of limitations, and for that reason ought not to have been established as a subsisting demand against the estate of James Robinett, deceased.

⁷⁶⁶ A brief consideration of conceded facts will show that the contention cannot be maintained. As has been remarked, avoidable judgment, until set aside in a proper proceeding for that purpose, possesses all the attributes of a valid judgment. The decree under consideration is, therefore, to be given the same force and effect as if James Robinett had been alive at the date of its rendition; and, as has been seen, an account of debts was ordered October 1, 1891, within less than five years from the date of the decree. So that the decree was plainly not barred by any statutory provision.

The remaining assignment of error to the first decree is to the action of the circuit court in refusing to require Harvey R. Mustard to be made a party defendant to the litigation.

It is not the practice of the courts, nor is it the policy of the law, to encumber suits for the administration of the assets of decedents' estates with collateral issues, affecting the adjustment of equities between persons as to whom and many of the creditors there is no sort of privity.

In respect to a similar contention, this court said, in the case of *Wytheville etc. Dairy Co. v. Frick Co.*, 96 Va. 141, 146, 30 S. E. 491, 492: "If these persons were made defendants any liens on their lands would have to be ascertained, which upon the same principle, would compel the making of any other persons parties defendants who were defendants to judgments constituting liens on their lands, thereby adding new parties from time to time without end, at the expense and delay of the creditor, and to the great prejudice of his rights."

But, aside from the general rule of the subject, there were special reasons in this case which justified the court in dismissing the petition of appellant asking that appellees be required to implead Harvey R. Mustard, and subject his property to the

satisfaction of their debts. It was not pretended that the debts had been paid or otherwise satisfied, and Mustard's insolvency⁷⁰⁷ was shown to the answers to the petition and affidavits accompanying them, and admitted by appellant, who filed no replication to those answers.

It also appears that the petition was not presented until about three years after the demands of appellees had been established before the commissioner. The court was warranted, therefore, in concluding that the petition was interjected for purposes of delay, rather than for the bona fide object of bringing a necessary party before the court.

The petition for a rehearing of the decrees of May term, 1902, which was denied by the decree of November term, 1902, is predicated upon alleged errors in the former decree, which have already been discussed and disposed of in this opinion.

Upon the whole case, the decrees complained of are without error, and are affirmed.

A Judgment Against a Deceased Person, if jurisdiction has been obtained during his lifetime, is generally considered voidable merely and not subject to collateral attack: See the monographic note to Watt v. Brookover, 29 Am. St. Rep. 816. Compare Ex parte Massie, 131 Ala. 62, 90 Am. St. Rep. 20, 31 South. 483; Reynolds v. Nesbitt, 196 Pa. St. 636, 79 Am. St. Rep. 736, 46 Atl. 841. But an action begun and prosecuted against a dead person is void: Shea v. Shea, 154 Mo. 599, 77 Am. St. Rep. 779, 55 S. W. 869.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

WEISER v. HOLZMAN.

[33 Wash. 87, 73 Pac. 797.]

APPEAL BONDS—Justification of Sureties.—An objection to an appeal bond that the sureties did not justify as to "property within the state" is one going to the sufficiency of the sureties, and must be first raised in the court below in order to be available on appeal. (p. 933.)

NEGLIGENCE—Sale of Explosive—Pleading.—A complaint alleging negligence in that the defendant manufactured, sold and delivered, under the name of champagne cider a dangerous explosive, knowing it to be such, without warning the buyer of its dangerous character, or placing on the bottle containing the substance anything to indicate that it was a dangerous explosive, whereby a third person, without fault or negligence on his part, was injured by an explosion of the substance, is not subject to general demurrer. The only remedy is by motion to make the complaint more definite and certain. (p. 934.)

NEGLIGENCE—Liability to Third Person.—One who knowingly sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, explosive, or the like without notice to the purchaser that it is intrinsically dangerous, is liable to any person who is, without fault on his part, injured thereby without regard to any privity of contract. (p. 934.)

Roche & Onstine, for the appellant.

Post, Avery & Higgins, for the respondents.

FULLERTON, C. J. The appellant sued for personal injuries. A general demurrer was interposed and sustained to his complaint, whereupon he refused to plead further, and a judgment that he take nothing by his action was entered against him, from which he appeals to this court.

The respondents move to dismiss the appeal for the reason that the justification of the sureties on the appeal bond fails to recite that the sureties are worth the amount for which they justify "in property within this state," as required by section 6509 of the Code (Ballinger's). In other respects the bond is regular. While it may be difficult to distinguish this omission from others made in appeal bonds, which were deemed fatal to the appeal by this court, we have uniformly held this one not to be so, but that an objection on this ground is one going to the sufficiency of the sureties, which must be raised and passed upon in the court below in order to be available in this court: *McEachern v. Brackett*, 8 Wash. 652, 658, 40 Am. St. Rep. 922, 36 Pac. 690; *Warburton v. Ralph*, 9 Wash. 537, 546, 38 Pac. 140; *Horton v. Donohoe Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435. As ^{so} the objection in this case was not so raised, the motion to dismiss must be denied.

The next question is, Does the complaint state facts sufficient to constitute a cause of action? Stripped of its verbiage, the complaint alleges that the respondents manufactured, sold and delivered to one Pratt, under the name of "champagne cider," a dangerous explosive, knowing it to be such, without warning Pratt of its dangerous character, or placing on the bottle containing the substance anything to indicate that it was a dangerous explosive; and that appellant while in the employ of Pratt, and engaged in his duties as such employé, and without fault or negligence on his part, was injured by an explosion of the substance. Paragraph 5 of the complaint was as follows: "That the injuries to said plaintiff were caused by the willful negligence, carelessness and want of proper care on the part of the defendant, D. Holzman & Co., by reason of said defendant willfully, carelessly and negligently, and for want of ordinary care in the manufacturing, bottling, preparing, and selling of said champagne cider, in this, that the said defendant's failure to manufacture, bottle and prepare the said champagne cider in the proper degree of temperature; failed to properly charge the said champagne cider with the proper amount of carbonic acid gas, and other substances used in the manufacturing and bottling of the same; failed to properly test said bottle as to its strength and endurance to hold said champagne cider; failed to properly label said bottle as to its being an explosive and dangerous substance; failed to explain to the said M. L. Pratt, or said plaintiff, or anyone else, of the danger in handling and using said bottle of champagne cider,

and the cause for, and probability of its exploding and injuring those who came in contact with the same." The prayer was for damages in the sum of ten thousand dollars.

⁹⁰ The record does not advise us as to the ground upon which the trial judge sustained the demurrer, but the respondents urge against its sufficiency two principal contentions, the first of which is that the allegations of negligence are so indefinite as to be meaningless, and the second, that there is no causal connection between the negligence alleged (conceding the allegations sufficient) and the injury complained of. The argument that the allegations of negligence are so indefinite as to be meaningless is based upon recitals in the paragraph above quoted. It seems to us, however, that the complaint states a cause of action without that paragraph, and hence it is not very material to inquire just how definite this particular one should have been made; but, conceding it otherwise, we do not think the allegations susceptible to a general demurrer. Clearly, the acts recited therein, when taken with the other acts recited in the complaint, constitute actionable negligence. and, if more particularity of statement was desired and could be required, the remedy was by a motion to make more definite and certain; not by a general demurrer.

The second objection seems to us to be equally without merit. One who sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to any person who is, without fault on his part, injured thereby. The rule does not rest upon any principle of contract, or contractual relation existing between the person delivering the article and the person injured, for there is no contract or contractual relation between them. It rests on the principle that the original act of delivering the article is wrongful, and that everyone is ⁹¹ responsible for the natural consequences of his wrongful acts. The rule that liability exists in such cases is abundantly supported by authority. In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, it was held that a manufacturer of drugs who had sold a druggist extract of belladonna under the label "extract of dandelion," was liable to a person injured thereby who had procured it of the druggist on a physician's prescription calling for extract of dandelion, it appearing that neither the druggist nor the person taking it knew that it was other

than it was labeled. In *Norton v. Sewall*, 106 Mass. 148, 8 Am. Rep. 298, it was held that an apothecary, who had negligently sold a deadly poison for a harmless medicine called for, was liable for the death of the purchaser's servant to whom it was administered, at the suit of the servant's administrator. In *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, the principle governing the liability was stated in the following language: "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does, in fact, result therefrom, to that person or any other who is not himself in fault." So, in *Lewis v. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398, it was said: "We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. . . . But when the seller, as ⁹² in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it be dangerous because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts." See, also, *Shearman and Redfield on Negligence*, 5th ed., sec. 117; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 20 Am. St. Rep. 324, 10 S. E. 118; *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103; *Bishop v. Weber*, 139 Mass. 411, 52 Am. St. Rep. 715, 1 N. E. 154; *Elkins v. McKean*, 79 Pa. St. 493; 12 Am. & Eng. Ency. of Law, 2d ed., 508, subd. 6.

The judgment appealed from is reversed, and the cause remanded, with instruction to overrule the demurrer.

Hadley, Anders, Mount and Dunbar, JJ., concur.

The Vendor or Manufacturer of a Dangerous Article may be answerable for injuries caused by such article to others than the purchaser: *Lewis v. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398; *Schubert v. Clark*, 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103; *Woodward v. Miller*, 119 Ga. 618, 46 S. E. 847, 100 Am. St. Rep. —, and note. But see *Heizer v. Kingsland etc. Mfg. Co.*, 110 Mo. 605,

53 Am. St. Rep. 482, 19 S. W. 630; and, also, *Tyler v. Wood*, 111 Ky. 191, 98 Am. St. Rep. 406, 63 S. W. 433; *Boston Woven Hose etc. Co. v. Kendall*, 178 Mass. 232, 86 Am. St. Rep. 478, 59 N. E. 657. As to the liability to the buyer of one who sells a dangerous substance, see *Gibson v. Torrent*, 115 Iowa, 163, 88 N. W. 443, 91 Am. St. Rep. 147, and cases cited in the cross-reference note thereto.

TOWNER v. RODEGEB.

[33 Wash. 153, 74 Pac. 50.]

PUBLIC LANDS—Homesteads—Administrator's Right to Sell Improvements and Right of Possession.—If a homestead settler upon unsurveyed public lands dies without heirs who are citizens of the United States, his administrator cannot sell his improvements and right of possession of the land for the purpose of paying debts and expenses of administration and vest in the purchaser the right to oust the then occupant of the land. (p. 939.)

HOMESTEADS—Death of Claimant Before Patent.—If a homestead claimant upon public lands dies before patent issues, or before the right to demand a patent has accrued, the land does not become a part of his estate, nor subject to administration. Upon his death, all of his rights under the homestead entry cease, and his heirs become entitled to a patent, not as successors to his equitable interests, but because the law gives them a preference as new homesteaders, and allows them the benefit of the residence of their ancestor upon the land. (p. 939.)

HOMESTEADS—Liability for Debts—Administration.—Neither a homestead nor a homesteader's mere right to possession of unsurveyed public lands, together with his improvements thereon, can be made liable for debts contracted before patent issues, either under execution, or in case of his death, by process of administration. (p. 940.)

HOMESTEADS—Death of Homesteader—Rights of Heirs—Administration.—Whatever rights survive the death of a homestead settler belong to his heirs and not to his estate, and if his heirs fail to exercise such rights, or if there are no heirs capable of exercising them, the land becomes again open for occupancy by any qualified homesteader. The administrator of the deceased homesteader, as such, succeeds to no rights in the homestead, because these are reserved to the heirs, nor is such administrator invested with any right to sell the property and improvements to pay debts simply because there are no heirs. (p. 941.)

EXECUTORS AND ADMINISTRATORS—Sales.—Rule of Caveat Emptor applies to a purchaser at an administrator's sale of a homestead settler's rights. (p. 941.)

A. F. Flegel, for the appellant.

Magill & Magill and J. N. Percy, for the respondent.

¹⁵⁴ Per CURIAM. Respondent brought this suit and alleged that he was in possession of a certain forty acre tract of unsurveyed government land, which was formerly occupied by one Morrison as a squatter; that respondent has been in possession of the land since about October 1, 1898; that he has partially fenced the same, has continuously improved it since said date, intends to take it as a homestead, has qualified under the laws of the United States to do so, and is entitled to the possession thereof; that on August 26, 1898, said Morrison died intestate and without heirs, and soon thereafter respondent entered ¹⁵⁵ into possession of the land, and commenced the cultivation and improvement thereof as aforesaid; that on January 19, 1902, one Van Name, acting as administrator of the estate of said Morrison, attempted to sell, at public administrator's sale, the said improvements and the right of possession of said land, to the appellant herein; and thereafter the appellant, by stealth and in the absence of respondent, broke open the house upon the land, entered therein, removed respondent's goods therefrom, entered upon the land itself, and refuses to depart therefrom; that appellant has cut timber on the premises, thrown down fences built by respondent, and threatens to cultivate the land and drive respondent therefrom; that respondent has not been absent from the premises at any time for a longer period than five days, and then only at rare intervals, since he entered into possession thereof; and that he has spent large sums of money and much labor in the improvement and cultivation of the land. An injunction is prayed, restraining appellant from committing waste upon the premises, and from in any manner interfering with respondent's possession and enjoyment thereof. The prayer also asks that respondent shall be adjudged to have the sole right of possession of said land, and that so much of said administrator's sale as attempted to convey the right of possession shall be declared null and void.

Appellant answered the complaint, denying many allegations thereof, and alleged affirmatively, among other things, that said Morrison died intestate and without heirs who were citizens of the United States; that at the time of his death he was indebted to various persons; that ten or twelve years prior to his death he settled upon the land described in the complaint, with the intention of claiming it as a ¹⁵⁶ homestead, he being qualified under the laws of the United States so to do; that after his settlement thereon he proceeded to improve the land, built a dwell-

ing-house, barn, and woodshed, and cleared, fenced, plowed, and cultivated about twenty-five acres of the tract; that the said improvements and the right to the possession of said land constituted the whole estate left by Morrison, except a few articles of personal property of small value. The facts concerning the probate proceedings authorizing the aforesaid sale, and the fact of the sale itself, are also alleged. It is further averred that appellant took possession of the land quietly and peaceably, and under and by virtue of said administrator's sale. The answer contains other allegations which need not be set out here, and concludes with a prayer for a restraining order prohibiting respondent from interfering with appellant's quiet enjoyment of the premises, and for a judgment quieting appellant's title in and to the right of possession of the land.

Respondent demurred to the affirmative answer on the ground that it does not state facts sufficient to constitute a defense to the cause of action set out in the complaint, and also upon the further ground that the court has no jurisdiction of the subject matter of the defense set out in the answer. The demurrer was sustained. Appellant elected to stand upon his answer, and refused to plead further. Thereafter the court entered judgment to the effect that such attempted sale by the administrator of the right to possession of the land was void, and that appellant acquired no right to such possession by virtue of such sale; that respondent is, and at all times since October 1, 1898, has been, entitled to the possession of the land; and that appellant shall be restrained from interfering with respondent's possession and enjoyment thereof. The cause is here on appeal from said judgment.

¹⁵⁷ Briefly stated, the facts challenged by the demurrer to the answer are, that one duly qualified settled upon unsurveyed government land with the intention of taking it as a homestead, and afterward died intestate, without heirs who are citizens of the United States. Subsequently, another, also duly qualified, took possession of the land with the intention of taking it as a homestead, and thereafter resided upon it and improved and cultivated it for that purpose. The question of law presented is, Can the administrator of the deceased settler sell the latter's improvements and his right to the possession of the land for the purpose of paying debts and expenses of administration, and vest in the purchaser the right to oust the occupant?

The homestead law vests the rights in the land in the claimant himself, for his exclusive benefit, and if he die before patent

issues, leaving no widow, then in his heirs or devisees, if they be at the time citizens of the United States: U. S. Rev. Stats., secs. 2290, 2291. The alien heirs are incompetent to make proof and secure title to a homestead: *Agnew v. Morton*, 13 Land Dec. Dept. Int. 228. The answer in the case at bar alleges that the deceased homesteader left no heirs who were citizens of the United States. They are, therefore, incompetent to make the necessary proof and secure title as heirs of the deceased.

There is no authority in the land laws for an executor or administrator to consummate the inchoate claim of a deceased homesteader for the benefit of the creditors: *Stinson v. South & North Ala. R. R. Co.*, 9 Land Dec. Dept. Int. 599. If a homestead claimant dies before patent issues, or before the right to demand a patent has accrued, the land does not become a part of his estate. Upon ¹⁵⁸his death, all his rights under the homestead entry cease, and his heirs become entitled to a patent, not because they have succeeded to his equitable interest, but because the law gives them preference as new homesteaders, and allows them the benefit of the residence of their ancestor upon the land: *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233; *Chapman v. Price*, 32 Kan. 446, 4 Pac. 807. The same principle, under similar statutory provisions, is applied in the case of death of a pre-emptor. The subsequently perfected title shall inure to the benefit of the heirs, and can neither be devised by the pre-emptor, nor sold in satisfaction of his debts or expenses of administration: *Wittenbrock v. Wheadon*, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664.

"The claim of a squatter on public land, and his improvements made on the land during his occupancy, are not assets": 11 Am. & Eng. Ency. of Law, 2d ed., 845; citing *Holton v. Holton*, 99 Ga. 250, 25 S. E. 468, and *Bowen v. Burnett*, 1 Pinn. (Wis.) 658.

The last cited case is directly in point, but an examination of the first one cited fails to disclose what was actually involved. The decision is a mere memorandum only, to the effect that an administrator is under no duty to administer, as a portion of his intestate's estate, property which does not belong to the latter. It may be fairly presumed, however, that the editor of the above-quoted text was advised that the property referred to in the decision was "the claim of a squatter on public land."

Moreover, a homestead cannot be made liable for debts contracted before patent issues: U. S. Rev. Stats. sec. 2296; *Barnard v. Boller*, 105 Cal. 214, 38 Pac. 728; *Wallowa Nat. Bank v. Riley*, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766. This court has recognized the above to be the invariable rule as to the enforcement of debts by any unwilling ¹⁵⁹ or involuntary appropriation, as by way of execution or attachment, the exception to the rule being that a voluntary encumbrance, as a mortgage, may be enforced: *Weber v. Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400.

If the homestead itself, with title acquired, cannot be subjected to liability for debts contracted before the issuance of patent, it would seem to follow with equal force that the homesteader's mere right to possession of land, not even entered, together with his improvements thereon, is likewise exempt from such liability. If execution for debts contracted before patent cannot be enforced against a homestead, either acquired or inchoate, it follows that such debts cannot be enforced against it by the processes of administration, as was attempted to be done in this case. If the improvements and right of possession of the settler when living cannot be sold to satisfy his debts, the mere fact of death does not change the principle.

It therefore seems to be the policy of the law to guard homestead rights for the benefit of the entryman himself, and, in case of his death before patent, for the benefit of his heirs. Whatever rights survive the death of the homesteader belong to the heirs, and not to the estate of the deceased. The heirs do not succeed to such rights by inheritance, but by virtue of the law which merely grants to them preference rights. If they fail to exercise those rights, or if, as in this case, there are no heirs capable, as citizens of the United States, of succeeding to such rights, then there is no one else to whom any preference right survives, and the land is open, as a part of the public domain, for occupancy by any qualified homesteader. The administrator, as such, succeeds to no rights in the homestead, for the reason that these are reserved for the heirs, ¹⁶⁰ and the law does not invest the administrator with any rights therein simply because there are no heirs.

Appellant cites *Burch v. McDaniel*, 2 Wash. Ter. 58, 3 Pac. 586, and urges that case as authority for selling the possessory rights of a homesteader by the administrator. That case seems to have been decided upon the strength of the provision of former section 2269 of the Revised Statutes of the United

States. That section has since been repealed by the act of March 3, 1891: See 2 U. S. Comp. Stats. 1901, p. 1379. That section provided that upon the death of any person entitled to claim benefits of the pre-emption laws, before consummating his claim, his executor or administrator might file the papers necessary, and that the entry should be in favor of the heirs of said deceased pre-emptor; that the patent thereon should cause the title to inure to such heirs in the same manner as if their names had been specifically mentioned.

The court held under that law that the right of possession of pre-empted land to which title was inchoate passed on the death of the pre-emptor to his administrator; that the right of possession thus acquired was subject to a trust which required the administrator to perfect title in favor of the heirs, if the estate was in such condition as to enable him to do so, and if the interests of the heirs and all things considered so demanded; that he might, also, under such trust, if the interests of the heirs so demanded, sell the right of possession for their benefit instead of perfecting title in their behalf. But it was expressly held that such sale must be for the benefit of the heirs, and not for creditors; that the administrator stood in possession as representing the ancestor for the benefit of the heirs, and not as representing him for the benefit of creditors and heirs alike. Thus it will be seen that the case cited ¹⁶¹ is authority for sale by the administrator only when it is for the benefit of the heir. Section 2292 of the Revised Statutes of the United States provides for such a sale by the administrator for the benefit of infant children of the deceased, but it must be for their benefit, and for no other purpose. There seems to be no authority for the administrator to sell for the benefit of the creditors.

We conclude, therefore, that the attempted sale in this case was void. Appellant may have purchased in good faith, but the rule of caveat emptor applies to a purchaser at an administrator's sale: *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233; *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760, 35 Atl. 1047; *Lindsay v. Cooper*, 94 Ala. 170, 33 Am. St. Rep. 105, 11 South. 325.

We think the demurrer to the answer was properly sustained and the judgment is affirmed.

If a Homestead Claimant to public lands dies before a patent issues, the land does not become a part of his estate: Gjerstadengen v. Van Duzen, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233. And his heirs who perfect title in themselves, receive the land, not from their

ancestor, but directly from the government; and, upon the issuing of the patent, they become possessed of the full legal and equitable title, free from any mortgage lien sought to be created thereon by the entryman in his lifetime: *Marley v. Sturkert*, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056. See, too, *Wittenbrock v. Wheadon*, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664. As to the exemption of land entered under the federal homestead act from debts contracted before the issuance of a patent, see *Weber v. Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400; *Wallowa Nat. Bank v. Riley*, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766; *Adams v. Church*, 42 Or. 270, 95 Am. St. Rep. 740, 70 Pac. 1037. And as to the selling, leasing, or encumbering of a homestead before final proof, see the monographic note to *Wilcox v. John*, 52 Am. St. Rep. 249-254; *Milliken v. Carmichael*, 134 Ala. 623, 33 South. 9, 92 Am. St. Rep. 45, and cases cited in the cross-reference note thereto.

YOUNG v. SEATTLE TRANSFER COMPANY.

[33 Wash. 225, 74 Pac. 375.]

EVIDENCE—Telephone Communications.—When material to the issues, communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face, but the identity of the person sought to be charged with a liability by means of a telephone communication must be established by some testimony, either direct or circumstantial. (pp. 945, 946.)

EVIDENCE—Telephone Communications—Failure of Proof.—A person whose sole cause of action is his reliance and action taken upon a telephonic communication, has the burden of proof to establish the identity of the person sought to be charged as the person conversing with him at the other end of the telephone line, and in the absence of his establishing such identity, his case must fall for failure of proof. (p. 946.)

Metcalf & Jurey, for the appellant.

Ballinger, Ronald & Battle, for the respondent.

226 Per **CURIAM**. This was an action begun in the superior court of King county by respondent, J. W. Young, for the recovery of the value of a trunk and contents alleged to have been stored in the month of August, 1898, with appellant, Seattle Transfer Company. The answer was a general denial, except as to the incorporation of appellant, the character of its business, and the demand for the trunk. The cause was tried to a jury in the superior court, a verdict was rendered in favor of respondent against appellant for two hundred and forty dol-

lars, and judgment was entered on the verdict for that amount and costs, from which it appeals to this court.

At the trial, after respondent rested, appellant moved for a nonsuit, which was denied. Appellant thereupon submitted its evidence, and after the rendition of the verdict moved the court for a new trial, which was overruled. Appellant excepted to each ruling in denying its request for a nonsuit and its motion for a new trial. The assignment ²²⁷ of error presents the sole question in the case—Was there evidence to support the verdict of the jury?

Under the issues, as formulated by the pleadings, the burden of proof was cast upon respondent to show by some testimony that the Seattle Transfer Company undertook to receive and place in storage, for a consideration, in one of its warehouses at the city of Seattle, respondent's trunk and contents, and that in pursuance of such agreement appellant did receive said goods for that purpose. The evidence bearing on these propositions, adduced at the trial on behalf of respondent and appellant, may be summarized as follows: Respondent and one Ramsay, in February, 1898, jointly occupied a room at the Yesler residence in Seattle. Respondent, intending to go to Alaska, placed certain of his wearing apparel in said trunk, then in the Yesler residence in the custody of Mr. Ramsay, to remain in the room they were jointly occupying until Mr. Ramsay should desire to move from said place, in which event he was instructed by respondent to store the trunk with appellant company; that some time during the month of August, 1898, Ramsay, intending to remove from the Yesler residence, attempted to communicate with the appellant about the storage of the trunk on two different occasions. At the trial the circumstances regarding such communications were related by Ramsay in his direct examination in the following language:

"I rang up the Seattle Transfer Company and told them to send up and get Mr. Young's trunk at the Yesler home, where we were rooming, and take it down and put it in storage for Mr. Young; and somehow they didn't send up for the trunk that day; so when I went back to my room that night I found the trunk hadn't been sent for; so the following day I telephoned again to the Seattle Transfer Company, and told them I would like for them to send up and get that trunk right away; that I wanted ²²⁸ to move, and would like for them to take care of it; and they said they would send a man up to attend

to it that day; so when I went back home that evening I found the trunk had been called for and taken away."

This witness also testified in this connection, in response to questions propounded by respondent's counsel, in the following manner:

"Q. You don't know, of course, who it was at the other end of the line that you were talking to? A. No, I do not. Q. How did you— Just explain to the jury what you did, now, about reaching the office of the Seattle Transfer Company. A. Well, I did in that case the same as I would do in any other—just simply looked up the number in the directory, and rang up and inquired if that was the Seattle Transfer Company. Q. What reply did you get? A. They replied that it was. So then I requested them to send up and get the trunk."

Ramsay, on cross-examination, testified, that he telephoned from Newhall's store down town in Seattle each time; that he did not recognize the voice of the person addressed at either time; that he did not recollect the number of the telephone he called up, and did not know who took the trunk away from the house. Mrs. Emma Gagle, who lived at the Yesler residence at the time, testified: "I know that the trunk was taken from the Yesler residence. I don't know the party's name who took it, but I do know it was an expressman. I don't know where the trunk was taken." No check or receipt for the trunk was ever asked for or received by Ramsay or Mrs. Gagle from the appellant or the expressman who removed the trunk. The respondent at that time was in Alaska.

In the spring of the year 1900, Young wrote Ramsay from Alaska requesting him to go to the transfer company and get his trunk, pay the storage charges, and send it to him. Ramsay, pursuant to such request, went to the office ²²⁸ of appellant, and after diligent search the company was unable to find any trace of the trunk or its contents, either by consulting its books or by searching through its warehouse. Respondent testified that he left Seattle for Alaska in February, 1898, corroborated Mr. Ramsay with regard to leaving the trunk and contents with him, and authorizing him to store same with appellant; and testified further, that he never at any time saw the trunk in the possession of the transfer company; that he personally had had no agreement with the company concerning the trunk, but had left the matter in Ramsay's hands; that, on his return from Alaska, he went to the office of appellant and had a conversation concerning the trunk with Mr. Shaubut, in

charge of the baggage department of the transfer company. Respondent testified: "We went down into the storage-room to see if witness could pick out the trunk, and were unable to find it. Mr. Shaubut claimed that the company did not have it." The date of this conversation and search was not definitely fixed by Mr. Young, but Mr. Shaubut, testifying on behalf of appellant, said it was about one year prior to the trial of the cause, thereby fixing the date about June 12, 1901.

On behalf of appellant the testimony tended to show that no record was ever made with reference to the trunk; that thorough search was had and no trace of it or its contents could be found; that the company, in the month of August, 1898, did an extensive storage and transfer business; that mistakes had sometimes occurred in handling merchandise; that the three witnesses examined on behalf of appellant, who were at that time agents and officers of the transfer company, had no knowledge or recollection of the communications over the telephone alleged to have been made by Ramsay; witness Shepard testifying, that in the ~~230~~ month of August, 1898, he was clerk in the office of appellant company, that it was his business to receive orders communicated over the telephone, and that while he happened to be out of the office attending to the company's affairs someone else might answer calls at the telephone.

The appellant contends that the evidence produced at the trial failed to show that the trunk and contents in question ever came into the possession of the Seattle Transfer Company by virtue of any contract or arrangement made or had with respondent, or in any other manner. The onus probandi was upon respondent at the trial as to the issues tendered by him, above noted. The jury, having rendered a verdict in respondent's favor, must necessarily have found that the trunk and contents came into appellant's possession by virtue of some contractual relation entered into between some agent of appellant and Mr. Ramsay, representing the respondent. Verdicts of juries as well as findings of courts, in determining questions of fact, must be based upon testimony: *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118.

When material to the issues, communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either

direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party, for that matter, be recognized by the other in such conversations, but the identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. To hold parties responsible for answers made by unidentified persons, in response to calls at the telephone ²³¹ from their offices or places of business concerning their affairs, opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics of which we are aware. A party relying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line.

The able counsel for respondent argue that the case at bar presents the question as to the weight of evidence—that the jury having found in respondent's favor on these issues, the court will not interfere. On that branch of the case, relating to communications over the telephone as evidence, our attention is directed to 25 American and English Encyclopedia of Law, first edition, 885, where the following language is used: "There may be cases, however, in which the fact that the voice is not recognizable, and that neither party can be absolutely sure of the identity of the person conversing with him, may necessitate the application of exceptional rules."

Several cases are cited in the footnote in support of this proposition. *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49, was an action brought by plaintiffs (respondents) against the company (appellant) to recover damages for breach of a contract for the carriage and delivery of merchandise. At page 477, 94 Mo., also 10 Am. St. Rep. 331, 11 S. W. 50, Barclay, J., delivering the opinion of the court observes: "In the progress of the trial the court admitted testimony of alleged conversations by telephone connected with plaintiff's office, though the witness did not identify the voice he heard at their instrument." The opinion states subsequently that there was ample testimony to support the finding of the trial court, and that its instructions were correct; and then proceeds to remark: "A ²³² question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between someone at the instrument in plaintiff's private office and the witness." It is significant that the subject matter of the conversation is not discussed by the court.

The language, in connection with facts of the case as shown by the decision, would imply that the alleged communication was not very material to the issues, as the court remarked further on: "The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission."

In the controversy at bar, appellant does not question the admissibility of Ramsay's alleged conversations over the telephone with reference to the trunk, but contends that they fail to connect appellant with the transaction.

The case of *Globe Printing Co. v. Stahl*, 23 Mo. App. 451, bears more directly on the propositions discussed by the respective counsel in the case at bar. The action was brought by the printing company (respondent) against Stahl (appellant) for the purpose of collecting a debt. The facts appear in the opinion of the court at page 452, and are thus stated:

"The sole question which arises upon the record is whether the court erred in admitting evidence of a conversation had through a telephone between the plaintiff's bookkeeper and a person who answered to the defendant's name. The bookkeeper testified that he called up by telephone to the general office of the Bell Telephone Company for the defendant's number, and was, by the central office, connected therewith; that the list of the telephone company showed that the defendant had two telephones, one at his undertaking establishment on Franklin avenue, in the city of St. Louis, and another at his livery-stable, on Olive street; that witness was not certain which number he ²²³ called, but that his best recollection was that it was the Olive street number; that there was an answer from the defendant's number, to the telephone call; that he (the witness) did not know whose voice it was, and does not now know; that the witness did not know the defendant's voice and did not know the defendant, but that he asked, through the telephone, if that was Stahl (the defendant) and the answer was 'Yes.' The witness was then asked to give the conversation then had through the telephone with the party answering the call. In response to this question the witness testified, against the objection of the defendant, 'that he asked why defendant did not pay the bill for which this suit was brought, and the party answering said, "All right; I will attend to the matter about the first of the month."' A previous witness had testified for the plaintiff to a conversation through the telephone. The re-

in a similar manner with the defendant, whose voice the former witness identified."

The court ruled that the testimony was admissible. In that case it appeared that the bookkeeper of respondent identified Stahl by first inquiring if it were he who answered the call at the telephone. Receiving an affirmative response, he talked with Stahl about the debt for which suit was brought; though Stahl's voice was not recognized, still it should be borne in mind that the alleged conversation related to prior dealings had between the parties to the litigation. It further appears that a previous witness, who recognized the voice, had testified to a conversation had with Stahl over the telephone. The court very properly held that the testimony was admissible. While it appears in the case at bar that neither respondent nor Mr. Ramsay had any previous dealings with the appellant concerning the trunk in question, Ramsay did not, on either of the occasions named make any effort to identify the party or parties.

234 The facts in the other cases cited by the author were so dissimilar to those presented in this controversy we deem it unnecessary to comment upon them. The respondent offered no evidence to supply "the missing link" in that regard. The jury was permitted to guess, and base its findings thereon, that some agent or employé of the appellant answered witness Ramsey's communications, or at least one of them; that in pursuance thereof an employé of the transfer company, who was unknown and unidentified by the testimony, called and removed the trunk from the Yesler residence. This is not a question as to the weight of evidence, but one of failure of proof on material issues tendered by respondent and denied by appellant. A verdict based on such considerations cannot stand.

We are therefore of the opinion that the trial court erred in denying appellant's motions for a nonsuit and for a new trial, that the verdict of the jury was not sustained by the evidence, that the judgment of the superior court should be reversed, and the case remanded with directions to dismiss the action, and it is so ordered.

A Conversation Over a Telephone is admissible in evidence: *Shawyer v. Chamberlain*, 113 Iowa, 742, 84 N. W. 661, 86 Am. St. Rep. 411. and cases cited in the cross-reference note thereto; and this is true, it is said, although the voice at the telephone is not identified: *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49.

STATE v. KENNAN.

[33 Wash. 247, 74 Pac. 381.]

WITNESSES — Nonresident — Compelling Attendance of. — Neither a superior judge nor any other officer qualified to take depositions has jurisdiction to compel by attachment the attendance of a nonresident, who is outside the jurisdiction, for the purpose of having his deposition taken, although he has been served with subpoena while temporarily within the jurisdiction. (p. 950.)

Thayer & Belt, for the relator.

Post, Avery & Higgins, for the respondent.

247 DUNBAR, J. There is pending in the United States circuit court for the district of Washington a suit wherein T. Ford Hopkins, the relator in this application, is plaintiff, and Charles R. Smith the defendant, the same being a law action for the recovery of money. Issues of fact are made up, and the cause stands ready for trial at the next term of said circuit court. Smith was notified to appear before the Honorable Henry L. Kennan, judge of the superior court of the state of Washington in and for the county of Spokane, to give his deposition, at the instance of the relator in the cause pending in the said circuit court of the United States. Subpoena was issued by the judge aforesaid, but the said Smith did not appear in answer to said **248** subpoena, whereupon the attorney for the relator requested the court to issue a writ of attachment to compel Smith to appear and testify in said action, according to the directions of the subpoena. The court refused to issue said writ of attachment on the ground that he was without jurisdiction in the premises, and the relator applies to this court for a writ of mandamus directing said judge of the superior court to issue an attachment for the person of said Smith to require him to attend before said judge and give his deposition, and to make all orders which may be necessary or convenient in the premises in order to require said Smith to give his deposition.

It is conceded that Smith is a nonresident living in the state of Wisconsin; that he was temporarily in Spokane City, in this state, at the time the subpoena was served upon him; and that he has now returned to his home in the state of Wisconsin. Passing by all technical questions, and conceding that the fees were properly tendered in this case, we find no authority in the statutes of this state or elsewhere sustaining the re-

lator's contention that jurisdiction is conferred upon a superior judge of this state, or any other officer who under the laws of the state is qualified to take depositions, to compel by attachment the attendance, for the purpose of having his deposition taken, of a nonresident of the state; and no legitimate deduction can be drawn from the general provisions of the statutes in relation to the exemption of witnesses distant a certain number of miles from the place where the trial is held, and the statute in relation to the taking of depositions, that would warrant the assumption of such authority on the part of the court.

This question, however, has been squarely before courts of other jurisdictions, and notably before the supreme court ²⁴⁹ of Kansas in the case of *In re Hughbanks*, 44 Kan. 105. 24 Pac. 75. There Hughbanks, who was a resident of Osage county, went to Lyon county on business for a day, and while there was served with a subpoena issued by a justice of the peace of Lyon county, commanding him to appear before that officer four days thereafter, and give his deposition to be used in a case pending in Lyon county. He went back to his residence in Osage county, and, failing to return to Lyon county in obedience to the subpoena, was attached and adjudged guilty of contempt. Thus it will be seen that the case was exactly the same in principle as the case at bar. Held, on habeas corpus, that Hughbanks was not obliged to obey the subpoena, and that the judgment for contempt and his imprisonment thereunder were illegal.

It is said by the relator in his brief that the court in that case relied upon the fact that the proper amount of witness fees had not been tendered, which was not true in the case at bar; but this was not the theory upon which the Hughbanks case was tried. While it is true that in that case the witness had returned to his home county, and the court stated that he would be obliged to return to Emporia, the place where the court was held, and that the suggestion that he would be entitled to mileage fees for going and returning was correct, and that he would not be in contempt for the reason that such fees had not been tendered, yet the court concludes: "In our opinion, however, the matter of tender was not involved in the proceeding, as the petitioner was not obliged to obey the subpoena, and therefore we must hold his imprisonment to be illegal." The same principle, in effect, was decided in *Henry v. Ricketts*, 1 Cranch C. C. 580, 11 Fed. Cas. No. 6386.

250 The attorney for the relator urges with great force and energy that the administration of justice will be crippled if witnesses, under such circumstances, cannot be compelled to attend and testify; but this subject must be relegated to the legislature, and in the absence of legislative action, such authority does not exist.

The writ will be denied.

Fullerton, C. J., and Hadley, Mount and Anders, JJ., concur.

Nonresidents temporarily within the state are usually regarded as exempt from service of process: See the monographic note to *Worth v. Norton*, 76 Am. St. Rep. 535-543; *Thomas v. Thomas*, 96 Me. 223, 90 Am. St. Rep. 342, 52 Atl. 642. Compare *Guyann v. McDanel*, 4 Idaho, 605, 95 Am. St. Rep. 158, 43 Pac. 74; *Greenleaf v. People's Bank*, 133 N. C. 292, 98 Am. St. Rep. 709, 45 S. E. 638.

SIMPSON v. CITY OF WHATCOM.

[33 Wash. 392, 74 Pac. 577.]

MUNICIPAL CORPORATIONS—Liability for Acts of Officers.—If a damaging act or the neglect of a city officer arises in the execution of a duty which is for the exclusive benefit of the city, it is liable, but if such duty, in whole or in part, is one imposed upon the city as a public instrumentality of the state, it is not liable. (p. 953.)

MUNICIPAL CORPORATIONS—Bicycles and Their Use upon the streets of a city are proper subjects for police regulation in the interest of the public safety and welfare. (p. 954.)

MUNICIPAL CORPORATIONS—Liability Under Void Ordinance.—A municipal corporation is not liable for the acts of its officers in arresting and prosecuting a person under a void ordinance undertaking to impose a license fee for the benefit of the city and enacted under apparent authority of a statute. In such case, the damage arises in the performance of a duty imposed upon the city as a public instrumentality of the state. (p. 960.)

Stafford & Ellis and M. P. Stafford, for the appellant.

H. M. White, for the respondent.

252 **DUNBAR, J.** Respondent passed a municipal ordinance prohibiting the riding of bicycles of a certain size upon its streets unless a license therefor were procured and a tax of one dollar a year paid for such license. The ordinance pro-

vided ³⁹⁴ that seventy-five per cent of the revenue derived from such license should be expended on certain local improvements within respondent's municipal limits, and that the remaining twenty-five per cent was to be, and it was, mingled with, and made a part of, the general funds of the city for use in its local interests, benefits, and advantages.

On the fifteenth day of August, 1900, one Shelley, a policeman of respondent city, made and swore to an affidavit before a police justice of the respondent, charging appellant with the violation of said ordinance by riding a bicycle on the public streets without having procured a license therefor. A warrant was issued, the said policeman arrested the plaintiff, imprisoned him for several hours, and caused him to be arraigned before a police justice on said charge. Appellant was prosecuted by the city attorney, and convicted and fined, and a judgment for such fine and costs, amounting to thirteen dollars and seventy cents, was entered against him in the police court of said city. In order to release himself from said conviction and judgment, appellant was compelled to, and did, appeal therefrom to the superior court of the state of Washington, giving bond in the sum of one hundred dollars to perfect such appeal. Upon said appeal the ordinance was held by the judge of the superior court to be null and void in so far as it purported to prohibit the riding of bicycles upon the public streets of respondent without a license, and appellant was acquitted of such charge. In defending himself from such charge, conviction, and judgment, appellant was compelled to employ attorneys at an expense of fifty dollars.

Afterward appellant brought an action for damages against the city, alleging in his complaint the matters and things just above stated, in addition to the allegation that, by reason of such charge, arrest, and trial, appellant lost time to the value of fifteen dollars, and was injured in his feelings ³⁹⁵ and subjected to humiliation and disgrace and caused mental pain and anxiety to his damage in the sum of two thousand five hundred dollars, asking judgment for two thousand five hundred and sixty-five dollars. To this complaint, the substance of which we have given, the respondent city demurred. The demurrer was sustained, and, appellant refusing to plead further, judgment was entered in favor of respondent.

The issues arise on the ruling of the court in sustaining the demurrer to the complaint. The exact question involved in this case has not heretofore been presented to this court, and

we have therefore made an exhaustive examination of the authorities bearing on the question. It must be confessed that they are somewhat bewildering, as well in number as in lack of harmony, viewed either from the standpoint of different conclusions from the same state of facts, or of the announcement of different principles controlling the same conclusions. So that it is not easy to reconcile all of the decisions and deduce therefrom a satisfactory general principle, by subjection to which the different facts can be tested.

The controlling question in all this character of cases is whether or not the officers, to whom are attributed the delinquencies which resulted in the damage alleged, are the agents of the city. If they are, then the doctrine of respondeat superior applies, and the city is liable; if not, otherwise. We think it is a general rule—at least one which has been adopted by this court—that, even in the absence of a statute giving the right of action, cities are liable for acts of misfeasance and malfeasance injurious to individuals, done by their authorized agents or officers in the course of the performance of corporate powers, or in the execution of corporate duties. But this raises the perplexing distinction between corporate duties and public duties—questions as ³⁹⁶ to when the officers are acting as agents for the corporation, and when of the state or general public. When for the general public, or in furtherance of the public policy of the state, the city is not liable for their acts. In some jurisdictions, as in Massachusetts, it is held that, even when the officers are acting confessedly in the interests of the city, no private actions for damages will lie unless specially authorized by statute. But it is unnecessary to discuss that line of cases, as this court in *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273, has laid down the contrary rule, which it has since uniformly followed.

We think, however, this general deduction may be made: that whenever the damaging action or the neglect of the officer arises in the execution of a duty which is for the exclusive benefit of the city, the city is liable; but if the duty, in whole or in part, is one imposed upon the city as a public instrumentality of the state, the city is not liable. It is insisted by the learned counsel for the appellant that, inasmuch as the complaint shows that the ordinance provides that the revenues arising from the licenses sought to be secured shall go into the city treasury, the city is liable, under the rule announced in *Dillon on Municipal Corporations*, fourth edition, section 974; that, if the duties

relate to the exercise of corporate powers and are for the peculiar benefit of the corporation in its local or special interest, they (the officers) may be regarded as its agents or servants, and the maxim of respondeat superior applies.

But it does not necessarily follow that the duty is purely a corporate one because the revenues arising from the provisions of the law go into the treasury of the municipality. It is in the nature of a police regulation, a regulation which the legislature had a right to make; the legislature had a right, also, to distribute the powers of the government in ³⁹⁷ the enforcement of its public policy, to constitute the different municipalities enforcing agencies, and to distribute the revenues as it saw fit. It would certainly not be an unreasonable act on the part of the legislature to place the revenues arising from the law in the treasury of the municipality collecting them. And it cannot be disputed that the state, under its police power, has the right, in the absence of constitutional limitations or inhibition, to subject all occupations to a reasonable regulation where such regulation is required for the public welfare. The bicycle is a comparatively modern invention, and legislation in regard to it has been limited. Still it has been established by judicial decision that, so far as its use on the highways is concerned, it is to be regarded as a carriage or vehicle and subject to the burdens as other vehicles: 4 Ency. of Law, 2d ed., 16, and cases cited. The use of vehicles on public highways is a subject of police regulation: 22 Am. & Eng. Ency. of Law, 2d ed., 929.

In any event, common observation would determine the fact that the bicycle, with its capacity for extreme speed, its liability on that account to injure pedestrians who might come in contact with it, as well as the riders themselves, is a particularly suggestive subject for the public legislation; and the legislature of this state, recognizing such necessity, passed a law found in the Laws of 1899 at page 41, authorizing and empowering cities of the first, second, third, and fourth classes to regulate and license by ordinance the riding of bicycles, to construct and regulate the use of bicycle paths and roadways, prohibiting the improper use of such paths and roadways, and providing a penalty and declaring an emergency. This law authorizes the cities to establish and collect reasonable license fees from all persons riding bicycles, and to enforce the payment thereof by reasonable ³⁹⁸ fines and penalties, and make provision for the distribution of the funds arising from such licenses. So that it will be seen that the ordinance was enacted in conformity with

the express policy of the legislature in relation to controlling bicycles.

Nor could Mr. Dillon, in the quotation relied upon by appellant, have had in view the kind of case under discussion here; for, after a discussion of the general principles relating to the liability of towns for the action of its officers, he continues, in section 975, as follows: "Agreeably to the principles just mentioned, police officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties; and, accordingly, a city is not liable for an assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city; or for an arrest made by them which is illegal for want of a warrant, or for other cause. . . . So, on the same principle, a person who suffers personal injury while aiding the police officers of a city, at their request, in arresting disturbers of the public peace under a valid ordinance, has no remedy against the city. The municipal corporation in all these and the like cases represents the state or the public; the police officers are not the servants of the corporation; the principle of respondeat superior does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability."

While the case of *McGraw v. Marion*, 98 Ky. 673, 34 S. W. 18, seems to lay down a different doctrine, holding that a municipal corporation is answerable for the damage done to any person by its officers in enforcing an unconstitutional ordinance or by-law enacted for the sole benefit of the corporation or its citizens—the ordinance in question being one requiring all transient persons to pay a license tax for the privilege of ³⁹⁹ selling goods or merchandise of any kind at auction—and while a few cases have followed the doctrine announced in that case, yet the same court in *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948, held that a municipal corporation was not liable for the acts of its officers in enforcing the penal or criminal laws of the commonwealth, or in enforcing penal ordinances of the city; and that municipal officers, while engaged in duties relating to the public safety and in the maintenance of public order, are the servants of the commonwealth. So that the court in the case of *McGraw v. Marion*, 98 Ky. 673, 34 S. W. 18, must evidently have concluded that the imposition of a license tax on transient persons was not in accordance with any provision of the general law, but for the sole and special

benefit of the city. The difficulty in discriminating the cases on any reasonable theory, however, arises from the fact that the court in the case of *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 849, states that while the ordinance under which the arrest purported to be made was void, the arrest was held to be authorized by a state statute; but says that the absence of the statute would have made no difference, for the reason that municipal corporations are auxiliaries of the state government; that the officers charged with keeping the peace are officers of the commonwealth, and a breach of the peace is an offense against the commonwealth, so that a municipal corporation is not liable for the acts of its officers in making a reasonable arrest for such breach. But whether or not there was any legitimate distinction that could have been drawn between the cases, both of them arising out of the police power of the state, it seems to us that the great weight of authority supports the first announcement of the Kentucky court as made in *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 849.

While there are some courts which follow the rule announced ~~400~~ in *McGraw v. Marion*, 98 Ky. 673, 34 S. W. 18, no court that we know of has held the municipality liable in a case exactly like the one at bar, where the question came up squarely as to whether or not a policeman, in making an arrest under an illegal ordinance or warrant, was the agent of the city. There are many cases directly to the contrary, and sustaining the doctrine announced by section 975 of *Dillon on Municipal Corporations*.

In *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1, a case of enforcing illegal ordinances, it was held that, for acts done by police officers in their public capacity and in discharge of their duties to the public, cities and towns incurred no liability to persons who may be injured by them; that neither for the act of the council in passing an illegal ordinance, nor for that of the mayor in issuing a warrant for the arrest of any person for its violation, nor for that of the marshal in arresting the offender under it, is a town liable to him. In *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289, it was held that a city which undertakes the celebration of a holiday under the authority of the public statutes, exclusively for the gratuitous amusement of the public, is not liable to an action by one who sustains personal injuries through the negligence of servants of the city in discharging fireworks for the purpose of the celebration.

After discussing a certain class of cases where the city was liable for the action of its servants, the court says:

"Easily distinguishable from these are the cases where the city or town is exonerated from liability, on the ground that the wrongful act complained of is not its act, but the act of persons who are deemed to be public officers, existing under independent provisions of the law; officers who, though appointed and paid by the city or town, and though perhaps its agents or servants for other purposes, are yet held not to sustain this relation in respect to the particular ⁴⁰¹ act in question—as, for example, members of a fire department."

It may be said here that this court held in *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347, that the city was not liable for the negligence of officers of a fire department. In *Worley v. Columbia*, 88 Mo. 106, it was held that police officers of a town, engaged in enforcing its police regulations, are not regarded as officers of the town, in its corporate capacity, and the town is not liable for acts done by them while so engaged. This was an action for false imprisonment, and in its facts was parallel in principle with the case at bar. The court, in discussing the action of the officers in enforcing the police regulation, said: "When so acting, their duties are of a public character; their acts are in the interest of civil government and of the public, and they are not, when acting in that behalf, the servants of the town or city, in its corporate capacity. The relations of principal and agent do not then exist, and the town is not liable for their said acts in that behalf."

In *Nisbet v. Atlanta*, 97 Ga. 650, 25 S. E. 173, where the death of one convicted in a corporation court, and sentenced to work upon the public streets, was occasioned by the negligence on the part of the foreman who had been placed by the municipal authorities in charge thereof, the court said: "The question involved in this case has been too often passed upon by this court to require further elaboration. Neither the law of master and servant nor the doctrine of respondeat superior applies in a case where a prisoner undergoing punishment for the violation of a municipal ordinance is injured or killed in consequence of the negligence or misconduct of the officer having the custody or control of such prisoner. This is true because, in such matters, the municipal corporation is exercising governmental powers and discharging governmental duties, in ⁴⁰² the course of which it, of necessity, employs the services of the officer in question": Citing *Wilson v. Mayor*, 88 Ga. 455, 14

S. E. 710; *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29.

In *Bartlett v. Columbus*, 101 Ga. 300, 28 S. E. 599, it was held that a municipal corporation is not liable in an action for false imprisonment for damages alleged to have been occasioned to the plaintiff by reason of his imprisonment under a judgment rendered against him by a municipal court for the violation of an ordinance, and that this was true though such judgment may have been irregular, erroneous, or even void.

"The passage of the ordinance," said the court, "by the city council of Columbus, for the alleged violation of which the plaintiff in error was tried, convicted, and imprisoned, was an exercise of the legislative power, and his trial and sentence by the recorder was an exercise of the judicial power conferred by the state upon the municipal corporation. It is well settled that for errors of judgment committed in the exercise of either of these powers a municipal corporation is not liable in damages."

This applies to the action of the city in passing the illegal ordinance under discussion in this case, and upon that question it is said by Cooley on Torts, page 408: "Whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suit; in effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual ⁴⁰⁸ shall not be suffered to call in question his official action in a suit for damages."

The same might be said with reference to the executive duties of a police officer, and of the liability of the corporation enforcing what it deems to be the law through the medium of such officers. If for every miscarriage of a prosecution by reason of some unconstitutional provision in the law, criminals who were guilty of violating the law on the merits could get redress in damages against either the officer or the municipality, there would be a timidity in enforcing the law which would tend to paralyze the administration of justice.

In *McFadin v. San Antonio*, 22 Tex. Civ. App. 140, 54 S. W. 48, it was held that since a city, in the enactment of an ordinance against suspicious characters, acts in its governmental capacity and in the exercise of its police powers, it will not be liable for damages to the reputation of one arrested, fined, and imprisoned under such an ordinance, even though the ordinance be void; and that the motives of the mayor and city council in enacting the ordinances could have no effect upon the rule: Citing *Easterly v. Irwin*, 99 Iowa, 694, 68 N. W. 919; *New Orleans v. Kerr*, 50 La. Ann. 314, 69 Am. St. Rep. 442, 23 South. 384, and many other cases cited in support of the rule announced.

In *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949, an action for false imprisonment, the court said: "It is well settled that cities are not liable in an action for false imprisonment for the acts of their officers while enforcing invalid ordinances, or for other illegal or unauthorized acts. The provision in question is a police regulation, and the officers in enforcing the same were exercising a public and governmental function."

A town ordinance enacted under statutory authority therefor, prohibiting transients or peddlers from selling ⁴⁰⁴ their wares therein until they shall have procured a license therefor, is a police regulation, and the town is not liable for an arrest and imprisonment for an alleged violation thereof, even though the ordinance be invalid for any reason, though the injured party is, in fact, innocent of the charge, and though the city authorities directed the arrest for the purpose of protecting resident merchants from competition: *Easterly v. Irwin*, 99 Iowa, 694, 68 N. W. 919.

In *Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721, it was decided that a city was not liable for an assault and battery committed by its police officers, even though it was done in an attempt to enforce an ordinance of the city; and, as bearing upon the question raised in the case at bar that the action was ratified by the city through the prosecution of the case by the city attorney, it was held in the case just cited that the action of a city in authorizing and employing its solicitor to appear and defend an action brought against its police officers for an assault and battery by them, does not make the city liable to pay damages for the assault and battery. An action of tort cannot be maintained against a town for the acts of its assessors and collectors in assessing and levying a poll tax upon a person not an

inhabitant thereof, even if the assessors act with integrity and fidelity, and are therefore by the general statutes not themselves liable to an action: *Alger v. Easton*, 119 Mass. 77.

Trescott v. Waterloo, 26 Fed. 592, like the case at bar, was for imprisonment under a void ordinance, and it was held that a party who had been arrested for the violation of an unconstitutional municipal ordinance requiring a license fee to be paid by nonresident peddlers, and, on conviction, has served out his fine in prison, cannot maintain an action against the municipal corporation.

⁴⁰⁵ In *Town of Laurel v. Blue*, 1 Ind. App. 128, 27 N. E. 301, it was held that a town is not responsible for an unlawful arrest by the town marshal, since in making arrests he is acting for the public, and is not the agent of the town; citing *Lafayette v. Timberlake*, 88 Ind. 330, where, in discussing a similar question, Elliott, J., said: "Officers appointed to execute the laws and ordinances are not agents engaged in corporate duties, but are public officers, appointed at the command of the legislature by the corporation authorities. There is no more reason for holding cities responsible for the wrongs of police officers than there is for holding counties or townships responsible for the torts of sheriffs and constables." See, also, *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *City of Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726.

Under the great weight of authority, we think the court did not err in sustaining the demurrer to the complaint. The judgment is therefore affirmed.

Fullerton, C. J., and Hadley, Anders and Mount, JJ., concur.

Municipal Corporations are not liable for failure to exercise, or for errors in exercising, their legislative or judicial powers; but they are liable for neglect to perform, or for improper or unskillful performance, of their ministerial duties: *Mayor etc. of Dalton v. Wilson*, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101, and cases cited in the cross-reference note thereto. See the discussion of this question in the monographic note to *Goddard v. Harpswell*, 80 Am. St. Rep. 376-403. A reference to page 405 of this note will show that a city is not answerable for the acts of its officers or agents in enforcing a void ordinance.

Bicycles and their use upon the streets are a proper subject of municipal regulation: *Gagnier v. Fargo*, 11 N. Dak. 73, 88 N. W. 1030, 95 Am. St. Rep. 705, and cases cited in the cross-reference note thereto.

THOMAS v. PRICE.

[33 Wash. 459, 74 Pac. 563.]

PLEADING DEFENSES—Statute of Limitations.—The statute of limitations is not an unconscionable defense, and its allowance by amended pleading is not to be discriminated against. (p. 962.)

PLEADINGS—Amendment—Statute of Limitations.—It is not error to permit at the trial an amendment pleading the statute of limitations, if the defendant is not surprised thereby, and makes no application for a continuance of the case. (p. 963.)

A. Munter, for the appellant.

E. C. Macdonald, for the respondents.

⁴⁰⁰ DUNBAR, J. This is an action on a promissory note given by defendant to plaintiffs on September 28, 1901, for seven hundred dollars, payable thirty days after date. Defendant denied plaintiffs' ownership of said note, and also pleaded by way of counterclaim the ownership of a note made by plaintiffs severally and jointly with one J. E. McGinnis on February 13, 1903, bearing interest at the rate of five per cent per month, payable to the order of G. M. Nethercutt, and on July 30, 1901, sold and assigned by said Nethercutt to defendant, on which note certain payments were in the answer alleged to have been made, and on which, at the time of the commencement of this action, there was due a balance of one hundred and forty-nine dollars and eighty-five cents in excess of the note owned by plaintiffs, for which amount defendant asks judgment.

⁴⁶¹ Upon the trial, plaintiffs proved the execution of their note by defendant, and ownership thereof by plaintiffs, and rested. After the introduction of the note which was pleaded as a counterclaim, plaintiffs asked permission to amend their reply by pleading the statute of limitations against the note set out in the cross-complaint. This permission was granted over the defendant's objection. The cause went to trial; proof to the satisfaction of the jury was made that the last payment, which would have prevented the statute of limitations from running, was not made as a payment on the note, but was a payment for notarial services. The jury brought in a verdict for plaintiffs, and, after defendant's motion for a new trial had been overruled, judgment

was rendered against defendant, from which judgment this appeal is taken; and the only error assigned is that the court erred in permitting the amendment to the reply by pleading the statute of limitations at the time such permission was given.

Great latitude in the amendment of pleadings is conferred upon the trial court by the statute, and the appellate courts in all jurisdictions have been liberal in construing this power. It is claimed by the appellant that one of the well-defined limitations is that there must not be an entire departure from the original cause of action and defense, and that it must be done in furtherance of justice. The basis of appellant's contention, and the only ground upon which it can be sustained, is that the statute of limitations is an unconscionable defense. But, in accordance with the weight of authority, this court has held that it is a defense which litigants have a right to plead, and that in the trial of a cause it should not be discriminated against, but should be treated as any other defense. In *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054, it was ⁴⁶² held not an abuse of discretion for the court, after a hearing of the cause, to allow an amendment correcting a mistake, although the equities of the case might have been in favor of the plaintiff. This court, after stating the ground of appellant's contention—that it was an abuse of discretion to permit the amendment, and that amendments should only be allowed in aid of justice, not of injustice—said: "A number of authorities are cited as sustaining the proposition that the amendment should not have been permitted. But we think that the action of the lower court was right in the premises. . . . Under the weight of the authorities, the statute of limitations is not now, at least, generally regarded as an unconscionable defense. We regard this as so well settled that we deem a citation of of many authorities unnecessary, but refer to *Wood v. Carpenter*, 101 U. S. 135," where that court vigorously laid down the rule that statutes of limitations are vital to the welfare of society and are favored in the law, giving cogent reasons for such announcements; citing also *Barnett v. Meyer*, 10 Hun. 109, where the court said: "Whatever may have been the earlier doctrine on the subject of what are called unconscionable defenses, it no longer prevails. The rules which govern amendments are now to be regarded without reference to the character of the defense."

The same rule was announced in *Roche v. Spokane County*, 22 Wash. 121, 60 Pac. 59, where the trial court permitted the defendant to file a special demurrer raising the defense of the statute of limitations, after a general demurrer had been overruled and after the same defense had been, on motion, stricken from defendant's answer. Also *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517, where the court, after stating the contention of the appellant ⁴⁶³ that it was particularly insisted that the plea of the statute of limitations was not viewed favorably, said: "But such view of the statute of limitations is not now, we think, usual or supported by the weight of authority"; citing with approval *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054, and the cases cited therein; and also 13 Ency. of Pl. & Pr. 209, where it is said: "Although according to some authorities the plea of limitation is classed among those not deemed meritorious, yet the statute of limitations is not now generally regarded as an unconscionable defense."

There is no claim that the defendant was surprised by the proffer of this plea, and, in any event, no motion was made for a continuance, and we held in *Daly v. Everett Pulp etc. Co.*, 31 Wash. 252, 71 Pac. 1014, that an action of the court in allowing, on an oral motion, an amendment to a pleading on the date of a trial, without an affidavit showing a good cause therefor, and without notice to the adverse party, was not reversible error, under the provisions of the statute authorizing the court to allow amendments to pleadings where the record did not show that he was injured by the amendment and unprepared with testimony to meet the issue thereby tendered. The court, after citing the case of *Barnes v. Packwood*, 10 Wash. 50, 38 Pac. 857—where the court permitted a fourth answer to be filed, and where this court had said that "the court having such a large discretion, under our law and practice, in matters of amendments, we do not think we would be justified in reversing the case for this reason"—proceeds to say: "The record does not disclose any claim on the part of appellant that he was really injured by the amendment, and unprepared with testimony to meet any issue tendered thereby. No application for continuance of the trial on ⁴⁶⁴ the ground of surprise or inability to produce testimony is shown. If such had been made to appear, no doubt the trial court would have granted the amendment upon such terms as would have fully protected any rights shown to be jeopardized by permitting the amendment at that time."

What was said there may be appropriately applied to this case. No prejudicial error appearing, the judgment is affirmed.

Fullerton, C. J., and Hadley, Mount and Anders, JJ., concur.

An Amendment to a pleading setting up the defense of the statute of limitations will not be allowed, unless it will further the ends of justice: *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348. A court does not err in refusing permission to set up the statute after answering to the merits: *Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262.

HEALY LUMBER COMPANY v. MORRIS.

[33 Wash. 490, 74 Pac. 681.]

CONSTITUTIONAL LAW—Eminent Domain.—A statute granting to the owner of timber lands the right to condemn a right of way over private property for logging roads and lumbering purposes is in violation of a constitutional provision prohibiting the taking of private property for a private use, and void. (p. 967.)

CONSTITUTIONAL LAW.—Courts Cannot Invade the province of the law-making power of the government, and intrude into their decrees their opinion on questions of public policy, but their duty is to strictly recognize legal limitations and confine themselves to the narrower duties of interpretation and construction. (p. 967.)

EMINENT DOMAIN—Public Use—Judicial Question.—A constitutional provision that the question in condemnation proceedings whether the use to which the property is to be put is public or not shall be a judicial question releases the courts from giving any weight to the fact that the legislature has pronounced a certain use a public use. The determination of that question is solely with the courts. (p. 968.)

EMINENT DOMAIN—Public Use—Public Benefit.—A public use, to authorize the exercise of the right of eminent domain, must be either a use by the public or by some agency, which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or the general prosperity of the state. (p. 975.)

EMINENT DOMAIN—Way of Necessity.—Constitutional authority to acquire a private way of necessity over land does not authorize a land owner to condemn a right of way over the land of a stranger for a logging road and lumbering purposes. (p. 975.)

Preston. Carr & Gilman and Hoyt & Height, for the appellants.

W. S. Fulton and V. H. Faben, for the respondent.

⁴⁹⁶ DUNBAR, J. This is an action brought by appellant to condemn land and waters for a logging road and waterway in King county. A demurrer to the complaint was sustained, and, the plaintiff electing to stand on its complaint, judgment was rendered for the defendants. The complaint made the necessary allegations to bring the case within the statute which provides for the condemnation of logging roads and waterways. The act is found on page 255 of the Laws of 1899, and the first section thereof is as follows:

"Section 1. Any owner or owners of any timbered lands, or timber, desiring to cut or remove the same to a point wherein the same may be manufactured, transported, by either rail or water, driven, rafted, assorted, boomed or shipped for lumbering purposes, and having no practical route for a road or right of way whereon to remove or haul said timber, shall have the right to condemn, as hereinafter provided, a right of way for a logging road or chute, stream, or watercourse from said lands to any waters, railroad, logging road or chute or public highway, by the most direct and feasible route, and shall have the right to condemn the use of any stream, watercourse, slough, pond or lake together with sufficient land along the bank or banks thereof, to enable the driving, rafting, booming, or handling of such timber for the removal of said timber, provided that proceedings to obtain such right of way shall conform to the law allowing private corporations to condemn a right of way in this state, except as is hereinafter provided."

Sections 2, 3, 4 and 5 provide the mode of procedure. Sections 7 and 9 are as follows:

"Sec. 7. Judgment shall be entered upon said verdict or finding appropriating an easement upon said land and other property for said right of way for the purpose only of logging or removing timber from the land set forth in said complaint; provided, however, that any one or more persons owning or controlling timber land or timber and ⁴⁹⁷ entitled to condemn such right of way under the provisions of this act may join as plaintiffs in such action. Any person condemning such right of way shall have the exclusive use thereof and the right to remove therefrom any improvements or structures placed thereon, subject to the right of any other person or persons to condemn said logging road, chute, stream, watercourse or slough, as herein provided; provided further, that any other party owning or controlling timber tributary to any such stream or watercourse condemned as aforesaid, and who has not joined in

such condemnation, may have the right to use the same upon paying to the parties owning the right of way the proper proportion of the cost of such improvement and the expenses of maintaining the same, to be determined by the superior court of the proper county, if the parties cannot agree.

"Sec. 9. When any logging road or chute, stream or watercourse, slough, or lake shall cease to have been used for one year, any party interested may file a motion in such action and upon notice to the owner or person in charge of such timber, obtain an order vacating such right of way, unless good cause is shown why such logging road or chute, stream, watercourse, slough, pond, or lake upon such condemned right of way should not be vacated. Nothing but an easement can be acquired by this proceeding and no interest in the land shall pass by the decree of appropriation."

The demurrer was sustained on the ground that the act was in contravention of section 16, article 1 of the constitution of this state, which provides as follows: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained ⁴⁹⁸ and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public," in that the act of condemnation did not provide for a public use of the land condemned.

This case presents important questions, deserving the most serious consideration, involving as it does the representative interests of private rights, and of property of the state sought to be protected and fostered through the exercise of the high prerogative of sovereignty: the former being guaranteed by the

fundamental law, and the latter being a subject of universal interest and concern. Eminent domain is the right or power of a sovereign state to appropriate private property. This right is generally exercised through condemnation proceedings, and the rights of the individual must yield to the superior rights of the state as a promoter and conservator of the public welfare. It will be seen that the vital question to be determined is whether the statutory proceedings in question secure the public or private use of the property condemned.

An immense number of authorities have been cited in this case, all of which we have carefully examined, but a particular analysis of which cannot be made within the limits of a reasonable opinion. But, from the research we have made, we conclude that both the weight of authority and the better reasoning sustain the judgment in this case; that, therefore, the statute in question is in contravention ⁴⁹⁰ of the constitution, and that the words "public use" were not used by the framers of the constitution in the liberal and, it seems to us, somewhat indiscriminate sense which is contended for by the appellant.

The learned attorneys for appellant have favored the court with an exhaustive and earnest argument in their brief, and a painstaking showing is made of the magnitude of the lumbering business and interest of this state, and the effect that it presumably has upon the general prosperity of the commonwealth, and we are urged to announce a broad and statesmanlike principle in determining this question, and one which would further the business prosperity of the state rather than one which would hamper and retard it. But the court cannot invade the province of the law-making powers of government, and intrude into its decrees its opinion on questions of public policy. Its duty is to strictly recognize its legal limitations and confine itself to the narrower duties of interpretation and construction. The main arguments in the brief, powerful as they are, would have been more appropriately presented to the framers of the constitution.

Many of the cases cited by the appellant have no application to this case, for the reason that they are from states having constitutions with different provisions from ours on the subject of eminent domain. An examination of all the different constitutions in the Union shows that only two other states, viz., Colorado and Missouri, have the provision of our constitution that "whenever an attempt is made to take private property for a use alleged to be public, the question whether the con-

templated use be really public shall be a judicial question and determined as such, without regard to any legislative assertion that the use is public." That fact eliminates from the discussion in this case all that line of cases which hold that the fact that the legislature ⁵⁰⁰ has either pronounced a certain thing a public use, or has so indicated by its enactment, by conferring the right of eminent domain, ought to have great weight with the court in construing the constitutionality of the act; because our constitution has expressly negatived any such idea, evidently deeming it necessary to place a restriction upon legislative sentiment in this respect. So that, under the provision of our constitution, the court is untrammelled by any consideration due to legislative assertion or enactment.

Most of the constitutions have limitations upon the power of the state to condemn private property except for public use. A good many, however, have left in the state just such powers as it had, untrammelled by limitations, and cases from states where is no limitation on legislative enactment, of course, are without value in the consideration of this case. The first few cases cited by appellant, commencing with the citation from Grotius, simply announce the undisputed doctrine that the power of eminent domain is inherent in sovereignty, and that the property of the subject is under the power of eminent domain of the state to such an extent that the state may use and even destroy such property for ends of public utility. *Hazen v. Essex Co.*, 12 Cush. 475, is not in point, for the announcement of the court in that case was that in determining the question we must look to the declared purpose of the act, and, if a public use was declared, it would be so held, unless it manifestly appeared by the provisions of the act that they could have no tendency to advance and promote such public use. So that with a premise of this kind it can readily be seen that any conclusion reached by the court would not be valuable in determining rights under a constitution like ours. *Talbot v. Hudson*, 16 Gray, 417, was a case from the same state, and, while in some respects its reasoning coincides with the appellant's contention in relation ⁵⁰¹ to the property of the people benefited, it makes the following announcement:

"When an act has been passed with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is therefore incumbent on those who deny the validity of a statute to show that it is a plain and

palpable violation of constitutional right." And this statement, which we concede is ordinarily a proper statement of the law, is, we think, not applicable under the provisions of our statute, where the sole question at issue, viz., whether or not the contemplated use be really public, is taken by special enactment from the legislature and placed within the discretion of the court. Under such circumstances the case comes to the court without any presumption one way or the other on the subject of public use, but is to be tried by the court like any other question that is submitted to its discretion. In support of his view the appellant presents the following quotation from Lewis on Eminent Domain, section 1:

"It embraces all cases where, by authority of the state and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen. Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature. It is sufficient that the use of the property for the purpose proposed is necessary to enable individual proprietors to cultivate and improve their land to the best advantage, or to develop certain natural and exceptional resources incident thereto, such as a water privilege or a mine. In such cases the public welfare is promoted, though indirectly, by the increased prosperity which necessarily results from developing the natural resources of the country."

502 It is the unlimited use of the power of eminent domain of which Mr. Lewis was speaking, but what he says in no way aids the determination of this question, for the author, continuing in the same section, says: "Doubtless the definitions which restrict eminent domain to a taking for public use have been inspired by the constitutional provisions which prevail in the United States and impose this limitation on the exercise of the power," the limitation being that the taking should be for a public use. And there is nothing in the language of the author by which we can conclude that the cases which he cites would be considered a taking for public use.

It is insisted that the courts have sustained the taking of property, ostensibly for the use and enjoyment of the property by the public, but really for the private benefit of one or more persons, and *Lewis v. Washington*, 5 Gratt. 265, is cited. This case does not involve the constitutional limitation, or any ques-

tion of the power of eminent domain, but is a construction of the power of the county court under the law to establish a road, and it was held that its establishment rested within the discretion of the court. In the discussion of that case the court laid down the broad doctrine that there was no principle upon which the wants and necessities of one individual must be imperatively rejected, which would not be applicable to two or three or a dozen, or any given number short of the whole or the greater part of the community, a doctrine which, of course, could not be sustained if it were applied to the subject of eminent domain under our constitutional provisions. The other cases cited under this head do not seem to us to be important as sustaining either view of this controversy. It is true that condemnation of lands for a cemetery has been sustained, and for dikes and levees for draining swamps, ⁵⁰³ and for many purposes of like character, but in all such cases there was more of an element of public use than in the case at bar, and the decisions were based on reasons that could not be applied to this case.

The case of North River Boom Co. v. Smith, 15 Wash. 438. 45 Pac. 750, is somewhat relied upon by appellant, from the statement therein made that boom companies were quasi public corporations. The writer of this opinion, being the writer of that, feels free to say that the opinion indulged in statements outside of the issues presented. The constitutional provision in question was not under consideration, the question being on the construction of section 28, article 2, of the constitution, in relation to special legislation, and no authorities were cited even on that question. But a boom company, organized under the laws of the state to do a carrying business for the public, stands on a different footing from a private logging company in the exclusive prosecution of its own private business. One is, to a certain extent, a common carrier compelled to serve the public, while upon the other, no such duties are imposed. It is true the statute provides: "That any other party owning or controlling timber tributary to any such stream or watercourse condemned as aforesaid, and who has not joined in such condemnation, may have the right to use the same upon paying to the parties owning the right of way the proper proportion of the cost of such improvement and the expenses of maintaining the same, to be determined by the superior court of the proper county, if the parties cannot

agree"; but this in effect only increases the number of parties in the company and falls far short of imposing a public duty. And, in any event, we do not care to extend the doctrine which we have already announced.

It must be conceded, however, that there are quite a ⁵⁰⁴ number of decisions to the effect that the phrase "public use" should be construed to be synonymous with public benefit, and that, when it is determined that the use is of great benefit to the public at large, condemnation of private interests should be guaranteed, even though the use is not by the state or through any of its agencies. One of the most prominent and direct decisions thus holding is *Dayton Gold etc. Min. Co. v. Seawell*, 11 Nev. 394. There the broad doctrine was announced that any appropriation of private property under the right of eminent domain, for any purpose of great public benefit, interest, or advantage to the community is a taking for public use, the application in that case being to condemn a strip of land in order to transport the wood, lumber, timbers, and other materials to enable it to conduct and carry on its business of mining. The law granting the privilege was sustained on the ground that mining was one of the leading industries of the state, and the principles above announced were applied. This is, in substance, the contention of the appellant in this case.

It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon private rights which the constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. Under such a rule an act might be construed to be legal one year, because a certain business was found to be profitable to the community at large, and the next year held void because it appeared that the business was not a paying one. The constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable and uniform, and to constitute a check on the more mutable sentiment and actions of members of different legislatures. And it seems to us that the result of such a ⁵⁰⁵ construction would be a virtual removal of any constitutional inhibition on legislative power in this respect, leaving the legislative will as free and untrammelled as in those states where the legislatures are permitted to act in consonance with the inherent power of sovereignty, and no constitutional enact-

ments have intervened. It was no doubt for the purpose of preventing enthusiastic legislation, practically destroying this limitation, that the question of public use was especially submitted to the courts, who are, and should be, ever watchful in maintaining inviolate the constitutional rights of the citizen.

It cannot be that, within the meaning of the constitution, the distinction between public policy and public use is to be obliterated. It might be of unquestionable public policy, and for the best interests of the state, to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade, increase property values, and thereby increase revenues of the state, even if the enterprise was purely private; for such is the relation, under our form of government, between public and private prosperity that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the constitution; and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on grounds of public policy.

It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction, the brewer could successfully demand condemnation of his neighbor's land for the purpose of the erection of a brewery, because, forsooth, many citizens of the state are profitably engaged in the ⁵⁰⁶ cultivation of hops. Condemnation would be in order for gristmills, and for factories for manufacturing the cereals of the state, because there is a large agricultural interest to be sustained. Tanneries, woolen factories, oil refineries, distilleries, packing-houses, and machine-shops of almost every conceivable kind, would be entitled to some consideration for the same reasons, thereby actually destroying any distinctions between public and private use, for the principle in one instance is the same as in the other; the difference is only in degree.

So many of the cases cited by both appellant and respondents have been decided on so many different theories and branches of the law that it is unprofitable to specially notice them here. There are, however, many cases that directly deny the doctrine laid down in the Nevada case, *supra*, and we think that the consensus of judicial opinion is opposed to such liberal con-

struction. As showing the confusion which would arise from such a construction, in our sister state of Oregon, where large timber interests predominate, as they do in this state, it was held in *Apex Transp. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, that the law providing that any corporation organized to transport timber or wood should have the right to construct railroads and tramways, which should be deemed for the public use, subject to corporate rights to toll, and gives such corporations the right of condemnation which railways possess, was void under the constitutional provision in relation to public use; the court saying that, while it is difficult to give an exact definition of public use, within the meaning of the constitution, no rule founded on the adjudged cases could be so framed as to include the case under consideration; citing *Lewis on Eminent Domain*, sec. 165; *Thompson on Corporations*, sec. 5593; *Cooley's Constitutional Limitations*, *532; *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 60 Am. St. Rep. 818, 507 46 Pac. 790, and many other cases. In California it has been held that rights of way for mining purposes could not be condemned, under a similar constitutional provision. Much more in accordance with sound reasoning, and even with true public policy when considered in the broadest sense, is the language of the court in *Bloodgood v. Mohawk etc. R. R. Co.*, 18 Wend. 9, 31 Am. Dec. 313, where, in discussing this question, it is said: "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property. The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us." And again, after announcing the contention that the improvement proposed was of great value and usefulness, productive of increase of comfort and convenience to individuals, and wealth and power to communities, the court said: "But is this enough to justify the conclusion that because the use to which it is dedicated by its owners accommodate individuals, and thereby advances the pub-

lic interest, therefore it is such a public use that private property may be taken to promote it. Can the constitutional expression 'public use,' be made synonymous with public improvement, or general convenience and advantage, without involving consequences inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees. If an incidental benefit, resulting to the public from the mode in ⁵⁰⁸ which individuals in pursuit of their own interest use their property, will constitute a public use of it, within the intention of the constitution, it will be found very difficult to set limits to the power of appropriating private property."

Mr. Cooley, in his Constitutional Limitations, and Mr. Elliott, in his work on Eminent Domain, have given this subject special attention, and reviewed all the authorities bearing thereon, and, while detached expressions from these authorities, frequently made with reference to cases cited, seem to sustain both contentions, yet the general deduction made is opposed to the idea that public use and public benefit are synonymous terms. Mr. Lewis, in discussing this identical proposition, in section 165, after giving a history of the earlier decisions, concludes as follows: "'Public use' means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: 1. That it accords with the primary and more commonly understood meaning of the words; 2. It accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; 3. It is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application. If the constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts"; and much more to the same effect which it is not practical to insert in this opinion. Mr. Cooley, under the head of "The Purpose," page 652, says: "Nor could it be of importance that the public would receive incidental benefits, such as unusually spring from the improvement of lands or the establishment of prosperous private enterprises; the public use implies a possession, occupation, and enjoyment of the land by the public ⁵⁰⁹ at large, or by public agencies; and a due protection of the rights of private property

will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it." The citation of nearly all the cases bearing on this question will be found in Cooley's Constitutional Limitations, and Lewis on Eminent Domain, and it is not necessary to reproduce them here. But from a consideration of all the authorities and from our own views on construction, we are of the opinion that the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state.

It is also contended by the appellant that, if the court should conclude that this was not such a public use as could be sustained, it has a right to this condemnation under the provision of the statute in relation to private ways of necessity. It is contended by the respondents that this action was not brought under the statute in relation to condemnation for private ways of necessity, and this seems to be true; but outside of this technical point the term "private way of necessity" must be construed with reference to what was deemed a private way of necessity at the time of the adoption of the constitution; or, in other words, the common-law definition of a private way of necessity. The rights asked for here do not fall within such definition. There is no element of a grant in this case upon which a private way of necessity is founded. "It is founded on an implied grant": 2 Blackstone's Commentaries, Hammond's small ed., 79.

"It is either created by express words or it is created by operation of law as incident to the grant, so that in both ⁵¹⁰ cases the grant is the foundation to the title": 3 Kent's Commentaries, 14th ed., *424.

"A way of necessity can only be raised out of land granted or reserved by the grantor, but not out of the land of a stranger. For, if one owns land to which he has no access except over lands of a stranger, he has not thereby any right to go across these for the purpose of reaching his own": 2 Washburn on Real Property, 5th ed., 320.

"It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon

which such a proceeding can be justified": Lewis on Eminent Domain, 233.

"A way of necessity, when the nature of it is considered, will be found to be nothing else but a way of grant. It derives its origin from a grant, for there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant": Chitty's Notes to Blackstone's Commentaries, *36.

"The statute authorizing the location of private roads, as far as it provides for the exercise of the right of eminent domain to establish them, is unconstitutional": Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399 (syllabus). See, also, Dicky v. Tension, 27 Mo. 373; Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161; Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274; Long v. Billings, 7 Wash. 267, 34 Pac. 936.

We have not overlooked the motion of respondents to dismiss this cause on the ground that the order is not appealable, but, with the view we have taken on the merits of the case, it is not necessary to discuss the question raised in the motion, and for the reason that other cases of similar import are pending in this court, we thought it best to decide the case on its merits.

⁵¹¹ The court not having committed error in sustaining the demurrer to the complaint, the judgment is affirmed.

Fullerton, C. J., and Anders, Mount and Hadley, JJ., concur.

Public Use, as the term is used in the law of eminent domain, is defined in Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 43 S. E. 194, ante, p. 855, and cases cited in the cross-reference note thereto. As to whether the question of the existence of a public use is for the legislature or the courts, see the extended note to Chicago etc. Ry. Co. v. Morehouse, 88 Am. St. Rep. 926-946. It has been held that a highway cannot be laid out over the land of one person, under the power of eminent domain, for the mere convenience of an adjoining owner: Richards v. Wolf, 82 Iowa, 358, 31 Am. St. Rep. 501, 47 N. W. 1044; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399. Compare Fanning v. Gilliland, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209. And it has been held that a strip of land cannot be condemned by a coal company for the construction of a tramway leading from the coal works to a public railroad: Sholl v. German Coal Co., 118 Ill. 427, 59 Am. Rep. 379. But see Butte etc. Ry. Co. v. Montana Union Ry. Co., 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232. As to whether land may be condemned for a railroad over which to transport logs to a sawmill, see Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790.

CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

LUTHER v. LUTHER COMPANY.

[118 Wis. 112, 94 N. W. 69.]

CORPORATIONS—Corporate Policy—Right of Stockholders.—On a question of corporate policy the stockholders, subject to temporary control by the board of directors, have the ultimate right to decide according to a majority vote. (p. 978.)

CORPORATIONS—Unlawful Increase of Capital Stock.—In an established and going corporation, an increase of capital stock, accomplished either by formal increase of the amount originally authorized or by issue of what had originally been withheld, though within the authorized amount, without first giving opportunity to all existing stockholders to take their proportionate shares of such increase, is wholly beyond the power, not only of the directors, but of any mere majority of the stockholders. (p. 979.)

CORPORATIONS—Breach of Duty by Directors.—If directors manage property of the corporation so as to give one part of its shareholders a benefit and advantage over, or at the expense of, another part, it is a breach of duty, especially when the directors themselves belong to the benefited class, which may be remedied in equity. (p. 980.)

CORPORATIONS—Fraud on Shareholders—Issue of Stock to Gain Control.—If two of the directors of a corporation, forming a majority at a board meeting, in order to take control of the corporation from those who then own a majority of the stock, cause the issue and sale of a number of shares to a third person, thus making a majority of the stock in their hands, such act confers no right in the stock to such person, if he has knowledge of and participated in the unlawful act. (p. 981.)

CORPORATIONS—Fraudulent Issue of Stock—Remedy in Equity.—If two of the directors of a corporation being a majority at a board meeting, in order to take the control of the corporation from those who then own a majority of the stock, cause the issue and sale of a number of shares to a third person, thus securing a majority of the stock in their hands, a court of equity will decree on timely application, the stock so issued to be invalid; also, an

election of directors which was determined by the voting of such stock, will require such stock to be returned and canceled, and the amount paid therefor to be returned to the buyer without interest (p. 982.)

CORPORATIONS—Fraudulent Issue of Stock—Remedy—Erroneous Decree.—If, in an action by corporation stockholders to set aside as fraudulent an issue and sale of stock by two directors in order to obtain control of the corporation, the complaint alleges, among other breaches of duty by such directors, the taking, by one of them, in his own name of a patent which ought to belong to the corporation, but no issue is raised as to the title to such patent, or relief in regard thereto asked, the admission without objection of evidence relating to such patent is not a voluntary trial of the title thereto, and the entry of a decree requiring such director to transfer the title to such patent to the corporation is error. (p. 984.)

J. W. and J. H. Turner and Turner, Pease & Turner, for the appellants.

J. F. Trotzman, H. B. Schwinn and M. M. Riley, for the respondents.

¹²¹ **DODGE, J.** Were Clarence J. Luther the sole plaintiff, we should have little doubt that he ought to be dismissed from a court of equity without relief, for the reason that his own conduct has been so in outrage of his duties as a director and officer of the corporation that no court can patiently listen to his prayer for enforcement of fiduciary principles and duties. That objection does not, however, exist to some of the other plaintiffs, who, as stockholders, ask that their rights be protected as to them. The circuit court has found, and we find, nothing of misconduct in their relations to the company.

The salient facts presented by the findings are that the governing board of directors of this corporation were divided into two factions—C. J. Luther on the one hand, interested only in the profits which the corporation might make, and to that end interested that it should buy its supplies as cheaply as possible; on the other hand, T. A. Boerner and H. W. Bolens, largely interested in the company from which supplies were mainly purchased, and therefore anxious to have such purchases continue, and at prices profitable to the seller. Here was presented a question of corporate policy which the stockholders, subject to temporary control by the ¹²² directors, had the ultimate right to decide according to majority vote. In that situation, Bolens and Boerner, availing themselves of the temporary constitution of the board, exercised the power thus vested in them to sell a quantity of unissued stock to a confederate of theirs

for the purpose of placing in hands favorable to their policy a majority of the total corporate stock. Such sale is attacked primarily on the ground that, in an already established and going corporation, an increase of capital stock, accomplished either by formal increase of the amount originally authorized or by issue of what had originally been withheld, though within the authorized amount, without first giving opportunity to all existing stockholders to take their proportionate shares of such increase, is wholly beyond the power, not only of the directors, but of any mere majority of stockholders. This doctrine rests on the idea that, while its own corporate stock is property, so that the sale and disposition thereof involve questions of business policy properly controllable by the directors' or stockholders' meeting, the original issue thereof involves something more; that the latter act goes to underlying organization—modifies the fundamental arrangement and proportions of the members. This doctrine is supported by overwhelming and almost unconflicting array of authority, from which we need cite but a few illustrative cases and textbook discussions: Cook on Stock and Stockholders, 3d ed., secs. 284, 286, 662; 2 Beach on Private Corporations, secs. 473, 474; 2 Thompson on Corporations, sec. 2040; Taylor on Private Corporations, 5th ed., sec. 569; Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Reese v. Bank of Montgomery Co., 31 Pa. St. 78, 72 Am. Dec. 726; Electric Co. v. Edison etc. Co. 200 Pa. St. 516, 50 Atl. 164; Jones v. Concord etc. R. R. Co., 67 N. H. 119, 38 Atl. 120; Humboldt etc. Assn. v. Stevens, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Dousman v. Wisconsin etc. Co., 40 Wis. 418. It has not yet been decided in this state whether the reasons on which rests this rule of law are sufficient to impose such ¹²³ limitation upon the powers of directors in our corporations, resting, as they do, upon section 1776 of the Statutes of 1898, which provides that "the stock, property, affairs and business of every such stock corporation shall be under the care of and be managed by a board of directors," etc. The Minnesota court, in face of a similar statute, has held affirmatively: Jones v. Morrison, 31 Minn. 140, 16 N. W. 854. The question will be worthy of careful consideration when its decision becomes necessary.

For the purposes of the present case, it is not necessary to consider the unissued stock otherwise than as mere property, over which the powers of the directors are the same as over any

other assets of the corporation, namely, to sell to whom and at such prices as to them shall seem best for the corporation and all its stockholders, in the honest exercise of the discretion and trust vested in them. Even then, however, their duties with reference thereto are fiduciary; they are bound to act *uberrima fides* for all stockholders. To dispose of or manage property of the corporation to the end and for the purpose of giving to one part of their *cestuis que trustent* a benefit and advantage over, or at the expense of, another part, is breach of such duty, especially when the directors themselves belong to the specially benefited class: *In re Taylor Orphan Asylum*, 36 Wis. 534; *Eschweiler v. Stowell*, 78 Wis. 316, 23 Am. St. Rep. 411, 47 N. W. 361; *Spaulding v. North Milwaukee etc. Co.*, 106 Wis. 481, 494, 81 N. W. 1064; *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 169; *Farmers' etc. Co. v. New York etc., Ry. Co.*, 150 N. Y. 410, 55 Am. St. Rep. 689, 44 N. E. 1043. It cannot matter how this result is accomplished, nor what the form of the undue benefits conferred or acquired. The benefit to the one class or the injury to the other need not be pecuniary. While the ultimate purpose of most stock corporations is money profit, the right of proportionate voice and influence in selection of policy and method of accomplishing that result is most important to each shareholder. It is as fundamental and vital as the right of suffrage under a representative ¹²⁴ government. While a governmental act may not take away from any class of citizens property or physical liberty, yet, if, contrary to the fundamental law of organization, it abates their suffrage, it would be held void. Each holder of a share of stock has the right that, by convincing the holders of a certain number of other shares, his policy of business be followed. Any invasion of that right is an injury to him which, from his point of view, may be greater than very considerable present money loss to the corporation. While this right must yield to a power over it given by the terms of the association, still he has the right to insist that such power shall be exercised for the purposes of the whole association. It is not so when exercised for the direct purpose of depriving him of his proportionate voice and influence. That is not a legitimate manner for those temporarily vested with power to perpetuate the policy which they favor. Nothing can be more fallacious in corporate or in popular government than the argument that because they honestly believe their policy right, and another dangerous, they may rightfully invade the field of the suffrage upon which policy

rests, and disfranchise, in whole or in part, those who disagree with them. We have said this much of perhaps rather trite and elementary philosophy because the conclusions of the trial court seem to rest on the argument that, because the majority of the directors honestly considered Clarence J. Luther's control of corporate management dangerous, they might properly exert their power over unissued stock in order to colonize enough new notes to turn the majority supporting Luther's policy into a minority.

Since the trial court has found, and upon sufficient evidence, that the purpose of the sale of the new stock was to take from the faction supporting Luther's policy the control of the corporation, and to transfer it to the other faction to which the two directors perpetrating the act belonged, as did also the recipient of the stock, we must hold that such sale ¹²⁵ was a breach of the duty of the directors, and could confer no rights upon the beneficiary, who knew and participated in the unlawful act and purpose.

That conclusion having been reached, the next question is as to what a court of equity should do in the premises. What form of remedy will accomplish rescission of the unlawful acts, and re-establish the status quo disturbed by means thereof? In some cases, where, at the time of decision, the issue and delivery of the stock was not complete the remedy of declaring void the transaction and enjoining issue has sufficed: *Electric Co. v. Edison etc. Co.*, 200 Pa. St. 516, 50 Atl. 164; *Dousman v. Wisconsin etc. Co.*, 40 Wis. 418. It is also intimated, though on demurrer, that improperly issued stock may be adjudged canceled and the holder enjoined from voting thereon: *Wood v. Union etc. Assn.*, 63 Wis. 9, 22 N. W. 756; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854. And finally, it has been held proper to adjudge the cancellation of the unlawful stock, and to enjoin from acting directors and officers, who had been elected by voting it: *Humboldt etc. Assn. v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568; *Reynolds v. Bridenthal*, 57 Neb. 280, 77 N. W. 658. We have not found any case in which a court has gone any further than as above stated.

In the present record we are embarrassed by no circumstances of delay or acquiescence on plaintiff's part, nor of defendants' change of position in innocent reliance upon the validity of the stock issued. Plaintiffs gave full notice of their objections to the sale of the stock, and commenced this action, asserting its

invalidity, and seeking to prevent defendants from recognizing it as giving any voting right to the holder, nearly a month before the stock meeting of November 6, 1899. We deem it clear, therefore that the decree should declare the invalidity of the thirty-nine shares of stock issued by Arthur R. Boerner and adjudge their cancellation, and that upon surrender of the certificates the corporation ¹²⁶ repay to him the amount paid for the stock, without interest, less any dividends received by him on that stock; also that the election of directors purporting to have taken place November 6, 1899, be adjudged void, and defendant Arthur R. Boerner be enjoined from in any wise claiming or exercising the office of director. Any election to either of the general offices of the corporation made by such illegally chosen board of directors should be adjudged invalid, and the persons so elected, if defendants, should be restrained from claiming or exercising any such office by reason of any such election. This will restore the situation as it existed before the unlawful acts complained of, and a stockholders' meeting can then be held to elect a board of directors. This, as already stated, is going as far as any of the decided cases which have come to our notice, and we think does substantial justice, without the drastic remedy of now endeavoring to install in office those whose claimed election occurred more than three years ago, and whose legal term of office would have expired long since if successors had been elected.

2. Upon defendant Bolens' appeal is assigned as error the adjudication that he transfer to the corporation a certain patent. That relief is obtainable, of course, only in an action by the corporation against the individual defendant, to which none of the other parties to this record are either necessary or proper parties, and in which none of them would have any direct interest. True, in case of refusal of the corporation to bring such an action, the present plaintiffs might bring it, but only in the right of the corporation. It would still be an action by it merely forced into court by the individuals in representative capacity: *Land etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, 75 N. W. 964; *Jenkins v. Bradley*, 104 Wis. 540, 551, 80 N. W. 1025; *Boyd v. Mutual Fire Assn.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171. Such an action cannot be joined with one brought by the plaintiffs in their own right to remedy or redress direct wrongs to them. The ¹²⁷ two causes of action would not both belong to any one of the classes

specified in section 2647 of the Statutes of 1898, nor would they both affect all parties to the action as required by that section: Spaulding v. North Milwaukee etc. Co., 106 Wis. 481, 492, 81 N. W. 1064; Boyd v. Mutual Fire Assn., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171; Pietsch v. Krause, 116 Wis. 344, 93 N. W. 9. Hence, if the complaint containing the principal cause of action for cancellation of stock issued in derogation of plaintiffs' rights had also attempted to state a cause for recovery to the corporation of this patent it would have been obnoxious to demurrer for multifariousness. It, however, contained nothing even suggesting such attempt. It does not declare two separate causes of action, as required by section 2647. It refers to Bolens' conduct with reference to this and other patents merely as part of the charge of fiduciary misconduct, and the prayer does not hint at any such relief as that granted against Bolens; hence, there was no opportunity to raise the objection by demurrer.

Plaintiffs, however, urge two rules of practice, both well settled in this court: 1. That although the complaint may fail to state a cause of action, nevertheless, if, by evidence permitted by defendant to go in without objection, the cause of action is proved judgment may properly be rendered thereon the complaint being amended, or deemed to be, so as to correspond with the proof; 2. That, unless the objection to a complaint for multifariousness be raised by demurrer or answer, it is waived: Stats. 1898, sec. 2654. These rules have been adopted to promote justice and to enable full decision of the merits of a controversy after they have been tried by consent of both parties. They are not intended, and will not be perverted, to deprive a defendant of his rightful defenses without his consent or some lapse of reasonable diligence. They proceed on the theory of waiver of the right which every defendant has to be informed intelligibly of the facts which the plaintiff claims to entitle him ¹²⁸ to recover, as well as the right to have litigated a cause of action without the trial being complicated by the joinder of an incongruous one. Like all waiver predicated upon silence, however, there must have been reasonable opportunity, as well as omission, to object. When evidence is offered which is pertinent to the cause stated in the complaint it naturally is assumed to be offered in support of the cause of action so stated, and mere omission to object to it cannot, with reason, be ascribed to defendant's willingness that some other and unstated cause

of action be tried, to which also that evidence may be competent: *Mowatt v. Wilkinson*, 110 Wis. 180, 85 N. W. 661. The same considerations forbid any inference of consent that an incongruous cause of action may be joined from omission to object by demurrer or answer, when the complaint seeks no such joinder. It is not until the plaintiff reasonably notifies defendant of his desire to make such joinder, either by offering evidence unambiguously tending to support such additional cause of action or by offer to amend, that the latter can be deemed by silence to consent thereto or waive objection. Demurrer for multifariousness could not have been sustained to this complaint, for it certainly does not state any separate cause of action for recovery of the patent from defendant Bolens. The duty to object did not arise upon introduction of evidence with reference thereto, for such evidence was admissible, and apparently offered upon the issue as to the relative fidelity, or the reverse, of Luther and Bolens to the corporate welfare. It is clear that defendant Bolens never was so placed that silence on his part could be deemed to waive objection to adjudication in this action of a right of the corporation to enforce the conveyance of this patent to it. Hence, judgment to that effect must be reversed, and also all findings of fact on the issue thereby adjudicated, to the end that no estoppel by res adjudicata against either party may rise from this erroneous trial of an issue not presented to the court.

129 By the Court. Judgment reversed on both appeals, and cause remanded, with directions to enter judgment in accordance with the foregoing opinion.

The Power of a Corporation to increase the capital stock is in the stockholders, and not in the board of directors: *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90, and note. As stated in *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, an increase or reduction of the capital stock of a corporation is a fundamental change in its affairs, and must be authorized by a majority of the stockholders, at a corporate meeting, and in the manner prescribed by law. The original stockholders have a right to subscribe for and hold the new stock: *Humboldt Driving Park Assn. v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156. The general custom is to compel the stockholders to buy the new stock at par, or to sell the right to buy it at that price, in order to save their corporate interests: *Jones v. Concord etc. R. R.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614. That the distribution, by resolution of the board of directors, of capital stock remaining untaken at the time of incorporation among the stockholders not in arrears on the stock al-

ready taken by them, is an unlawful penalty on those in arrears, and a violation of the equal rights of a corporator who was ready and offered to take his proportion of the new shares, see *Reese v. Bank of Montgomery County*, 31 Pa. St. 78, 72 Am. Dec. 726. Fraudulent and overissued stock is discussed in the note to *First Ave. Land Co. v. Parker*, 87 Am. St. Rep. 847-860.

STATE v. FROEHLICH.

[118 Wis. 129, 94 N. W. 50.]

TAXATION for Private Purpose.—The legislature has no power to compel, or to authorize, a county or other municipality to raise money by taxation to be paid to private persons for a purely private purpose. (p. 986.)

TAXATION for Private Purpose.—The legislature cannot create a public debt or levy a tax, or authorize a municipality to do so, in order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of the citizen and give it to an individual, the public welfare being in no way connected with the transaction. The object for which money is raised by taxation must be public, and must subserve the common interest and well-being of the community required to contribute. (p. 989.)

TAXATION—Constitutional Law.—A constitutional provision declaring that the legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year, is intended to limit the annual tax to an amount sufficient to defray such expenses, but does not authorize the levy of a tax to pay a purely private claim, nor authorize its payment out of public funds raised by taxation. (p. 991.)

CONSTITUTIONAL LAW—Appropriation of Public Funds for Private Purpose.—A statute appropriating a specified sum of public money to pay innocent purchasers of unpaid county orders issued under an unconstitutional statute providing for the treatment of habitual drunkards in private institutions at the expense of the counties in which they reside, and purchased before the latter act was declared invalid, cannot be upheld as an appropriation made for the payment of claims founded in equity and justice. Such statute makes an appropriation of public funds to pay purely private claims, and for that reason is unconstitutional and void. (p. 993.)

Wickham & Farr and Ryan, Merton & Newbury, for the relator.

L. M. Sturdevant, attorney general, for the respondent.

134 CASSODAY, C. J. Chapter 203 of the Laws of 1895, providing "for the treatment and cure of inebriates and persons addicted to the excessive use of drugs and other narcotics," was held to be unconstitutional and void, because it involved the

imposition upon the respective counties of the state, without their consent, of a tax for the benefit of private institutions and individuals, not the legitimate objects of public charity: *Wisconsin Keeley Inst. Co. v. Milwaukee Co.*, 95 Wis. 153, 158-160, 70 N. W. 68, 70. In that case it was said by the court: "The act in question does not go upon the theory that the victim of such addiction is helpless and destitute and hence the subject of public charity. It does treat such addiction as ¹²⁵ a 'disease,' but it does not treat it as a contagious or infectious disease, and there is no allegation or claim that it is a contagious or infectious disease. The question recurs whether any county may be compelled to pay any private party for treatment, medicines and board of any resident therein having a disease not contagious or infectious, merely because such diseased person 'has not the means to pay for said treatment.' If a county may be compelled to make such payment for such treatment, medicines, and board of a person having such a disease, then it logically follows that every county may be compelled to pay private parties for treatment, medicines and board of any person having any disease, though not contagious or infectious, provided the victim has not the present means of making such payment himself. We are clearly of the opinion that no such power exists."

The following cases are there cited, in which this court had previously held that the legislature had no power to compel or authorize a municipality to raise money by taxation for a purely private purpose: *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *Whiting v. Sheboygan etc. R. R. Co.*, 25 Wis. 181, 3 Am. Rep. 30; *State v. Tappan*, 29 Wis. 664, 684, 9 Am. Rep. 622; *Attorney General v. Eau Claire*, 37 Wis. 436. From this last case this quotation was made in the *Keeley* case from the opinion of the court by Chief Justice Ryan: "Taxation is the absolute conversion of private property to public use. And its validity rests on the use. In legislative grants of the power to municipal corporation, the public use must appear. . . . The legislature can delegate the power to tax to municipal corporations for public purposes only; and the validity of the delegation rests on the public purpose. Were this otherwise, as was said at the bar, municipal taxation might well become municipal plunder."

Thus, it appears that chapter 203 was declared to be unconstitutional upon the express ground that it compelled any county to pay out of the public moneys of the county, to a private party for a purely private purpose, a sum not exceeding one hundred

and thirty dollars for every inebriate found therein and treated upon the order and certificate of the county judge thereof, as prescribed in ¹³⁶ the act. The case was distinguished in the later case of *Wisconsin Ind. School v. Clark Co.*, 103 Wis. 651, 666, 667, 79 N. W. 422, 427, but it was there said by my brother Marshall: "No 'public purpose', within any reasonable scope of the term, was discovered in the Keeley law. That was why it met the fate of legislation going beyond the boundaries of constitutional limitations. True, stress was put on the feature that the services of caring for the committed persons were performed by private agencies for private gain. But it was not decided that such feature alone was fatal to the law. The combination of it with the purely private service rendered showed that the entire scheme was private. . . . Stress was laid on the fact that, in order to enable a person to enjoy the benefits of the act, it was not requisite that he should be without means of paying therefor. Destitution as to present means—money in hand, as it were, to make such payment—was all that was required. It was thus demonstrated that there was an absolute absence of any public purpose whatever covered by the law."

In a still later case it was held by this court: "Neither the county board nor any county officer has any authority, under our statutes, to incur any liability for medical treatment of a pauper to cure him of inebriety as a disease. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers": *Putney Bros. Co. v. Milwaukee Co.*, 108 Wis. 554, 556, 557, 84 N. W. 822, 823.

In that case the inebriate was committed under chapter 203 of the Laws of 1895, and, following *Wisconsin etc. Co. v. Milwaukee Co.*, 95 Wis. 153, 60 Am. St. Rep. 105, 70 N. W. 68, it was held "that no liability arose by reason of the commitment"; but it was there contended "that it was the duty of the county to relieve and care for" the victim, "under section 1517 of the Statutes of 1898, and when the task had been performed by a private person, . . . the county" should be held "liable if its officers knew of the facts and made no objection, and the pauper had been restored to health." In the opinion of the court by my brother Winslow it is said: ¹³⁷ "The doctrine here invoked is that of ratification or estoppel. . . . The claim here is not for ordinary relief or care, but for the medical treatment of a pauper for what is termed 'inebriety,' his board being simply a minor incident of the treatment. Neither the county

board nor any county officer has authority under any specific statute to contract with a private person or corporation for such treatment, and entail a liability therefor upon the county. Inebriates may, indeed, be received into county asylums under certain restrictions, . . . and may be committed to a county poorhouse, . . . and the county become liable for their care in whole or in part, but the statutes seem to go no further."

Then, after stating that the legislature had "provided certain methods whereby inebriates and habitual drunkards" might be dealt with, and thereby excluded other methods it was further said: "There was, therefore, no authority resting in any officer or public body to incur the liability here claimed in the first instance. Such being the case, there can be no ratification by the county. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers": See, also, *Juneau Co. v. Wood Co.*, 109 Wis. 330, 333, 334, 85 N. W. 387.

Having thus held that chapter 203 of the Laws of 1895 was unconstitutional and void on the ground that the legislature had no power to compel a county to give away its public funds to private parties for purely private purposes, the question recurs whether the legislature has power to give away the public funds of the state to private parties for the same private purpose by the enactment of chapter 468 of the Laws of 1901.

The act, in terms, appropriates thirty thousand dollars "for the purpose of paying all innocent purchasers of county orders issued under an invalid law known as chapter 203 of the Laws of 1895, by different county judges of the state of Wisconsin which are yet unpaid and which were purchased prior to the date of the decision of the supreme court of the state of Wisconsin holding said act [Laws 1895, c. 203] unconstitutional." ¹³⁸ It appears from the relation that claims which arose under the act, and prior to the decision mentioned—a period of twenty-one and one-half months—had been filed, proved and audited to the amount of forty-nine thousand six hundred and fifty-eight dollars and forty-four cents. The facts stated sufficiently suggest the importance of that decision without any speculation as to what would have been the effect upon the taxpayers of the several counties in the state, had the court held chapter 203 of the Laws of 1895 to be valid instead of being unconstitutional and void. The gravity of the case at bar would seem to be of far greater importance, because more far-reaching in its appli-

cation. Counsel for the relator contend that "there is nothing in the constitution providing that the legislature may make appropriations only for public purposes." And then, after admitting "that there are several specific limitations on the power of the legislature to appropriate money," counsel assert that that is "no general limitation confining appropriations either to public purposes or legal obligations of the state." Counsel seemingly realize that it is essential to maintain these propositions in order to maintain this action. If these propositions are sound, then Chief Justice Ryan was in grave error when he made the statement above quoted, from his opinion in the *Eau Claire* case cited. If such propositions are sound, then Chief Justice Dixon was wrong in declaring, as he did:

"The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute": *Brodhead v. Milwaukee*, 19 Wis. 652, 88 Am. Dec. 711. See, also, cases cited from the supreme court of Pennsylvania in *State ex rel. New Richmond v. Davidson*, 114 Wis. 576, 90 N. W. 1067.

¹³⁹ Mr. Cooley declares: "It is implied in all definitions of taxation that taxes can be levied for public purposes only": *Cooley on Taxation*, 2d ed., 103-105. And again: "Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and, as all are alike protected, so all alike should bear the burden in proportion to the interests secured": *Cooley's Constitutional Limitations*, 6th ed., 608.

Mr. Dillon states the rule thus: "It may be regarded as a settled doctrine of American law that no tax can be authorized by the legislature for any purpose which is essentially private, or, to state the proposition in other words, for any but public purposes": 1 *Dillon on Municipal Corporations*, 4th ed., sec. 508. And again: "We may readily conceive of acts of the legislature demanding sacrifices which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the constitution should be infringed": 2 *Dillon on Municipal*

Corporations, 4th ed., sec. 737. And again: "There can be no legitimate taxation to raise money unless it be destined for the uses or benefit of the government, or some of its municipalities or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of a tax": 2 Dillon on Municipal Corporations, 4th ed., sec. 736.

In *State ex rel. New Richmond v. Davidson*, 114 Wis. 574, 90 N. W. 1067, numerous cases are cited from this and other courts to the effect "that the taxing power of the state can only be exercised for some object of public or common interest." It is there said: "These adjudications, and many others which might be cited, seem to be based upon the broad ground that from the very nature of our state government there is running through our constitution an implied prohibition against forcing our citizens, by way of taxation, to contribute to any mere private purpose or enterprise, and that the determination of the legislature upon the subject is not absolutely conclusive upon the courts."

¹⁴⁰ If the contention of counsel referred to is correct, then the decision of this court in that case is all wrong, and ought to be overruled. If the decision is right, then the contention of counsel, in the particular mentioned, is without foundation. The appropriation for the relief from the terrible calamity caused by the cyclone which struck New Richmond June 12, 1899, was sustained only on the ground that the object of the appropriation was public, and such as to subserve the common interest and well-being of the people of the state at large. In that case it was virtually conceded that the object of the appropriation was public. In considering whether the appropriation was repugnant to that clause of the constitution which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe" (Const., art. 8, sec. 1), it was said: "If the object of the appropriation in question was purely local to the city of New Richmond, then the rule of uniformity would require the tax to supply the same to be limited to that municipality. If, however, the contribution was to subserve the common interest and well-being of the people of the state, then the appropriation was legitimate": *State ex rel. New Richmond v. Davidson*, 114 Wis. 578, 90 N. W. 1067; citing *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622, and *Lund v. Chippewa Co.*, 93 Wis. 647, 67 N. W. 927.

In this last case it was said: "This provision manifestly requires such uniformity, in case of a state tax, to extend throughout the state; in case of a county tax, to extend throughout the county; in case of a city tax, to extend throughout the city; and, in case of a town tax, to extend throughout the town. In other words, the rule of uniformity is not broken merely because a town or city or county raises a special tax for local purposes."

To come within the rule of uniformity, as thus defined, it is necessary, not only that the object of the appropriation in question should be public, but also that it should subserve the common interest and well-being of the people of the state.

¹⁴¹ There is another clause of the constitution, which declares: "The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year": Const., art. 8, sec. 5.

Special stress was placed upon that provision in the New Richmond case, 114 Wis. 578, 96 N. W. 1067. It was there said: "To that language must be applied the well-known maxim, 'Expressio unius est exclusio alterius.' That construction limits such annual tax to an amount sufficient to defray such estimated expenses. . . . State taxes are thus only authorized to pay state expenses, or such expenditures as are authorized by the constitution."

The only reference to that provision of the constitution in the brief of counsel is in stating that that and other sections therein referred to "place limits on the power of the legislature to contract debts"; and from that we are asked to infer that the legislature is at liberty to give away the public moneys for objects concerning which it has no power to contract debts. While the provision quoted, like most of the provisions of the constitution, is affirmative in form, yet the manifest purpose is to limit the annual tax to an amount "sufficient to defray the estimated expenses of the state for each year." As held in the New Richmond case, in order for an appropriation to be valid, it must be for a public purpose, and such as subserves the common interest and well-being of the people of the state. The act in question does neither. It was solemnly adjudged that chapter 203 of the Laws of 1895 was for the sole benefit of private parties

and for private purposes. Counsel invoke the rule stated by Chief Justice Dixon, and quoted approvingly in the *New Richmond* ¹⁴² case wherein it is said: "Claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax": *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Cooley on Taxation*, 127, 128; *State ex rel. New Richmond v. Davidson*, 114 Wis. 579, 90 N. W. 1067. That language was used with reference to the validity of an act of the legislature empowering the qualified electors of each town, city or incorporated village to raise by tax, money to pay bounties to volunteers who might enlist therefrom. The moral obligation of such municipality to pay such bounties to such volunteers was strong, and rested upon the parties required to pay, and was for an object confessedly public; and yet in that case it was expressly held: "The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. . . . The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute."

There was no intention, in the language quoted, to justify a tax for every claim which one private party may have against another private party, though "founded in equity and justice . . . or in gratitude or charity." Here, numerous private persons were treated, under chapter 203 of the Laws of 1895, for a disease, by certain private individuals or corporations, under the supposition that the respective counties where the inebriates lived would pay for such treatment an amount not exceeding one hundred and thirty dollars each. The court held the act to be void and the county under no obligation to pay such private party for such private purpose. The only change in the situation is that such void claims have been transferred by such private parties to innocent purchasers." Wherein they are any more innocent than the persons or corporations furnishing the treatment it is difficult to perceive. Certainly, such transfer did not change the private purpose into a public ¹⁴³ purpose—much less did it make the claim which one private party had against another private party a claim founded in equity and justice, or in gratitude or charity, against the whole state. By chapter 203 the legislature only attempted to create claims against the counties. Notwithstanding the transfer, the claim still remains a private claim, founded upon a

private transaction. The appropriation is less than the amount of the aggregate claims; but by its terms each claimant is to have a pro rata share. It is essentially an appropriation from the general fund to pay numerous private claims growing out of private transactions. All taxpayers of the state are interested in preserving the funds of the state from illegal diversion or spoliation: *State ex rel. Raymer v. Cunningham*, 82 Wis. 39, 51 N. W. 1133.

If the decisions of this court are to be followed, and have the significance above ascribed to them, then there would seem to be no escape from a condemnation of the enactment in question. Counsel for the relator seem to rely with great confidence upon the decision in *United States v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. Rep. 1120, where a claim was made for sugar bounty, under an act of March 2, 1895 (28 U. S. Stats. at Large, 933), appropriating money to certain persons who had incurred expense in the production of sugar on the faith and credit of certain acts of Congress passed five years before, the constitutionality of which had been questioned and the acts afterward repealed. The court held: "It is within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the government."

It will be observed that the court had expressly declined to determine whether such prior acts of Congress were valid ¹⁴⁴ or not; and that question never was determined: *United States v. Realty Co.*, 163 U. S. 433, 16 Sup. Ct. Rep. 1120; citing *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495. If they were unconstitutional, it was simply because Congress had exceeded its powers upon a subject rightfully delegated to it. The opinion of the court in that case refers to no state adjudication, except *Town of Guilford v. Chenango Co.*, 13 N. Y. 143, 146, 149, 163 U. S. 443, 16 Sup. Ct. Rep. 1120. That case involved the validity of an act of the legislature requiring the town to reimburse its officers for moneys expended by them in fruitless litigation. The court decided that the constitution contained no clause prohibiting such an enactment. On the contrary, both opinions refer to the provisions of the constitution, then in force, regulating the

method of passing such enactments, and, among others, one which declared that: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes": N. Y. Const. 1846, art. 1, sec. 9. And one of the opinions states that such provisions were "not limitations of the absolute power of the legislature over the public moneys, or of the like power in the imposition of taxes, but rules prescribing the manner of its exercise." And Judge Denio said: "There is no question but that this law received the requisite vote." In a later case in New York, this case was distinguished and limited, and the court held:

"The legislative power of taxation, at least as regards the purposes for which it is to be exercised, is not without limit, and it is within the province of the courts to examine and to determine whether, in a particular case, the extreme boundary of legislative power has been reached and passed. It must be made quite clear, however, that the legislature has erred before the court can interfere with its action. The legislature has not power to authorize a municipal corporation to issue its obligations for the purpose of raising money wherewith to pay a subscription of said corporation to the capital stock of a private corporation, and to provide for the ¹⁴⁵ payment of such obligations by taxation. It has not power to tax for private purposes solely": *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586.

Such distinctions are not referred to in the opinion of the court in *United States v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. Rep. 1120, notwithstanding the learned justice who wrote it had long been an honored member of the court of appeals of New York. Probably he deemed such distinctions immaterial to the decision of the case then in hand. Assuming that the decision in that case goes to the extent claimed for it by counsel, and with great respect for the court from which it emanates, yet, in view of the provisions of our own constitution, and the decisions cited, and the general trend of authority in this country, we should be unwilling to follow it.

By the Court. The motion to quash the alternative writ of mandamus is granted, and the relation is dismissed.

Mr. Justice Bardeen was present at the hearing of this case, and participated and concurred in the decision thereof, which was made December 30, 1902.

Winslow and Dodge, JJ., dissent.

A motion for a rehearing was denied May 29, 1903, Siebecker, J., taking no part.

A Tax can be Levied for public purposes only, and never for private objects or purposes: State v. Switzler, 143 Mo. 287, 65 Am. St. Rep. 653, 45 S. W. 245. But it is held that the legislature may impose a tax for the payment of claims not strictly legal, but founded in justice and equity in the largest sense of those terms: See the monographic notes to New Orleans v. Telephone etc. Co., 8 Am. St. Rep. 511; Zigler v. Menges, 16 Am. St. Rep. 369. Taxes to provide for free scholarships have been pronounced invalid: State v. Switzler, 143 Mo. 287, 65 Am. St. Rep. 653, 45 S. W. 245; so have taxes to provide for interstate expositions: State v. Cornell, 53 Neb. 556, 68 Am. St. Rep. 629, 74 N. W. 59; Hayes v. Douglas County, 92 Wis. 429, 53 Am. St. Rep. 926, 65 N. W. 482. For other objects not warranting the imposition of taxes, see the note to Zigler v. Menges, 16 Am. St. Rep. 365-371.

An Appropriation of Public Money for pensions to persons who had been employes of a city is held unlawful in Matter of Mahon v. Board of Education, 171 N. Y. 263, 89 Am. St. Rep. 810, 63 N. E. 1107; and payments to drafted men by taxation is pronounced unlawful in Bush v. Board of Supervisors, 159 N. Y. 212, 70 Am. St. Rep. 538, 53 N. E. 1121. A state legislature cannot, according to Bourn v. Hart, 93 Cal. 321, 27 Am. St. Rep. 203, 28 Pac. 951, make an appropriation to indemnify a public servant for injuries sustained; nor, according to Conlin v. Board of Supervisors, 99 Cal. 17, 37 Am. St. Rep. 17, 33 Pac. 753, direct a municipality to pay a street contractor a certain sum where he has done work for which he is unable to obtain compensation because of errors and irregularities of the municipal officers. As to the allowance of a claim for damages for a wrongful conviction and imprisonment, see Allen v. Board of Auditors, 122 Mich. 324, 80 Am. St. Rep. 573, 81 N. W. 113. A statute providing for the payment of sugar bounties is declared unconstitutional in Michigan Sugar Co. v. Auditor General, 124 Mich. 674, 83 Am. St. Rep. 354, 83 N. W. 625; and in Northern Trust Co. v. Snyder, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460, it is held that a county cannot pay the expenses of a public officer rendered beyond the confines of the state.

If, Under a Statute Afterward Declared Unconstitutional, public officers offer bounties for animal scalps and issue county warrants in payment therefor, a subsequent statute legalizing such warrants and directing them to be paid out of general county funds is held void: Felix v. Board of Commissioners, 62 Kan. 832, 84 Am. St. Rep. 424, 62 Pac. 667.

SCHNEIDER v. CITY OF MENASHA.

[118 Wis. 298, 95 N. W. 94.]

CORPORATIONS—Contracts Ultra Vires.—The doctrine that respecting an executed contract, only the state can invoke the doctrine of ultra vires to challenge the right of a corporation to exercise power beyond the scope of its charter, is applied quite generally to private corporations but not to public corporations, such as municipalities. (p. 997.)

MUNICIPAL CORPORATIONS—Power to Purchase and Use Outside Lands.—A city having express authority to improve its streets and to purchase such real estate as is reasonably necessary or convenient for the city's use, has power to purchase real estate outside its corporate limits convenient for use in obtaining a supply of crushed rock to be used upon the city streets. (p. 997.)

MUNICIPAL CORPORATIONS—Power Outside of Limits.—Under general charter powers a city may do business outside its boundaries so far as is reasonably necessary to carry out the express powers granted to it. (p. 998.)

MUNICIPAL CORPORATIONS—Purchase of Outside Lands—Business Purposes—Governmental Power.—A municipal corporation may take and hold land convenient and accessible for its business use and purposes, although such land lies outside its corporate limits, and its charter confers no express authority to own land outside its limits. But the city cannot exercise its sovereignty over it, though it can exercise all the rights and powers pertaining to ownership. (p. 1000.)

MUNICIPAL CORPORATIONS—Powers.—A municipality has no right to exercise sovereign or governmental authority over property owned by it and acquired for business purposes outside its corporate limits. (p. 1000.)

MUNICIPAL CORPORATIONS—Power to Purchase Outside Lands—Remoteness of Property.—In determining whether corporate authority has been exceeded in purchasing outside lands for business purposes by reason of the distance from the city limits the act in question reaches, that question must be solved by an appeal to reason, keeping in mind that municipalities in business matters are governed by very much the same rules as private corporations, and are to be given a wide range without being held guilty of an abuse of power. If, however, the agents of the city go so far from its boundary to obtain land for its use that the element of convenience is no longer apparent, there is such an abuse of authority as to render the act void. (p. 1001.)

J. C. Kerwin, for the appellant.

Bouck & Hilton and J. M. Pleasants, for the respondents.

300 MARSHALL, J. Respondents urge in support of the order appealed from the doctrine that, respecting an executed contract, only the state can invoke the doctrine of ultra vires to challenge the right of a corporation to exercise power beyond

the scope of its charter. That doctrine is applied quite generally to private corporations. It is not, however, to public corporations. The numerous cases decided by this court, establishing the right of taxpayers to intervene to prevent the ³⁰¹ unlawful disposition of public money or to compel its restoration, clearly indicates that: *Webster v. Douglas Co.*, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885, 78 N. W. 451; *Northern etc. Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460. It is deemed so unsafe to allow the officers of a municipality to bind it beyond the scope of its powers, that all persons are held firmly to the rule that, in dealing with such a corporation, they are presumed to know the limit of its authority and act at their peril. The result is that no one can successfully plead ignorance to save himself from loss in dealing with a municipality as to matters expressly prohibited, nor as to any matter beyond the scope of corporate authority except in case his money or property has actually been used for legitimate corporate purposes. In that event, on equitable grounds, the court will afford a remedy to the extent of the corporate benefit, but no further: *Thomson v. Elton*, 109 Wis. 589, 85 N. W. 425; *Beach on Public Corporations*, sec. 219.

Counsel for appellant bring to our attention a number of authorities to sustain the contention that a city cannot purchase real estate outside of its corporate limits, but none that seems to really touch the precise question here presented, which is this: Can a city, under its general power to "purchase and hold real estate sufficient for the public use, convenience or necessities" (charter of Menasha—*Laws 1891, c. 123, subc. 15, sec. 4*), purchase real estate outside of its corporate limits convenient for use in obtaining a supply of crushed rock to be used upon the city streets?

The city of Menasha had express authority to improve its streets. It had express authority to purchase such real estate as it deemed reasonably necessary or convenient for the city's use. It possessed, by implication, all the powers reasonably necessary to the proper exercise of such express powers, and those essential to the objects and purpose of its corporate existence: *Trester v. Sheboygan*, 87 Wis. 496, 58 N. W. 747. The acquirement of a supply of crushed rock for use upon ³⁰² the city streets was a legitimate city purpose. That is conceded. It must be conceded, also, that to obtain such supply by the purchase of real estate and manufacturing the crushed

rock therefrom within the city limits would be a legitimate exercise of corporate power. Would an act which does not involve the exercise of sovereign authority—one in the exercise of the ordinary business functions of a city inside the city limits—cease to be such if performed just over the boundary line or within a convenient distance from the city?

The language of the charter is general. Looking at the literal sense thereof, the city may do business outside its boundaries so far as reasonably necessary to carry out the express powers granted to it, as well as within. It is admitted that a city may own realty outside its limits for purposes which are essential to its welfare, as for a cemetery or post-house. On that 2 Dillon on Municipal Corporations, fourth edition, sec. 565, is cited. Judge Dillon, as we shall see later, some time after the text of his work was written, successfully maintained much broader authority for cities. Counsel suggests that if the city can go outside its boundaries for a stone quarry because the corporation needs crushed rock for use upon its streets, it can go to any distance therefor, and that if it can go into the rock-crushing business, it can also go into the business of building rock-crushers. That argument, though plausible, lacks the merit of novelty, as will hereafter be seen. As an authority peculiarly in point, we are referred to *Duncan v. Lynchburg* (Va.), 34 S. E. 964, decided in the supreme court of appeals of Virginia. At first glance the case seems to strongly support counsel's side of the controversy, but upon a careful study thereof it appears that the powers of the charter of Lynchburg were much less liberal than those of the respondent city. Moreover, we find that the authorities cited do not support the extreme views of the Virginia court. The Lynchburg charter only authorized the purchase of property necessary for city purposes. The charter ³⁰³ before us authorizes the purchase of property necessary or convenient for such purposes. The authorities cited by the Virginia court, in the main, bear on the question of exercising governmental powers outside the city. Those that touch on mere rights of ownership support a view rather contrary to the decision of the court. For example, *Riley v. Rochester*, 9 N. Y. 64, is referred to. The learned counsel here rely upon that and similar cases. The New York court expressly declined to hold that a city cannot take title to realty outside its limits for any purpose. It held that it cannot do so for the purpose of exercising

governmental authority over the same. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601, was cited by the Virginia court and is also relied upon here. That holds that a city may own public works outside its boundaries by implied authority under some circumstances.

The rule that a city cannot exercise its governmental authority outside its limits has nothing to do with the case in hand. This court held that it cannot exercise such authority in *Becker v. La Crosse*, 99 Wis. 414, 67 Am. St. Rep. 874, 75 N. W. 84. It at the same time recognized that a city may exercise its mere right to own and use property for legitimate city purposes outside its boundaries. That is very decisively maintained in the following cases, which seem to fully cover the case in hand, so far as decisions in another jurisdiction can do so: *People v. Kelly*, 76 N. Y. 475; *Matter of Application of Mayor, etc.*, 99 N. Y. 569, 2 N. E. 642; *Lester v. Jackson*, 69 Miss. 887, 11 South. 114. In the second case cited Judge Dillon appeared for the city of New York and prevailed in the contention that the city possessed power to purchase land outside the city for a park. It was suggested to the court by the opposition, as an indication of the absurdity of that doctrine, that if land outside a city can be held for a park, it can acquire property regardless of distance; that if the city of New York can purchase land three miles from its limits, it can go to the Falls of Niagara or to the Adirondack ³⁰⁴ mountains, and can also build and operate a railroad to the premises acquired; and when its right in the matter is challenged, defend upon the plea of city purpose and implied power to subserve the same. That argument was taken seriously by the court and considered, with the result, based upon reason and authority, that a general grant of power as regards those matters which do not involve governmental functions, cannot be fenced about by corporate limits; that what constitutes a city purpose within such limits does not change merely by passing beyond the same. This language was used: "The truth is that neither in authority, nor in the legislative practice, nor in the common sense of the question is there any basis for declaring that there can be no true and sound municipal purpose which reaches beyond the corporate lines."

The undoubted right to purchase a water supply outside the city was suggested, and the instance was pointed to of New York going for such purpose to a distance of forty miles

from the city and expending millions of dollars in that regard. After disposing of the primary question of whether all city purposes end at the corporate limits going outward, and commence at such limits coming inward, the court took up the idea of distance suggested by the illustration given by counsel, and held that power in that regard is limited by the very nature of it; that so long as, considering the end in view, the range of reasonable convenience and adaptation to the exercise of the express power is not overstepped, municipal authority is not exceeded; that when an extreme action shall have been taken, so as to impress the impartial mind of some ulterior purpose, it is time to pause if not to turn backward. That doctrine was indorsed in *Lester v. City of Jackson*, 69 Miss. 887, 11 South. 114, which was another case of buying land beyond the city limits for a park. The language of the court, in substance, was this: A municipal corporation may take and hold land convenient and accessible for a park, although it lies outside the corporate limits, and the charter confers no express authority ~~305~~ to own land outside; the city cannot exercise its sovereignty over it, but it can exercise all the rights and powers pertaining to ownership.

It would not be profitable to examine at length the numerous cases called to our attention by appellant's counsel to support his view. It seems sufficient to say that, in the main, they hold that municipal authority in a governmental sense cannot be exercised outside the limits of the municipality. That is in harmony with the decision of this court, as we have seen. It is also in harmony with the view that municipal ownership may reach beyond corporate limits, as held in the cases to which we have referred. When one draws the distinction between mere right to own property for city purposes and the right to exercise sovereign authority over property, the authorities upon which this case was grounded are easily seen not to warrant the result sought.

In testing the question of whether a municipality has exceeded its corporate authority in going outside its boundaries in any given case, we must first determine the purpose in view. If that be found to be the exercise of police authority, or authority to govern in any sense, the conclusion must be that the end does not justify the act. If it be found to be the mere exercise of a business function, the conclusion must be that the mere act of going beyond the boundary does not

necessarily involve excess of power. In determining whether corporate authority has been exceeded by reason of distance from the city limits the act in question reaches, we must solve that by an appeal to reason and common sense, keeping in mind that municipal corporations, in their business matters, are governed by very much the same rules as private corporations: *Washburn Co. v. Thompson*, 99 Wis. 585, 75 N. W. 309. It comes down in each case to the exercise of mere human judgment. That being the case, there must necessarily be a wide range within which municipal officers, acting in good faith, may go, and not be guilty of such an abuse of ~~and~~ power as to render their acts, as acts of the city, void. As suggested in the New York case, they may go to the point where to go further would indicate some ulterior motive—indicate that a legitimate city purpose was no longer in view. That would be true whether the act done were performed within or without the corporate limits. Manifestly, in purchasing real estate for the convenience of a city, the element of convenience will enter into the matter, whether the purchase be made on one side or the other of the boundary line of the corporation. If the agents of the city should go so far from its boundary to obtain land for its use that the element of convenience would be no longer apparent, there would undoubtedly be such an abuse of authority as to render the act void. There is nothing of the kind in this case. It is not questioned, as we understand it, that municipal authority was not exceeded if power existed to purchase land for the purpose of obtaining a supply of crushed rock for use upon the city streets, beyond the city limits, at all. It follows, therefore, that the order appealed from must be affirmed.

By the Court. Order affirmed.

A Municipal Corporation cannot, as a general rule, purchase and hold real estate beyond its territorial limits, or lawfully perform any act beyond such limits, unless power to do so is expressly given by the legislature. This doctrine, however, does not extend to the construction of drains and sewers, or to the acquisition of land for that purpose: *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 486; *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, 44 Pac. 358; *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

STATE v. WEST.

[118 Wis. 469, 95 N. W. 521.]

WITNESSES—Husband and Wife.—The rule that neither husband nor wife can testify for or against the other is confined to cases where the testimony, if given, would be by one directly for or against the other, such other being a party to the litigation. (p. 1003.)

WITNESSES—Husband and Wife—Adultery.—If a person is separately charged with adultery committed jointly by him with another's wife, the husband of the latter is competent to testify as to his marriage, and generally as regards the alleged offense. (p. 1004.)

Indictment and prosecution against one West for adultery committed jointly with one Irene Foreman. Separate indictments were filed against each of them. On the trial of West, the husband of the said Irene, was permitted to testify against objection, as to the marriage between himself and the said Irene, and generally in relation to the alleged offense. The only question submitted to the supreme court was as to the admissibility of such testimony.

L. M. Sturdevant, attorney general, and L. H. Bancroft, first assistant attorney general, for the state.

R. F. Kountz, for the defendant.

⁴⁷⁰ MARSHALL, J. The rule is familiar that husband and wife cannot be witnesses for or against each other. Does that rule apply to the question in respect to which a decision is desired? ⁴⁷¹ Restating the court's question in a proper form, to the end that it may be answered affirmatively or negatively, it is this: Is the rule that neither husband nor wife can testify for or against the other confined to where the testimony, if given, would be by one directly for or against the other, such other being a party to the litigation? It must be conceded that there is authority both ways in respect thereto, but it seems, as claimed by the attorney general, that this court, in *State v. Dudley*, 7 Wis. 664, adopted the affirmative for this state. True, there is a difference between the manner in which the question was submitted there and here. Here is the former question: "Was the witness, John W. Winders, the divorced husband, competent to prove his marriage with his divorced wife, Mary Adaline Winders?" While that question was limited by two circumstances—1.

The witness and his wife were divorced between the time of trial and the alleged commission of the offense; and 2. He was a witness merely of the fact of marriage—nevertheless the affirmative of the question was maintained as not falling within the general common-law rule, and the court considered and decided it from that standpoint, apparently not deeming material the circumstances distinguishing it from the one we have here. That is evident not only from the reasoning of the opinion, but from the authorities cited. In none of such authorities was the circumstances of a divorce present. In the cases cited as conflicting with the decision of the court are such as *State v. Welch*, 26 Me. 30, 45 Am. Dec. 94, where the proposition was whether, on the prosecution of a man for adultery, the husband of the woman was competent to testify against him as to the fact of adultery, the decision being in the negative.

Whether the view which this court thus early took of the law is the better one we need not here discuss, nor whether it is supported by the greater weight of authority. Statements can be found in text-books both ways. Certain it is that many ⁴⁷² courts are in full harmony with this court on the subject. *Campbell v. State*, 133 Ala. 158, 32 South. 635, cited by the attorney general, is an instance of that. There it is said, in effect, that the law is well settled that a husband may testify on the trial of a party separately charged with being guilty of an offense committed jointly by him with the witness' wife, subject to the rule as to confidential communications between husband and wife. Such communications are obviously covered by a rule which applies regardless of whether the evidence relates to a person on trial or not, both at common law and under the statute: Stats. 1898, sec. 4072. In *Wharton's Criminal Evidence*, section 396, it is said: "The mere fact that the testimony to be given by a wife criminales her husband, or that the testimony of the husband criminales the wife, does not exclude such testimony in prosecutions in which the party so criminated is not a defendant. Yet while such testimony will be admitted, it will not be compelled."

Similar expressions can be found in the works of most text-writers. In 1 *Encyclopedia of Evidence*, 633, it is said: "Where the paramour is on trial the authorities are in conflict as to the admissibility of testimony of the husband or wife, the weight of authority holding it incompetent."

An examination of the authorities cited, however, leaves one in doubt as to the correctness of the author's view. It would require much time for a full review of the subject. We will not attempt it, since it appears, as before indicated, that the court's question, as we have restated it must be answered in the affirmative in harmony with the previous decision rendered here.

By the Court. The question submitted, as construed and restated, is answered in the affirmative.

For Authorities upon the question passed upon in the principal case, see the note to *State v. Boyd*, 27 Am. Dec. 379; *De Meli v. De Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996; *Crawford v. State*, 98 Wis. 623, 67 Am. St. Rep. 829, 74 N. W. 537; *Hanselman v. Dovel*, 102 Mich. 505, 60 N. W. 978, 47 Am. St. Rep. 557, and cases cited in the cross-reference note thereto.

OPITZ v. KAREL

[118 Wis. 527, 95 N. W. 948.]

GIFTS.—To Consummate Gifts Inter Vivos, there must be an absolute delivery of the subject matter thereof by the donors, with an intention to part with their interest in and dominion over the property sought to be transferred. (p. 1005.)

GIFTS.—Delivery.—The essential requirement in cases of gifts is that such a delivery shall be made as the nature of the subject sought to be bestowed reasonably admits of. (p. 1005.)

GIFTS.—Delivery of an Instrument making an appropriation of a fund is a symbolical delivery of the fund, and the gift becomes thereby executed and completed, vesting title in the person to whom such delivery is made. (p. 1006.)

INSURANCE, LIFE.—Gift of Policy.—If a life insurance policy, payable to the personal representatives of the insured, merely provides that if assigned, the assignment must be in writing, and that the company shall not be required to notice such assignment until the original or a duplicate thereof is filed in the home office, the company assuming no responsibility for its validity, such policy may be the subject of a parol gift inter vivos, without notice to the insurance company and to the exclusion of the beneficiaries named in the policy. (p. 1009.)

INSURANCE, LIFE.—Gift of Policy.—If an insured has power to transfer the policy on his life under the law and the terms of the contract, he may dispose of it by gift, and when such transfer meets the requirements of the law relating to gifts the title to the fund at its maturity is vested in the donee. (p. 1009.)

INSURANCE, LIFE—Gift of Policy.—When a gift of a life insurance policy is consummated, the donee's rights and interests become absolute, and all possibility of a devolution of benefits under the policy to the personal representatives of the insured named in the policy as beneficiaries is at an end. (p. 1010.)

INSURANCE—Insurable Interest.—A woman has an insurable interest in the life of the man whom she is under contract to marry. (p. 1010.)

INSURANCE, LIFE—Waiver of Objection to Transfer.—If an insurance company has paid the proceeds of a life policy into court for the lawful owner, it has waived any objection it might have to any transfer of the policy by the insured in his lifetime, and such objection is not available to the personal representative of the deceased or other person interested in his estate. (pp. 1010, 1011.)

INSURANCE, LIFE—Action to Recover—Judgment.—If, the donee of a life insurance policy brings an action against the personal representative of the insured named as beneficiary to recover the fund, and there is nothing to show that such representative is guilty of bad faith in defending the action, a personal judgment against him for interest, costs, and disbursements in the action is error. These must be paid out of the estate. (p. 1011.)

Cummings, Hayes & Thiel, for the appellant.

J. H. Stover, for the respondent.

529 **SIEBECKER, J.** The facts in this case present the question, Could the proceeds of this policy be made the subject of a gift, as claimed by the plaintiff? To consummate a gift inter vivos, there must be an absolute delivery of the subject of the gift by the donor, with an intention to part with his interest in and dominion over the property sought to be transferred. The rule seems well settled that bonds and other negotiable instruments for the payment of money can be transferred by delivery to the intended donee as a gift without a written assignment. The essential requirement in cases of gifts is that such a delivery shall be made as the nature of the subject sought to be bestowed reasonably admits of. Many of the strict requirements to the transfer of property by gift, indicated by the earlier cases, have been removed or relaxed to give a freer exercise to such a disposition of property. This modification of the law applies to what may be the subject of a gift, as well as the manner of executing it. In the case of *Crook v. First Nat. Bank*, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. 1131, the court adopts the language of Shaw, C. J., in *Chase v. Redding*, 13 Gray, 418—expressing the rule on the subject of gifts, as follows: "Originally it was limited, with some exactness, to chattels—to some object of value de-

liverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer or to order, and indorsed in blank. Subsequently it has been extended to bonds and other choses in action in writing, represented by a certificate, when the entire equitable interest is assigned."

The court further states: "These cases all go on the assumption that a bond or other security is a valid, subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money by a gift and delivery of the instrument that shows its existence, and affords the means of reducing it to possession": *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. Rep. 415; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Schollmier v. Schoendelen*, 78 Iowa, 426, 16 Am. St. Rep. 455, 43 N. W. 282.

In some jurisdictions, it has been held that certificates of stock in a corporation can be the subject of a valid gift by delivery thereof, though the rules of the corporation prescribing the manner of executing an assignment have not been complied with. The basis of these decisions is that the law recognizes the binding effect of such transfers, as between the parties thereto, though it does not alter the relations which exist between the shareholder and the persons related to him by ⁵³¹ reason of being members of the same company: *Commonwealth v. Compton*, 137 Pa. St. 138, 20 Atl. 417; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663. The suggestion that such an agreement cannot be relied upon, because it rests entirely in parol, is in conflict with the established rules controlling a transfer of property of this nature, where the delivery of the instrument which is the evidence of a subsisting obligation is a symbolical delivery of the property, and operates as a completed transfer of the title as between the parties to the transaction. No particular form or words or written instrument is required by the law to constitute an assignment of this class of property.

"Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as effectual as the most formal instrument. . . . The same is true as to gifts of choses in action, if a delivery, or what in judgment of law amounts to such, takes place": *Crook v. First Nat. Bank*, 83 Wis. 31, 35

Am. St. Rep. 17, 52 N. W. 1131; *Wilson v. Carpenter*, 17 Wis. 516; *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426.

The delivery of the instrument is a symbolical delivery of the fund, and the contract or gift becomes executed and completed, vesting title in the person receiving it.

It is strenuously contended that the rule is firmly established in this state, permitting no transfer of a policy in cases like this, except it be with the consent of the insurance company, and in the manner prescribed by the contract. Some of the recent cases relied upon in support of this proposition refer to change of beneficiaries. In *McGowan v. Supreme Court I. O. F.*, 104 Wis. 173, 80 N. W. 603, the subject of changing beneficiaries by the certificate-holder in a mutual benefit association was fully considered. It is there held that, if the holder of such certificate "wishes to change the beneficiary, he must make the change in the manner required by his policy, and the rules of the association, and that any material deviation from this course will render the attempted ~~632~~ change ineffectual. It is equally well settled that there are cases where literal and exact conformity with the requirements of the policy may be excused." The exceptions are considered and stated in the opinion upon a full review of the case of *Supreme Conclave R. A. v. Cappella*, 41 Fed. 1, and other cases. In the latter case of *Berg v. Damkoehler*, 112 Wis. 587, 88 N. W. 606, the question of changing beneficiaries by the insured in an ordinary life policy was considered, and the court states: "The general rule is that the change in beneficiary must be made in the manner required by the policy. This rule, however, in this state, is subject to several exceptions, one of which is that the insured may dispose of the policy by will to the exclusion of the beneficiary, when he first paid the premiums and kept control of the policy": Citing *Breitung's Estate*, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; *Clark v. Durand*, 12 Wis. 223; *Kerman v. Howard*, 23 Wis. 108; *Strike v. Wisconsin O. F. M. L. Ins. Co.*, 95 Wis. 583, 70 N. W. 819; *Alvord v. Luckenbach*, 106 Wis. 537, 82 N. W. 535.

The right to select a beneficiary, secured either by the contract, or under some provision of the charter or by-laws of the insurer, is in the nature of a power, and must therefore be exercised in compliance with the terms of the contract granting the power, while the right of a holder to transfer a policy on

his own life, and in his possession and control, if not prohibited by its terms, has been upheld as a legal right attached to the contract. This distinction between the right to transfer a policy and to change beneficiaries has at times not been carefully observed in the construction of such contracts. The cases of McGowan v. Supreme Court L. O. F., 104 Wis. 173, 80 N. W. 603, and Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606, present questions of a change of beneficiaries, and the principle applied as ruling those and like cases is in no way limited, modified, or affected by this right to transfer. The facts involved in those cases were in legal effect so unlike those involved in this case that the opinion in neither of those cases can properly be regarded as controlling ⁵³³ this case, nor in conflict with the conclusion we have reached. The recent case of Rawson v. Milwaukee Mut. Life Ins. Co., 115 Wis. 641, 92 N. W. 378, is a pertinent authority on this question. This court in that case states: "In Wisconsin, however, there has existed from early times a principle of the law of life insurance which is unique and at variance with the law in most of the state. This principle is that a person who insures his own life for the benefit of another, and pays the premiums thereon, may (except as limited by statute as to married women) dispose of the policy by will, or in other manner not inconsistent with the terms of the policy, to the exclusion of the beneficiary named therein."

Though the beneficiary in such a policy has vested interest, he can do nothing to prevent the insured, as equitable owner, from revoking such beneficial interest, retain it himself, or vest it elsewhere, when not prevented by the terms of the contract.

Appellant contends that under the contract in question the insured was prohibited from transferring this policy by will or otherwise, except by assignment in writing, and filing the original or a duplicate thereof in the home office of the company. The stipulation is: "If this policy shall be assigned the assignment must be in writing and the company shall not be required to notice the assignment until the original or a duplicate thereof is filed in the home office. The company will not assume any responsibility for the validity of any assignment."

This condition contains no agreement declaring the policy void in case of a transfer not in writing, nor any terms imposing restrictions on the insured to deal with third parties concerning it as his property. The provision, at most, is for the

benefit and protection of the company, which it may assert as against any claimant of the proceeds of the policy, other than the beneficiary named therein. It does not, however, prevent the insured from transferring it as a chose in action. We are unable to find anything in the contract or the condition ⁵³⁴ attached which takes from the insured the right and power to dispose of the policy by any of the methods approved in the law, to the exclusion of the beneficiaries named in the policy. Such a policy is not to be distinguished from ordinary choses in action, and comes within the operation of the legal rules applicable to agreements involving pecuniary obligations. To deprive the policy owner of the right given him by law to dispose of it, we must find clear and binding provisions to that effect. In addition to cases cited from this court, others supporting this doctrine are *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Ireland v. Ireland*, 42 Hun, 212; *Olmstead v. Keyes*, 85 N. Y. 593; *Marcus v. St. Louis M. L. Ins. Co.* 68 N. Y. 625; *Bacon on Benefit Societies*, sec. 298, and cases cited.

The case, then, presents this situation: The deceased procured a policy on his own life for the benefit of his executors, administrators, or assigns, agreeing to pay the premiums, retaining possession and control of it up to the time of the alleged gift to the plaintiff. Under the law of this state, he had the right and power to transfer it in any of the ways provided by the law. It is difficult to perceive why his interest in the policy could not, in law, be held as properly subject to gift as notes, bonds, and certificates. It represents a subsisting obligation while in force, as do these written instruments. It is the evidence of an amount to be paid at a time fixed by the contract, though it may lapse by failure to comply with its terms. This contingency, however, cannot destroy its character as a transferable chose in action while it subsists as a valid obligation. The doctrine is supported by reason and authority. It has been held that the insured, having the power to transfer the policy under the law and the terms of the contract, may dispose of it by gift, and, when such transfer meets the requirements of the law constituting a gift, the title to the fund at its maturity is vested in the donee: *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 ⁵³⁵ Atl. 1060; *Hogue v. Minnesota etc. Co.*, 59 Minn. 39, 60 N. W. 812; *Ireland v. Ireland*, 42 Hun, 212; *Chapman v. McIlwrath*, 77 Mo. 38, 46 Am. Rep. 1; *Marcus v. St. Louis*

etc. Ins. Co., 68 N. Y. 625; Appeal of Madeira (Pa.), 4 Atl. 908; Crittenden v. Phoenix Mut. L. Ins. Co., 41 Mich. 442, 2 N. W. 657; Williams v. Guile, 117 N. Y. 343, 22 N. E. 1071; Thornton on Gifts and Advances, 150, note 1.

The contention that it is not established in the case that the insured made a complete delivery of the policy, and surrendered dominion over it, is not borne out by the facts. It appears he gave plaintiff this policy on the day he received it from the company. She retained possession of it, except that deceased procured it shortly before his death, to have it assigned to her in writing. At the suggestion of the company's local agent postponed such assignment, with intention to do this after his marriage to plaintiff, which was then expected to take place in the near future. On the same day he returned the policy to the plaintiff, who retained and held it up to the time of his death. These facts, coupled with the other circumstances of the case, can leave no doubt that he completely surrendered his dominion over the policy at the time he first delivered it to the plaintiff. We must hold that deceased had the legal right to, and did, make a gift of the policy to the plaintiff, vesting title to the fund in her, and therefore the contingency which would give the personal representatives of the donor any interest in the fund did not arise. When the gift was perfected and consummated, donee's rights and interests became absolute, and all possibility of a devolution of benefits of the policy upon the personal representatives of the insured ceased.

It was agreed that nothing appeared showing that an insurable interest existed between the insured and plaintiff, and therefore all intendments should be presumed against the gift. The following cases sustain the position that an insurable interest exists where one party "has a reasonable right to ^{see} expect some pecuniary advantage from the continuance of the life of the other, or to fear a loss from his death, . . . as in case of a man and woman between whom a contract of marriage exists": Chisholm v. National etc. Ins. Co., 52 Mo. 203, 14 Am. Rep. 414; Taylor v. Travelers' Ins. Co., 15 Tex. Civ. App. 251. 39 S. W. 185, 53 L. R. A. 825, note.

The company has paid the proceeds of the policy into the court for the lawful owner. By this act it has waived any objection it might have made to any transfer of the policy by the insured during his lifetime. Any objections to a transfer of this policy which this company might have made under this

condition are not available to the defendant, as the personal representative of the deceased, nor any other person interested in his estate. The gift of the policy to the plaintiff made her the owner of the proceeds. We must hold that the judgment properly awarded her the amount due on the policy.

The court awarded judgment for interest on the fund for the time the fund was in court, and for costs and disbursements incurred by the plaintiff in the action against the defendant personally. Nothing appears in the record to show that he was guilty of any misconduct or bad faith in defending this action. Under such circumstances, the judgment should have directed such interest and costs and disbursements to be paid out of the estate: *Ladd v. Anderson*, 58 Wis. 591, 17 N. W. 320; *Wiesmann v. Brighton*, 83 Wis. 550, 53 N. W. 911. The judgment of the circuit court is erroneous in this respect.

By the Court. The judgment of the circuit court is modified so as to render judgment for the interest and the costs and disbursements against appellant as administrator of the estate of William Enos, deceased; and, as so modified, the judgment is affirmed. The appellant is awarded costs on this appeal.

A Gift of a Life Insurance Policy may be made without a written assignment: *Hani v. Germania Life Ins. Co.*, 197 Pa. St. 276, 80 Am. St. Rep. 819, 47 Atl. 200. And it is generally considered that actual delivery is not essential to the valid assignment of a policy: *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139. As to what does amount to a delivery, see the monographic note to *Chamberlain v. Butler*, 87 Am. St. Rep. 492-494, on the assignment of life insurance policies. There seems to be a tendency among the modern authorities to adopt more reasonable rules in the matter of delivering the subject of a gift: See *Waite v. Grubbe*, 43 Or. 406, ante, p. 764, 73 Pac. 206.

KINN v. FIRST NATIONAL BANK.

[118 Wis. 537, 95 N. W. 969.]

REWARDS—Definition.—A reward is a recompense or a premium offered by the government or an individual in return for special or extraordinary services to be performed and may be offered in writing or orally, either to a particular person or class of persons, or to any and all persons complying with the terms of the offer. (p. 1012.)

REWARDS—Arrest and Conviction—Right of Claimant.—An offer of a reward for the arrest and conviction of an unknown perpetrator of a crime cannot be taken literally, but the conditions thereof are substantially performed by a person who obtains possession of the facts necessary to secure the arrest and conviction, and gives them to some proper person interested, although he does not himself make the arrest, but this and the prosecution are made by the proper officers. (pp. 1013, 1014.)

REWARDS—Right of Peace Officer to.—Police and other officers may recover the reward offered when the information furnished or the service performed was extraofficial, but cannot recover for an act within the scope of the duties of their offices. (pp. 1015, 1016.)

REWARDS—Right of Officer to.—A sheriff or chief of police acting in reliance upon a general offer of a reward for the capture of a criminal is entitled to the reward if he succeeds in making the capture, having no process in his hands, and is not required by law to make such capture without process. (p. 1016.)

COSTS.—If a bank has offered a reward for the arrest and conviction of a person, and on being sued by one claimant therefor, has paid the amount of the reward into court and procured the other claimants to be interpleaded, such reward must thereafter be deemed the property of the claimants who may ultimately recover, and it is error to adjudge costs in favor of such bank out of the fund deposited in court. (p. 1016.)

Fiedler & Fiedler, for the appellants.

Smelker & Smelker, J. M. Smith and H. Kinne, for the respondents.

§42 CASSODAY, C. J. To appreciate the questions presented, it is important to keep in mind the nature of the action. It is said: "A reward is a recompense or a premium offered by the government or an individual in return for special or extraordinary services to be performed": 21 Am. & Eng. Ency. of Law, 389. Such offer may be made in writing or orally, either to a particular person or class of persons, or to any and all persons complying with its terms: 21 Am. & Eng. Ency. of Law, 391; Reif v. Paige, 55 Wis. 496, 42 Am. Rep. 731, 13 N. W. 473. Of course, "one who offers a reward has the right to prescribe whatever terms he may see fit; and these terms

must be complied with before any contract arises between him and the claimant, though, if the performance substantially corresponds with the terms of the offer, it will generally be sufficient": 21 Am. & Eng. Ency. of Law, 395, 396; *Amis v. Conner*, 43 Ark. 337. Thus it has been held in Massachusetts that an "offer or reward by public advertisement is to be regarded as a conditional promise. Whoever would entitle himself to the reward must prove that he has performed substantially the service proposed in the advertisement, though it need not be performed literally": *Besse v. Dyer*, 9 Allen, 151, 85 Am. Dec. 747. Here the complaint alleges that the reward was offered "for the 'arrest and conviction' of the culprit who had burglarized the" bank. The admission in the answer of the bank is "for the arrest and securing the conviction of the person who had committed said burglary." The respective answers of the other defendants seem to admit that the offer was as alleged in the complaint. The court found that the "bank orally offered a reward of one thousand dollars for the arrest and conviction of the person or persons who had committed the said crime." We assume that the offer was as found by ⁵⁴³ the court. It seems to be well settled that, where "a reward is offered for the arrest and conviction of a criminal, . . . both the arrest and conviction . . . are conditions precedent to a recovery of the reward": 21 Am. & Eng. Ency. of Law, 396, 397; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Furman v. Parke*, 21 N. J. L. 310; *Blain & Kelly v. Pacific Exp. Co.*, 69 Tex. 74, 6 S. W. 679. Of course, it is competent for a party offering a reward to waive strict, or even substantial, conditions of the offer: 21 Am. & Eng. Ency. of Law, 397. Here the bank, when sued, conceded its liability, and paid the money into court, and thereby seems to have admitted that somebody was entitled to the reward. The extent of this admission is simply to the effect that the person who committed the offense had been arrested by some of the claimants and convicted. The important question is, Who, of the several claimants, are entitled to the reward? The action is upon contract. Only such claimants as substantially complied with the terms of the offer are entitled to any portion of the reward. The reward was offered for the arrest and conviction of the offender. What is meant by the terms "arrest and conviction"? This question has recently been answered by the supreme court of Maine in a case where it was held: "An offer of a reward for 'the arrest and conviction' of an

unknown perpetrator of a crime cannot be taken literally, but the conditions thereof are substantially performed by a person who obtains possession of the facts necessary to secure his arrest and conviction, and gives them to some proper person interested, although he does not himself make the arrest, but this and the prosecution are made by the proper officers": *Haskell v. Davidson*, 91 Me. 488, 64 Am. St. Rep. 254, 40 Atl. 330.

In that case the claimants, in pursuance of the offer, made investigation, and discovered facts and circumstances which tended strongly to inculcate the accused, and thereupon disclosed such facts and circumstances to the deputy sheriff, who, upon process issued, made the arrest. The accused thereupon confessed and pleaded guilty and was sentenced, ⁵⁴⁴ the same as here. As said in that case, the claimant himself could not convict the offender. That case followed the ruling in *Besse v. Dyer*, 9 Allen, 151, 85 Am. Dec. 747, and also *Crawshaw v. Roxbury*, 7 Gray, 374, where the offer was "for the apprehension and conviction" of the offender. It respect to that case it was there said: "The court at nisi prius instructed the jury, in regard to the service to be performed to entitle the plaintiff to a reward, that the offer of a reward could not be taken literally, for, as the conviction must be in due course of law, requiring the intervention of the court and jury, a person might be entitled to the reward by becoming the prosecutor, and as such causing the arrest and conducting the case to a conviction, or he might be entitled to it by giving information which should lead to and produce the arrest and conviction of the offender. This instruction was unqualifiedly sustained by the full court," with Shaw, C. J., presiding.

It will be observed that in these cases the claimant participated in making the arrest to the extent of discovering and disclosing to the officer or person interested facts and circumstances tending to convict the offender. The case at bar is unlike those where the offer of reward is for information which will lead to the discovery or arrest and conviction of the offender. In such a case the giving of the information in compliance with the terms of the offer entitles the person doing so to the reward: *Williams v. Carwardine*, 4 Barn. & Adol. 621-623, 6 Eng. Ruling Cases, 133-139, and notes; *Lawson on Contracts*, secs. 12, 26. Thus, it is stated as elementary: "Where a reward is offered for information, and several persons furnish distinct pieces, which combined make a perfect whole, it may be

equitably apportioned amongst them, a bill of interpleader being maintainable for such purpose": 21 Am. & Eng. Ency. of Law, 399, 400. In support of that statement see *Fargo v. Arthur*, 43 How. Pr. 193; *Rea v. Smith*, 2 Handy, 193. The so-called findings of fact seem to be based ⁵⁴⁵ upon the theory that the offer of reward by the bank was for the furnishing of information or evidence leading to such arrest and conviction, instead of the offer which was in fact made.

The findings from 6 to 13, inclusive, contain lengthy recitals of evidence in respect to Richards, Ovitz, Dawe and Terrell, without finding therein any of the facts material to the determination of the controversy as to who had in fact complied with the offer of the bank. The court finally, after the deduction of certain alleged costs, found that the remainder of the fund should be divided equally between Richards and Dawe; and yet there is no finding that they or either of them participated in making the arrest, which was one of the conditions imposed by the offer. The court does find that the plaintiff Ovitz made the arrest, without warrant, within the city limits, and that he was at the time marshal of the city, his official designation being "chief of police," and that he was on a salary. That he was such official is claimed to be the ground on which the court refused to allow him any portion of the reward. Counsel for the plaintiffs concedes that upon grounds of public policy a public officer cannot recover a reward for an act which it was his official duty to perform. They contend, however, that it was not Ovitz's official duty to make the arrest without process. The statute prescribed his duties as follows: "He shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables, and be taken as included in all writs and papers addressed to constables. It shall be his duty to obey all lawful written orders of the mayor or common council; to arrest, with or without process, and with reasonable diligence to take before the police justice every person found in the city in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city": Laws 1901, c. 272.

⁵⁴⁶ We find nothing in this statute nor any other making it his duty to make such arrest without process. The general rule undoubtedly is: "Police and other officers may recover the reward offered when the information furnished or the service performed was extraofficial, but cannot recover the reward of-

ferred if the information furnished or the service performed was within the scope of the duties of such officer": 21 Am. & Eng. Ency. of Law, 400, 401; England v. Davidson, 11 Ad. & E. 856, 39 Eng. Com. L. 254; Neville v. Kelly, 12 Com. B., N. S., 740, 104 Eng. Com. L. 740; Davis v. Munson, 43 Vt. 676, 5 Am. Rep. 315; Russell v. Stewart, 44 Vt. 170; Bronnenberg v. Coburn, 110 Ind. 169, 174, 11 N. E. 29; Gregg v. Pierce, 53 Barb. 387; Mechem on Public Officers, secs. 376, 885.

Thus, it was held in the first of the Vermont cases cited: "A sheriff acting in reliance upon a general offer of a reward for the capture of a criminal is entitled to the reward the same as though not a peace officer, where he succeeds in making the capture, having no process in his hands."

To the same effect, Gregg v. Pierce, 53 Barb. 387, and Reif v. Paige, 55 Wis. 496, 42 Am. Rep. 731, 13 N. W. 473. We must hold that the mere fact that Ovitz was at the time city marshal did not preclude him from the reward or a portion thereof. In respect to the plaintiff Kinn, the court has made no findings, except to state by way of recitals that he voluntarily offered to take and did take Ovitz in his vehicle out to arrest Jelleff, and that on the way out Ovitz gave to him one of the revolvers he was carrying. All the claimants seem to have known of the offer of the reward prior to their doing the several acts by virtue of which they, respectively, claim the reward, or some part thereof. There is nothing in the statutes cited (Stats. 1898, secs. 132, 725a), nor otherwise, to prevent the reward from being apportioned among two or more claimants, who may have participated in complying with the terms of the offer.

All the several claimants were properly brought into the ⁶⁴⁷ case by interpleader, as prescribed by the statute: Stats. 1898, sec. 2610.

We are unable to perceive on what theory costs were adjudged in favor of the bank, payable out of the fund in court. The bank was, confessedly, liable to pay the reward, and for costs incurred up to the time of its disclaimer and deposit of the reward in court: Stats. 1898, sec. 2789. The whole amount of the reward so deposited in court must be deemed to be the property of the claimants who may ultimately be found entitled thereto. We perceive no reason why claimants who ultimately fail to recover should be exempt from paying costs, nor why those who ultimately recover should not be entitled to costs. The cause seems to have been tried upon a misapprehension of

the law as applied to the facts of the case, and no findings of fact were made as prescribed by the statute: Stats. 1898, sec. 2863. The result is that there are no findings nor evidence to support the judgment.

The evidence fails to disclose with reasonably certainty the rights of the respective claimants. It seems clearly to establish that Ovitz made the arrest, and is therefore entitled at least to share in the reward; but whether Richards can be held to have participated is not clear. Doubtless, if he brought information of his discovery, and secured the co-operation of Ovitz to return with him to make the arrest, then he would be legally a participant. If, after giving the information, he was prevented from accompanying Ovitz by the latter's subterfuge, then Ovitz should have no larger share than if Richards accompanied him, nor should Richards have less. If, on the other hand, Richards intentionally evaded any participation in the actual arrest, the mere giving of information to Ovitz, not in his official capacity, would not be a compliance with the offer of reward. As to Kinn, his share, if any, in the recovery must depend on the facts, as to Richards, whether the latter intentionally refrained from joining in the arrest, or was prevented by the acts of Ovitz, in which ⁵⁴⁸ Kinn participated. The trial court is the appropriate place for the determination of such question. There must be further trial in this case. This is in harmony with what is said in *Brown v. Griswold*, 109 Wis. 275, 280, 85 N. W. 363, and *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246, 259.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded for further trial and proceedings according to law.

A Reward may be claimed by a constable or other officer for making an arrest not required by his official duty: *Kasling v. Morris*, 71 Tex. 584, 10 Am. St. Rep. 797, 9 S. W. 739; *Hayden v. Songer*, 56 Ind. 42, 26 Am. Rep. 1; *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315. But it is generally held, on grounds of public policy, that he cannot claim the reward where it was his duty to make the arrest: *Note to Hayden v. Songer*, 26 Am. Rep. 5; *Matter of Russell*, 51 Conn. 577, 50 Am. Rep. 55; *Stamper v. Temple*, 6 Humph. 113, 44 Am. Dec. 296; *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658; *St. Louis etc. Ry. Co. v. Grafton*, 51 Ark. 504, 14 Am. St. Rep. 66, 11 S. W. 702. A substantial compliance with the terms of reward is sufficient: *Note to Hayden v. Songer*, 26 Am. Rep. 7. There must, however, be a substantial performance: *Williams v. West Chicago St. R. R. Co.*, 191 Ill. 610, 85 Am. St. Rep. 278, 61 N. E. 456.



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1. **ACCOUNT STATED.**—If one of two correspondent banks sends to the other numerous statements of their account as it appears from its books, and such statements are acknowledged by the other bank to be correct, this constitutes an account stated, which affords strong presumptive evidence which may be rebutted by showing fraud or mistake. (Ky.) Louisville Banking Co. v. Asher, 283.

2. **ACCOUNT STATED—Basis of Settlement.**—If one of two correspondent banks sends to the other numerous statements of their account as it appears from its books, and such statements are acknowledged by the other bank to be correct, this constitutes an account stated between them, and the balance shown thereby must be taken as the basis of settlements between them, subject to all proper corrections. (Ky.) Louisville Banking Co. v. Asher, 283.

3. **ACCOUNT STATED—Relief from—Mistake.**—If an account stated by one bank against another embraces the amount of a note for which both banks, under a mistake of law, supposed the debtor bank to be liable on the ground that it had failed to protest such note, equity will grant relief from such mistake if the position of the creditor bank was not altered to its prejudice, after the debtor's acknowledgment of the correctness of the account between them as stated. (Ky.) Louisville Banking Co. v. Asher, 283.

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2. **PARENT AND CHILD—Adoption Proceedings, Construction of.**—While proceedings under the statute for the adoption of a minor child are not strictly judicial, they call for the exercise of judicial functions, and in construing them such a reasonable construction should be given as will sustain, rather than defeat, the object they have in view. (Cal.) Estate of McKeag, 80.

3. PARENT AND CHILD—Adoption Proceedings.—Failure of the Court to Examine the Child or its Parents or the Persons Purporting to Adopt it is an error of procedure which cannot affect the validity of the adoption, where the court had obtained jurisdiction of all the parties. (Cal.) Estate of McKeag, 80.

4. PARENT AND CHILD—Adoption Proceedings—Estoppel.—One Claiming Under a Deceased Adopting Parent is estopped from questioning the validity of the adoption, if such parent, in his lifetime, was so estopped. (Cal.) Estate of McKeag, 80.

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3. ACTIONS—Settlement of—Dismissal of Appeal.—If, after an appeal has been taken, the parties thereto settle the matter in litigation between themselves, the appeal will be dismissed, although the case has been argued and submitted to the supreme court. (Nev.) Wedekind v. Bell, 704.

4. APPEAL BONDS—Justification of Sureties.—An objection to an appeal bond that the sureties did not justify as to "property within the state" is one going to the sufficiency of the sureties, and must be first raised in the court below in order to be available on appeal. (Wash.) *Weiser v. Holzman*, 932.

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3. ASSIGNMENT FOR THE BENEFIT OF CREDITORS, Extra-territorial Effect of.—The authority of an assignee for the benefit of creditors extends to all property of the assignor passing by the assignment, whether within or without the state. (Minn.) *Swedish-American Nat. Bank v. First Nat. Bank*, 549.

4. CONFLICT OF LAWS—Assignment for Benefit of Creditors.—The power of an assignee for the benefit of creditors appointed in Minnesota is governed, as to the property passing by the assignment and situate within another state, not by the laws of that state, but by those of Minnesota. The power of the assignee must be measured, as to all property covered by the assignment, by the laws of the state wherein it was made and the trust is to be administered. At least, this must be the rule as to citizens of Minnesota who have not seized the property in another state. (Minn.) *Swedish-American Nat Bank v. First Nat. Bank*, 549.

5. ASSIGNMENT FOR CREDITORS—Conflict of Laws as to Pledges.—A pledge is controlled and its validity determined by the law of the state wherein the property is situate, and if creditors of an assignor for the benefit of creditors could have contested a pledge in the state where the property is, because not valid by its laws, the assignee may accomplish the same end in the state where the assignment was made. (Minn.) *Swedish-American Nat. Bank v. First Nat. Bank*, 549.

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1. **BANKRUPTCY.**—A Judgment Against the Putative Father of a Bastard for sums awarded against him for its maintenance was subject to be discharged by the national bankruptcy act as it existed prior to 1903. Whether a different rule resulted from the amendment of that year is not determined. (Minn.) *McKittrick v. Cahoon*, 606.

2. **BANKRUPTCY**, Replevin for Property in the Possession of the Assignee.—An action of replevin cannot be maintained in a state court against an assignee in bankruptcy who has taken and holds possession of property as such assignee and claims it to be a part of the estate of the bankrupt. (Me.) *Crosby v. Spear*, 424.

3. **BANKRUPTCY.**—An Assignee in Bankruptcy may Refuse to Take Possession or Receive the Title to onerous property or such as will be a burden instead of a profit. (Me.) *Fleming v. Courtenay*, 414.

4. **BANKRUPTCY**, Election of Assignee to Take or not Take Title to Property.—An assignee in bankruptcy is required to elect within a reasonable time whether he will take title to onerous property, and if within such time he does not elect to take the property, he is deemed to elect to reject it. (Me.) *Fleming v. Courtenay*, 414.

5. **BANKRUPTCY**, Property, When Remains in Bankrupt for Failure of Assignee to Elect to Take Title.—Whenever an assignee elects to reject or when it must be presumed that such has been his election, an asset, whatever it is, remains in the bankrupt. (Me.) *Fleming v. Courtenay*, 414.

6. **BANKRUPTCY**, Assignee, When Presumed to have Elected not to Take Title to an Unliquidated Claim.—If an assignee having information of the existence of an unliquidated claim in favor of a bankrupt for more than twenty-two years neglects to assert title thereto, it will be presumed that he has elected not to accept this asset of the estate, believing it to be burdensome and unprofitable, and if he files and settles his account declaring that he has no assets of any kind in his possession, the election is final and irrevocable. (Me.) *Fleming v. Courtenay*, 414.

7. **BANKRUPTCY**, Election of Assignee not to Take Title, Effect of a Subsequent Sale Under Order of Court.—A sale of a claim in favor of a bankrupt made after his estate had been in bankruptcy more than twenty-two years, and after the assignee is presumed to have elected not to accept it as an asset, and the order of court authorizing the sale, do not prevent the heirs of the bankrupt from insisting that such sale is therefore unavailing and passes no title to the purchaser. (Me.) *Fleming v. Courtenay*, 414.

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BENEFIT SOCIETY.

1. BENEFIT SOCIETY.—A Member of a Beneficial Association is a part and parcel of the corporation, and is chargeable with knowledge of its laws, rules, regulations, and manner of doing business. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

2. BENEFIT SOCIETY—Notice of Assessment, Sufficiency of.—If the constitution of a benefit society requires the grand recorder to call on the subordinate lodges for the beneficiary funds in their treasuries when needed, and declares that such call shall constitute an assessment, and shall contain a list of all deaths occurring since the last call was made, a notice showing the deaths which had been reported to the recorder up to the time of the issuance of the notice is sufficient. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

3. BENEFIT SOCIETY—Monthly Assessments.—If the constitution of a benefit society fixes the rate of assessments, and requires that they be paid monthly, provided that twelve assessments are required to meet death losses, and directs such payments to be made on or before a certain day of the month in which the assessments are made, a member may be required to pay monthly assessments. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

4. BENEFIT SOCIETY—Notice of Assessment, Sufficiency of.—If the constitution of a benefit society requires the grand recorder to issue a call on the subordinate lodges for their beneficiary funds when needed, and to give notice of assessments, with the approval of the finance committee, and declares that the call shall constitute an assessment, and directs that the notice shall be published, and a copy of the paper sent to each member and lodge, the notice of assessment and the call on the beneficiary funds are properly approved when signed and approved as one instrument. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

5. BENEFIT SOCIETY—Forfeitures.—It is the Duty of a Court to declare a forfeiture upon facts which admit of no other conclusion. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

6. BENEFIT SOCIETY—Suspension of Member.—It requires no affirmative action on the part of a beneficial association to suspend a member for the nonpayment of assessments. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

7. BENEFIT SOCIETIES—Payment of Dues by Husband on Wife's Certificate.—In the absence of contract, payment of dues by a husband on a certificate of membership in a benefit society issued to his wife is gratuitous, and creates no equities in his favor. (Va.) Leftwich v. Wells, 865.

8. BENEFIT SOCIETIES—Designation of Beneficiary—Delivery of Certificate.—If a member of a benefit society has appointed a beneficiary in any of the modes pointed out in the contract of insurance, it is not necessary that the certificate of membership should be delivered to the beneficiary so named, as the claim of such beneficiary is not based on a contract, but upon the appointment and direction for the payment of the fund. (Va.) Leftwich v. Wells, 865.

9. BENEFIT SOCIETIES—Designation of Beneficiary—Assignment—Delivery of Certificate.—If a member of a benefit society has power to designate or change his beneficiary under his certificate by an assignment thereof, such designation or change when made is not, in fact, an assignment of the certificate, but is the mere exer-

case of a power of appointment, and it is not necessary that either the certificate or the assignment thereof should be delivered to the beneficiary. On the contrary, the retention of the certificate by the member is a necessary incident of the power to change the beneficiary. (Va.) *Leftwich v. Wells*, 865.

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1. **NEGOTIABLE INSTRUMENTS—Indorsement—Effect of Failure to Protest.**—Notes discounted by a bank in another state are not placed on the footing of bills of exchange, and an indorser is not released by failure to protest them. (Ky.) *Louisville Banking Co. v. Asher*, 283.

2. **NEGOTIABLE INSTRUMENTS—Failure of Demand and Notice.**—If a bank fails to demand payment or to protest for nonpayment, a note sent it for collection on which it is liable as an indorser, it becomes liable to the holder for the amount of the note. (Ky.) *Louisville Banking Co. v. Asher*, 283.

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1. **RAILWAYS, Right of to Run Special Trains for the Accommodation of Those Persons Only Who Purchase Sleeping-car Berths.**—A railway has the right to run a special limited train for those only who have secured sleeping-car accommodations, and to make it a condition as to the purchase of a ticket that the passenger shall procure a sleeping berth before he can have the benefit of the special train, and to exclude him from the train when such berth cannot be procured thereon. (Cal.) *Ames v. Southern Pac. Co.*, 98.

2. **A RAILWAY TICKET is not a Contract Expressing all the Conditions and Limitations usually contained in a written agreement.** Hence, parol evidence is admissible to prove the terms of the contract or the representations made by the agent at the time the ticket was purchased, if not in conflict with its express terms. (Cal.) *Ames v. Southern Pac. Co.*, 98.

3. **RAILWAYS—Ticket, Parol Evidence to Vary Effect of.**—Notwithstanding a ticket purports on its face to be for a particular train, parol evidence is admissible to prove that before it was purchased the purchaser had been told by the ticket agent that he could not ride on the train specified unless he could and did procure a sleeping-car berth. (Cal.) *Ames v. Southern Pac. Co.*, 98.

Baggage.

4. CARRIERS OF PASSENGERS—Baggage, Duty of to Transport.—The existence of the relation of passenger and carrier entitles the passenger to have his personal baggage transported at the same time without additional charge. (Me.) *Wood v. Maine Cent. R. R. Co.*, 339.

5. CARRIERS OF PASSENGERS—Responsibility of for Baggage. A carrier, with respect to baggage accompanying a passenger, incurs the responsibility of a common carrier of merchandise, and is liable as an insurer of the baggage, except in the case of vis major or the public enemy. (Me.) *Wood v. Maine Cent. R. R. Co.*, 339.

6. CARRIERS OF PASSENGERS—Liability of for Baggage.—If a passenger does not accompany his baggage in its transportation, the carrier does not incur the liability of an insurer of the baggage, unless the passenger's failure to accompany it is due to the carrier's fault. (Me.) *Wood v. Maine Cent. R. R. Co.*, 339.

7. CARRIERS OF PASSENGERS—Baggage, When Liable for Only as a Gratuitous Bailee.—If a carrier receives baggage, understanding that it will go forward as the baggage of a passenger, but he does not intend to, and in fact does not, accompany it, the carrier is liable only as a gratuitous bailee. (Me.) *Wood v. Maine Cent. R. R. Co.*, 339.

8. CARRIERS OF PASSENGERS, When not Answerable for Baggage in Their Possession as Gratuitous Bailees.—If a carrier of passengers has baggage in its possession as a gratuitous bailee, which it deposits in an ordinarily well constructed baggage-room with doors and windows closed in the ordinary manner, it is not liable for the loss of the baggage through the felonious entrance of a thief effected by breaking a pane of glass in one of its windows. (Me.) *Wood v. Maine Cent. R. R. Co.*, 339.

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COMMON LAW.

1. **COMMON LAW, What Part of not Adopted.**—The adoption of the common law extends only to such provisions of it as are

adapted to our condition or local situation. (Cal.) *Katz v. Walkinshaw*, 35.

2. **COMMON LAW, Variability and Flexibility of.**—The true doctrine is that the common law by its own principles adapts itself to conditions and modifies its own rules so as to serve the end of justice under different circumstances. (Cal.) *Katz v. Walkinshaw*, 35.

3. **COMMON LAW, When Inapplicable.**—Whenever it is found that, owing to the physical features of this state and the peculiarity of its climate, soil and productions, the application of any given common-law rule tends constantly to cause injustice and wrong, rather than justice and right, then a different rule should be adopted—one calculated to secure persons in their property and possessions and preserve for them the fruits of their labors and expenditures. (Cal.) *Katz v. Walkinshaw*, 35.

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CONFLICT OF LAWS.

1. **CONFLICT OF LAWS—Enforcing in One State a Cause of Action Arising in Another.**—Where a right of action has become fixed, and a legal penalty has been incurred in one state, that liability may be enforced in any court in another state that has jurisdiction of such matters, and can obtain jurisdiction of the parties, if the alleged cause of action is not contrary to the public policy of the state where the action is brought, nor against justice and good morals. (Or.) *Bergman v. Inman*, 771.

2. **CONFLICT OF LAWS.**—Comity cannot be invoked to enforce the laws of another state which are inimical to the interests of the state where their enforcement is sought. (Utah) *Palmer v. Palmer*, 820.

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1. **CONSTITUTIONAL LAW.**—The Constitutionality of a Statute is Presumed where the contrary is not shown beyond a reasonable doubt. (Me.) *Soper v. Lawrence Brothers Co.*, 397.

2. **CONSTITUTIONAL LAW.**—Courts cannot invade the province of the law-making power of the government, and intrude into their decrees their opinion on questions of public policy, but their duty is to strictly recognize legal limitations and confine themselves to the narrower duties of interpretation and construction. (Wash.) *Healy Lumber Co. v. Morris*, 964.

3. CONSTITUTIONAL LAW—Statutes Unconstitutional in Part. A statute requiring a claimant of land which has been sold for taxes to pay the amount of the taxes before the trial of an action involving the validity of the sale is, as to such provision, unconstitutional and void, but this does not require the statute to be declared void as a whole, if such provision is not connected in meaning, nor co-operative in purpose, with the other provisions of the statute. (Me.) *Soper v. Lawrence Brothers Co.*, 397.

4. CONSTITUTIONAL LAW—Statute Void in Part may be Valid as to the Residue.—Though a statute provides that in certain cases the widow or next of kin may nominate an administrator, and that in counties of a specified population the public administrator must be appointed, yet if the latter provision is unconstitutional as special legislation, it may be disregarded, and the balance of the statute given effect, and the widow or next of kin be permitted to nominate an administrator. (Ill.) *Strong v. Dignan*, 225.

5. POLICE POWER.—Nothing in the Fourteenth Amendment has shorn the states of their police power to prohibit or regulate unwholesome trades and occupations. (Mo.) *St. Louis v. Fischer*, 614.

6. CONSTITUTIONAL LAW—Legislation, when Special.—An Act Applying Only to Counties of a Specified Population, there being but one such in the state, is special legislation. (Ill.) *Strong v. Dignan*, 225.

7. CONSTITUTIONAL LAW—Special Legislation, Devices to Evade Constitutional Prohibitions Against.—The designation of counties as a class according to population, which makes it absolutely certain that but one county in the state can avail itself of the benefits of the act, can but be regarded as a mere device to evade the constitutional provision forbidding special legislation. (Ill.) *Strong v. Dignan*, 225.

8. CONSTITUTIONAL LAW—Special Statute Regulating the Practice in Courts of Justice, What is.—The appointment of an administrator and the mode of selecting him constitute a part of the practice in probate courts, and a statute providing for the appointment of public administrators in a single county is invalid, under a constitution prohibiting special legislation regulating the practice in courts of justice. (Ill.) *Strong v. Dignan*, 225.

9. CONSTITUTION—Classification of Counties When Prohibited. A classification of counties by population as a basis for legislation is not valid, unless there is some reasonable relation between the situation of the counties classified and the purposes and objects to be attained. (Ill.) *Strong v. Dignan*, 225.

10. CONSTITUTIONAL LAW—Appropriation of Public Funds for Private Purpose.—A statute appropriating a specified sum of public money to pay innocent purchasers of unpaid county orders issued under an unconstitutional statute providing for the treatment of habitual drunkards in private institutions at the expense of the counties in which they reside, and purchased before the latter act was declared invalid, cannot be upheld as an appropriation made for the payment of claims founded in equity and justice. Such statute makes an appropriation of public funds to pay purely private claims, and for that reason is unconstitutional and void. (Wis.) *State v. Froehlich*, 985.

11. CONSTITUTIONAL LAW—Judiciary, Imposing Political Duties Upon.—A statute providing that whenever as many voters of a county as represent one-half of the votes cast at the last election

for governor shall petition the circuit court to submit the question of granting liquor licenses at the next congressional election, the court shall issue an order to the sheriff for an election on that question, requires the court to perform nonjudicial duties, and offends constitutional provisions that the three branches of the government shall be kept separate, and that no judge shall hold any other political trust or employment. (Md.) Board of Supervisors v. Todd, 438.

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1. **CONTEMPT—Inherent Power to Punish Summarily.**—The supreme court has inherent power to punish contempts summarily. (Mo.) State v. Shepherd, 624.

2. **CONTEMPTS are Classified as civil or criminal, and as direct or constructive.** (Mo.) State v. Shepherd, 624.

3. **CIVIL CONTEMPTS are such as affect a private person.** (Mo.) State v. Shepherd, 624.

4. **CRIMINAL CONTEMPTS are all acts committed against the majesty of the law or against courts as an agency of the government, and in which, therefore, the commonwealth and the whole people are concerned.** (Mo.) State v. Shepherd, 624.

5. **DIRECT CONTEMPTS are those committed in the presence of the court while in session, or so near as to interrupt its proceedings, but also include any improper conduct tending to defeat or impair the administration of justice.** (Mo.) State v. Shepherd, 624.

6. **CONSTRUCTIVE CONTEMPTS arise from matters not transpiring in court which tend to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the administration of justice.** (Mo.) State v. Shepherd, 624.

7. **CONTEMPT.—Scandalizing a Court Itself is a criminal contempt, and the contempt need not relate to a cause that is still pending.** (Mo.) State v. Shepherd, 624.

8. **CONTEMPT—Summary Punishment of Different Kinds of.**—The supreme court has jurisdiction to punish, summarily, civil as well as criminal contempts; and this power is the same whether the contempt is direct or constructive, there being only a difference of procedure in the two cases. (Mo.) State v. Shepherd, 624.

9. **CONTEMPT—When Both Civil and Criminal.**—A Newspaper article scandalizing the court and abusing one of the parties to a cause still pending, by charging bribery and corruption, is both a civil and a criminal contempt. (Mo.) State v. Shepherd, 624.

10. **CONTEMPT—What Court may Punish.**—Only the Court in which a contempt is committed, or whose authority is defied, has power to punish it or entertain proceedings to that end. (Mo.) State v. Shepherd, 624.

11. **CONTEMPT—Legislature cannot Regulate Right to Punish.**—The supreme court has an inherent and constitutional right to pun-

ish contempt summarily, which cannot be taken away, abridged, limited, or regulated by the legislature. (Mo.) *State v. Shepherd*, 624.

12. **CONTEMPT—Right to Jury Trial.**—Cases of contempt are not triable by jury, either at the common law or under constitutional guarantees of the right of trial by jury. (Mo.) *State v. Shepherd*, 624.

13. **CONTEMPT—Due Process of Law.**—One who has been regularly charged with contempt in an information filed by the attorney general, and brought into court, and has appeared in person and by counsel, has pleaded, and had a trial according to the practice in such cases, has had the benefit of due process of law. (Mo.) *State v. Shepherd*, 624.

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3. **CONFLICT OF LAWS.**—Contracts Made in One State cannot be enforced in another if in contravention of the public policy of the latter state. (Utah) *Palmer v. Palmer*, 820.

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5. **CONFLICT OF LAWS.**—Comity Between Different States requires no state to uphold or enforce contracts injuriously affecting the welfare of its subjects or contravening its own laws, institutions or policy. If the *lex loci contractus* comes in conflict with the *lex fori*, comity must yield to the positive law and policy of the forum. (Utah) *Palmer v. Palmer*, 820.

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3. ACTIONS—Settlement of—Dismissal of Appeal.—If, after an appeal has been taken, the parties thereto settle the matter in litigation between themselves, the appeal will be dismissed, although the case has been argued and submitted to the supreme court. (Nev.) Wedekind v. Bell, 704.

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3. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS**, Extra-territorial Effect of.—The authority of an assignee for the benefit of creditors extends to all property of the assignor passing by the assignment, whether within or without the state. (Minn.) *Swedish-American Nat. Bank v. First Nat. Bank*, 549.

4. **CONFLICT OF LAWS**—Assignment for Benefit of Creditors.—The power of an assignee for the benefit of creditors appointed in Minnesota is governed, as to the property passing by the assignment and situate within another state, not by the laws of that state, but by those of Minnesota. The power of the assignee must be measured, as to all property covered by the assignment, by the laws of the state wherein it was made and the trust is to be administered. At least, this must be the rule as to citizens of Minnesota who have not seized the property in another state. (Minn.) *Swedish-American Nat Bank v. First Nat. Bank*, 549.

5. **ASSIGNMENT FOR CREDITORS**—Conflict of Laws as to Pledges.—A pledge is controlled and its validity determined by the law of the state wherein the property is situate, and if creditors of an assignor for the benefit of creditors could have contested a pledge in the state where the property is, because not valid by its laws, the assignee may accomplish the same end in the state where the assignment was made. (Minn.) *Swedish-American Nat. Bank v. First Nat. Bank*, 549.

ATTORNEY AND CLIENT.

ATTORNEYS' FEES, Allowance of, in the Supreme Court.—Under a statute allowing attorneys' fees in actions against railroad companies for the killing of stock, the supreme court has no jurisdiction to allow such a fee to the attorney of the defendant in error for his services in that court. If he is entitled to such fee, he must

seek it by application to the trial court. (Fla.) *Florida East Coast Ry. Co. v. Hazel*, 114.

ATTORNEY'S FEES.

See Attorney and Client; Divorce, 5.

Note.

• Baggage. See Carriers of Passengers.

BANKRUPTCY.

1. **BANKRUPTCY.**—A Judgment Against the Putative Father of a Bastard for sums awarded against him for its maintenance was subject to be discharged by the national bankruptcy act as it existed prior to 1903. Whether a different rule resulted from the amendment of that year is not determined. (Minn.) *McKittrick v. Cahoon*, 606.

2. **BANKRUPTCY**, Replevin for Property in the Possession of the Assignee.—An action of replevin cannot be maintained in a state court against an assignee in bankruptcy who has taken and holds possession of property as such assignee and claims it to be a part of the estate of the bankrupt. (Me.) *Crosby v. Spear*, 424.

3. **BANKRUPTCY.**—An Assignee in Bankruptcy may Refuse to Take Possession or Receive the Title to onerous property or such as will be a burden instead of a profit. (Me.) *Fleming v. Courtenay*, 414.

4. **BANKRUPTCY**, Election of Assignee to Take or not Take Title to Property.—An assignee in bankruptcy is required to elect within a reasonable time whether he will take title to onerous property, and if within such time he does not elect to take the property, he is deemed to elect to reject it. (Me.) *Fleming v. Courtenay*, 414.

5. **BANKRUPTCY**, Property, When Remains in Bankrupt for Failure of Assignee to Elect to Take Title.—Whenever an assignee elects to reject or when it must be presumed that such has been his election, an asset, whatever it is, remains in the bankrupt. (Me.) *Fleming v. Courtenay*, 414.

6. **BANKRUPTCY**, Assignee, When Presumed to have Elected not to Take Title to an Unliquidated Claim.—If an assignee having information of the existence of an unliquidated claim in favor of a bankrupt for more than twenty-two years neglects to assert title thereto, it will be presumed that he has elected not to accept this asset of the estate, believing it to be burdensome and unprofitable, and if he files and settles his account declaring that he has no assets of any kind in his possession, the election is final and irrevocable. (Me.) *Fleming v. Courtenay*, 414.

7. **BANKRUPTCY**, Election of Assignee not to Take Title, Effect of a Subsequent Sale Under Order of Court.—A sale of a claim in favor of a bankrupt made after his estate had been in bankruptcy more than twenty-two years, and after the assignee is presumed to have elected not to accept it as an asset, and the order of court authorizing the sale, do not prevent the heirs of the bankrupt from insisting that such sale is therefore unavailing and passes no title to the purchaser. (Me.) *Fleming v. Courtenay*, 414.

BASTARDS.

See Bankruptcy.

BENEFIT SOCIETY.

1. BENEFIT SOCIETY.—A Member of a Beneficial Association is a part and parcel of the corporation, and is chargeable with knowledge of its laws, rules, regulations, and manner of doing business. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

2. BENEFIT SOCIETY—Notice of Assessment, Sufficiency of.—If the constitution of a benefit society requires the grand recorder to call on the subordinate lodges for the beneficiary funds in their treasuries when needed, and declares that such call shall constitute an assessment, and shall contain a list of all deaths occurring since the last call was made, a notice showing the deaths which had been reported to the recorder up to the time of the issuance of the notice is sufficient. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

3. BENEFIT SOCIETY—Monthly Assessments.—If the constitution of a benefit society fixes the rate of assessments, and requires that they be paid monthly, provided that twelve assessments are required to meet death losses, and directs such payments to be made on or before a certain day of the month in which the assessments are made, a member may be required to pay monthly assessments. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

4. BENEFIT SOCIETY—Notice of Assessment, Sufficiency of.—If the constitution of a benefit society requires the grand recorder to issue a call on the subordinate lodges for their beneficiary funds when needed, and to give notice of assessments, with the approval of the finance committee, and declares that the call shall constitute an assessment, and directs that the notice shall be published, and a copy of the paper sent to each member and lodge, the notice of assessment and the call on the beneficiary funds are properly approved when signed and approved as one instrument. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

5. BENEFIT SOCIETY—Forfeitures.—It is the Duty of a Court to declare a forfeiture upon facts which admit of no other conclusion. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

6. BENEFIT SOCIETY—Suspension of Member.—It requires no affirmative action on the part of a beneficial association to suspend a member for the nonpayment of assessments. (Ind. App.) Grand Lodge A. O. U. W. v. Marshall, 273.

7. BENEFIT SOCIETIES—Payment of Dues by Husband on Wife's Certificate.—In the absence of contract, payment of dues by a husband on a certificate of membership in a benefit society issued to his wife is gratuitous, and creates no equities in his favor. (Va.) Leftwich v. Wells, 865.

8. BENEFIT SOCIETIES—Designation of Beneficiary—Delivery of Certificate.—If a member of a benefit society has appointed a beneficiary in any of the modes pointed out in the contract of insurance, it is not necessary that the certificate of membership should be delivered to the beneficiary so named, as the claim of such beneficiary is not based on a contract, but upon the appointment and direction for the payment of the fund. (Va.) Leftwich v. Wells, 865.

9. BENEFIT SOCIETIES—Designation of Beneficiary—Assignment—Delivery of Certificate.—If a member of a benefit society has power to designate or change his beneficiary under his certificate by an assignment thereof, such designation or change when made is not, in fact, an assignment of the certificate, but is the mere exer-

cise of a power of appointment, and it is not necessary that either the certificate or the assignment thereof should be delivered to the beneficiary. On the contrary, the retention of the certificate by the member is a necessary incident of the power to change the beneficiary. (Va.) *Leftwich v. Wells*, 865.

BICYCLES.

See Municipal Corporations, 17.

BILLS AND NOTES.

1. **NEGOTIABLE INSTRUMENTS—Indorsement—Effect of Failure to Protest.**—Notes discounted by a bank in another state are not placed on the footing of bills of exchange, and an indorser is not released by failure to protest them. (Ky.) *Louisville Banking Co. v. Asher*, 283.

2. **NEGOTIABLE INSTRUMENTS—Failure of Demand and Notice.**—If a bank fails to demand payment or to protest for nonpayment, a note sent it for collection on which it is liable as an indorser, it becomes liable to the holder for the amount of the note. (Ky.) *Louisville Banking Co. v. Asher*, 283.

See Corporations, 3-5.

BURDEN OF PROOF.

See Evidence, 3-4.

BURIAL.

See Dead Bodies.

CARRIERS.

Tickets.

See Street Railways.

1. **RAILWAYS, Right of to Run Special Trains for the Accommodation of Those Persons Only Who Purchase Sleeping-car Berths.**—A railway has the right to run a special limited train for those only who have secured sleeping-car accommodations, and to make it a condition as to the purchase of a ticket that the passenger shall procure a sleeping berth before he can have the benefit of the special train, and to exclude him from the train when such berth cannot be procured thereon. (Cal.) *Ames v. Southern Pac. Co.*, 98.

2. **A RAILWAY TICKET** is not a Contract Expressing all the Conditions and Limitations usually contained in a written agreement. Hence, parol evidence is admissible to prove the terms of the contract or the representations made by the agent at the time the ticket was purchased, if not in conflict with its express terms. (Cal.) *Ames v. Southern Pac. Co.*, 98.

3. **RAILWAYS—Ticket, Parol Evidence to Vary Effect of.**—Notwithstanding a ticket purports on its face to be for a particular train, parol evidence is admissible to prove that before it was purchased the purchaser had been told by the ticket agent that he could not ride on the train specified unless he could and did procure a sleeping-car berth. (Cal.) *Ames v. Southern Pac. Co.*, 98.

Baggage.

4. CARRIER OF PASSENGERS—Baggage, Duty of to Transport.—The existence of the relation of passenger and carrier entitles the passenger to have his personal baggage transported at the same time without additional charge. (Me.) Wood v. Maine Cent. R. R. Co., 339.

5. CARRIERS OF PASSENGERS—Responsibility of for Baggage. A carrier, with respect to baggage accompanying a passenger, incurs the responsibility of a common carrier of merchandise, and is liable as an insurer of the baggage, except in the case of vis major or the public enemy. (Me.) Wood v. Maine Cent. R. R. Co., 339.

6. CARRIERS OF PASSENGERS—Liability of for Baggage.—If a passenger does not accompany his baggage in its transportation, the carrier does not incur the liability of an insurer of the baggage, unless the passenger's failure to accompany it is due to the carrier's fault. (Me.) Wood v. Maine Cent. R. R. Co., 339.

7. CARRIERS OF PASSENGERS—Baggage, When Liable for Only as a Gratuitous Bailee.—If a carrier receives baggage, understanding that it will go forward as the baggage of a passenger, but he does not intend to, and in fact does not, accompany it, the carrier is liable only as a gratuitous bailee. (Me.) Wood v. Maine Cent. R. R. Co., 339.

8. CARRIERS OF PASSENGERS, When not Answerable for Baggage in Their Possession as Gratuitous Bailees.—If a carrier of passengers has baggage in its possession as a gratuitous bailee, which it deposits in an ordinarily well constructed baggage-room with doors and windows closed in the ordinary manner, it is not liable for the loss of the baggage through the felonious entrance of a thief effected by breaking a pane of glass in one of its windows. (Me.) Wood v. Maine Cent. R. R. Co., 339.

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- baggage, extra, liability for, 359.
- baggage, father, whether may maintain action for though he was not himself a passenger, 390.
- baggage, husband may maintain action for though he was not a passenger, 389.
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CEMETERIES.

See Dead Bodies.

CLASS LEGISLATION.

See Constitutional Law.

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See Judgments, 17-20.

COLLATERAL SECURITY.

See Pledge.

COMITY.

See Conflict of Laws, 2; Contracts, 4.

COMMERCIAL AGENCY.

See Sales, 2.

COMMON LAW.

1. **COMMON LAW, What Part of not Adopted.**—The adoption of the common law extends only to such provisions of it as are

adapted to our condition or local situation. (Cal.) *Katz v. Walkinshaw*, 35.

2. **COMMON LAW, Variability and Flexibility of.**—The true doctrine is that the common law by its own principles adapts itself to conditions and modifies its own rules so as to serve the end of justice under different circumstances. (Cal.) *Katz v. Walkinshaw*, 35.

3. **COMMON LAW, When Inapplicable.**—Whenever it is found that, owing to the physical features of this state and the peculiarity of its climate, soil and productions, the application of any given common-law rule tends constantly to cause injustice and wrong, rather than justice and right, then a different rule should be adopted—one calculated to secure persons in their property and possessions and preserve for them the fruits of their labors and expenditures. (Cal.) *Katz v. Walkinshaw*, 35.

COMPROMISE.

See Appeal and Error, 2.

CONFLICT OF LAWS.

1. **CONFLICT OF LAWS—Enforcing in One State a Cause of Action Arising in Another.**—Where a right of action has become fixed, and a legal penalty has been incurred in one state, that liability may be enforced in any court in another state that has jurisdiction of such matters, and can obtain jurisdiction of the parties, if the alleged cause of action is not contrary to the public policy of the state where the action is brought, nor against justice and good morals. (Or.) *Bergman v. Inman*, 771.

2. **CONFLICT OF LAWS.**—Comity cannot be invoked to enforce the laws of another state which are inimical to the interests of the state where their enforcement is sought. (Utah) *Palmer v. Palmer*, 820.

See Assignment for Creditors, 3-5; Contracts, 3, 4; Death, 1; Limitation of Actions, 7-10; Pledge, 3-5; Warehousemen, 3.

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CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW.**—The Constitutionality of a Statute is Presumed where the contrary is not shown beyond a reasonable doubt. (Me.) *Soper v. Lawrence Brothers Co.*, 397.

2. **CONSTITUTIONAL LAW.**—Courts cannot invade the province of the law-making power of the government, and intrude into their decrees their opinion on questions of public policy, but their duty is to strictly recognize legal limitations and confine themselves to the narrower duties of interpretation and construction. (Wash.) *Healy Lumber Co. v. Morris*, 964.

3. CONSTITUTIONAL LAW—Statutes Unconstitutional in Part. A statute requiring a claimant of land which has been sold for taxes to pay the amount of the taxes before the trial of an action involving the validity of the sale is, as to such provision, unconstitutional and void, but this does not require the statute to be declared void as a whole, if such provision is not connected in meaning, nor co-operative in purpose, with the other provisions of the statute. (Me.) *Soper v. Lawrence Brothers Co.*, 397.

4. CONSTITUTIONAL LAW—Statute Void in Part may be Valid as to the Residue.—Though a statute provides that in certain cases the widow or next of kin may nominate an administrator, and that in counties of a specified population the public administrator must be appointed, yet if the latter provision is unconstitutional as special legislation, it may be disregarded, and the balance of the statute given effect, and the widow or next of kin be permitted to nominate an administrator. (Ill.) *Strong v. Dignan*, 225.

5. POLICE POWER.—Nothing in the Fourteenth Amendment has shorn the states of their police power to prohibit or regulate unwholesome trades and occupations. (Mo.) *St. Louis v. Fischer*, 614.

6. CONSTITUTIONAL LAW—Legislation, when Special.—An Act Applying Only to Counties of a Specified Population, there being but one such in the state, is special legislation. (Ill.) *Strong v. Dignan*, 225.

7. CONSTITUTIONAL LAW—Special Legislation, Devices to Evade Constitutional Prohibitions Against.—The designation of counties as a class according to population, which makes it absolutely certain that but one county in the state can avail itself of the benefits of the act, can but be regarded as a mere device to evade the constitutional provision forbidding special legislation. (Ill.) *Strong v. Dignan*, 225.

8. CONSTITUTIONAL LAW—Special Statute Regulating the Practice in Courts of Justice, What is.—The appointment of an administrator and the mode of selecting him constitute a part of the practice in probate courts, and a statute providing for the appointment of public administrators in a single county is invalid, under a constitution prohibiting special legislation regulating the practice in courts of justice. (Ill.) *Strong v. Dignan*, 225.

9. CONSTITUTION—Classification of Counties When Prohibited. A classification of counties by population as a basis for legislation is not valid, unless there is some reasonable relation between the situation of the counties classified and the purposes and objects to be attained. (Ill.) *Strong v. Dignan*, 225.

10. CONSTITUTIONAL LAW—Appropriation of Public Funds for Private Purpose.—A statute appropriating a specified sum of public money to pay innocent purchasers of unpaid county orders issued under an unconstitutional statute providing for the treatment of habitual drunkards in private institutions at the expense of the counties in which they reside, and purchased before the latter act was declared invalid, cannot be upheld as an appropriation made for the payment of claims founded in equity and justice. Such statute makes an appropriation of public funds to pay purely private claims, and for that reason is unconstitutional and void. (Wis.) *State v. Froehlich*, 985.

11. CONSTITUTIONAL LAW—Judiciary, Imposing Political Duties Upon.—A statute providing that whenever as many voters of a county as represent one-half of the votes cast at the last election

For governor shall petition the circuit court to submit the question of granting liquor licenses at the next congressional election, the court shall issue an order to the sheriff for an election on that question, requires the court to perform nonjudicial duties, and offends constitutional provisions that the three branches of the government shall be kept separate, and that no judge shall hold any other political trust or employment. (Md.) Board of Supervisors v. Todd, 438.

See Criminal Law, 3, 4; Divorce, 9; Limitation of Actions, 5, 6; Master and Servant, 1, 2; Statutes; Taxation.

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CONTEMPT.

1. **CONTEMPT**—Inherent Power to Punish Summarily.—The supreme court has inherent power to punish contempts summarily. (Mo.) State v. Shepherd, 624.

2. **CONTEMPTS** are Classified as civil or criminal, and as direct or constructive. (Mo.) State v. Shepherd, 624.

3. **CIVIL CONTEMPTS** are such as affect a private person. (Mo.) State v. Shepherd, 624.

4. **CRIMINAL CONTEMPTS** are all acts committed against the majesty of the law or against courts as an agency of the government, and in which, therefore, the commonwealth and the whole people are concerned. (Mo.) State v. Shepherd, 624.

5. **DIRECT CONTEMPTS** are those committed in the presence of the court while in session, or so near as to interrupt its proceedings, but also include any improper conduct tending to defeat or impair the administration of justice. (Mo.) State v. Shepherd, 624.

6. **CONSTRUCTIVE CONTEMPTS** arise from matters not transpiring in court which tend to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the administration of justice. (Mo.) State v. Shepherd, 624.

7. **CONTEMPT**.—Scandalizing a Court Itself is a criminal contempt, and the contempt need not relate to a cause that is still pending. (Mo.) State v. Shepherd, 624.

8. **CONTEMPT**—Summary Punishment of Different Kinds of.—The supreme court has jurisdiction to punish, summarily, civil as well as criminal contempts; and this power is the same whether the contempt is direct or constructive, there being only a difference of procedure in the two cases. (Mo.) State v. Shepherd, 624.

9. **CONTEMPT**—When Both Civil and Criminal.—A Newspaper article scandalizing the court and abusing one of the parties to a cause still pending, by charging bribery and corruption, is both a civil and a criminal contempt. (Mo.) State v. Shepherd, 624.

10. **CONTEMPT**—What Court may Punish.—Only the Court in which a contempt is committed, or whose authority is defied, has power to punish it or entertain proceedings to that end. (Mo.) State v. Shepherd, 624.

11. **CONTEMPT**—Legislature cannot Regulate Right to Punish.—The supreme court has an inherent and constitutional right to pun-

ish contempt summarily, which cannot be taken away, abridged, limited, or regulated by the legislature. (Mo.) *State v. Shepherd*, 624.

12. **CONTEMPT—Right to Jury Trial.**—Cases of contempt are not triable by jury, either at the common law or under constitutional guarantees of the right of trial by jury. (Mo.) *State v. Shepherd*, 624.

13. **CONTEMPT—Due Process of Law.**—One who has been regularly charged with contempt in an information filed by the attorney general, and brought into court, and has appeared in person and by counsel, has pleaded, and had a trial according to the practice in such cases, has had the benefit of due process of law. (Mo.) *State v. Shepherd*, 624.

CONTRACTS.

In General.

1. **CONTRACTS—Implied Assent.**—If a person accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and to be bound by them. (Ill.) *Forthman v. Deters*, 145.

2. **RESCISSION—A Partial Rescission is not Allowed by Law.**—One who has sufficient cause to rescind a contract for fraud must rescind the whole or none. (Me.) *Morrow v. Moore*, 410.

Conflict of Laws.

3. **CONFLICT OF LAWS.**—Contracts Made in One State cannot be enforced in another if in contravention of the public policy of the latter state. (Utah) *Palmer v. Palmer*, 820.

4. **CONFLICT OF LAWS.**—The Validity of Contracts is to be determined by the laws of the place of performance. (Minn.) *Swedish-American Nat. Bank v. First Nat. Bank*, 549.

5. **CONFLICT OF LAWS.**—Comity Between Different States requires no state to uphold or enforce contracts injuriously affecting the welfare of its subjects or contravening its own laws, institutions or policy. If the *lex loci contractus* comes in conflict with the *lex fori*, comity must yield to the positive law and policy of the forum. (Utah) *Palmer v. Palmer*, 820.

CONTRIBUTION.

See Principal and Agent.

CONVEYANCE.

See Deeds; Vendor and Vendee.

CORPORATIONS.

In General.

1. **CORPORATIONS—Notice to Director When not Notice to Bank.**—Although a bank director when purchasing land for himself, learns that the title thereto is held in trust, his bank is not chargeable with notice thereof, so as to defeat an execution sale to it of the land under its judgment obtained against the holder of the legal title. (Ill.) *Home Savings etc. Bk. v. Peoria Agricultural etc. Soc.*, 132.

2. **CORPORATIONS—Knowledge of Directors—Presumption.**—Directors in a corporation are conclusively presumed to know its

condition financially, its business, its receipts and expenditures, and all the general facts which go to make up its condition and business as shown by the entries on its regular books. (Ill.) *Mamerow v. National Lead Co.*, 196.

3. **CORPORATIONS**.—**Oral Authority is Sufficient to Authorize the Agent of a Corporation to execute a promissory note.** (Cal.) *Curtin v. Salmon River etc. Min. Co.*, 75.

4. **CORPORATION**, **Ratification by of an Unauthorized Note.**—If a note purporting to be the note of a corporation is executed without authority and the transaction is fully entered upon its books, and it retains the consideration of the transaction and accepts all its benefits, it must be held to have ratified the execution of the note; or perhaps it is more accurate to say that an estoppel is raised by the conduct of the corporation precluding it from resisting the enforcement of the note. (Cal.) *Curtin v. Salmon River etc. Min. Co.*, 75.

5. **CORPORATION**.—**Promissory Note Secured by a Void Mortgage.**—Though a note and mortgage purporting to be executed by a corporation are void because not authorized at a meeting of the board of directors assembled as required by statute, and the mortgage is never ratified in writing as required by law, yet the note may be ratified by the acquiescence of the corporation or the retention by it of the consideration, and when so ratified, may be enforced. (Cal.) *Curtin v. Salmon River etc. Min. Co.*, 75.

6. **CORPORATIONS**.—**Contracts Ultra Vires.**—The doctrine that respecting an executed contract, only the state can invoke the doctrine of ultra vires to challenge the right of a corporation to exercise power beyond the scope of its charter, is applied quite generally to private corporations but not to public corporations, such as municipalities. (Wis.) *Schneider v. Menasha*, 996.

7. **CORPORATIONS**.—**Corporate Policy—Right of Stockholders.**—On a question of corporate policy the stockholders, subject to temporary control by the board of directors, have the ultimate right to decide according to a majority vote. (Wis.) *Luther v. Luther Co.*, 977.

8. **CORPORATIONS**.—**Breach of Duty by Directors.**—If directors manage property of the corporation so as to give one part of its shareholders a benefit and advantage over, or at the expense of, another part, it is a breach of duty, especially when the directors themselves belong to the benefited class, which may be remedied in equity. (Wis.) *Luther v. Luther Co.*, 977.

Issue and Increase of Stock.

9. **CORPORATIONS**.—**Unlawful Increase of Capital Stock.**—In an established and going corporation, an increase of capital stock, accomplished either by formal increase of the amount originally authorized or by issue of what had originally been withheld, though within the authorized amount, without first giving opportunity to all existing stockholders to take their proportionate shares of such increase, is wholly beyond the power, not only of the directors, but of any mere majority of the stockholders. (Wis.) *Luther v. Luther Co.*, 977.

10. **CORPORATIONS**.—**Fraud on Shareholders—Issue of Stock to Gain Control.**—If two of the directors of a corporation, forming a majority at a board meeting, in order to take control of the corporation from those who then own a majority of the stock, cause the

issue and sale of a number of shares to a third person, thus making a majority of the stock in their hands, such act confers no right in the stock to such person, if he has knowledge of and participated in the unlawful act. (Wis.) *Luther v. Luther Co.*, 977.

11. CORPORATIONS—Fraudulent Issue of Stock—Remedy in Equity.—If two of the directors of a corporation being a majority at a board meeting, in order to take the control of the corporation from those who then own a majority of the stock, cause the issue and sale of a number of shares to a third person, thus securing a majority of the stock in their hands, a court of equity will decree on timely application, the stock so issued to be invalid; also, an election of directors which was determined by the voting of such stock, will require such stock to be returned and canceled, and the amount paid therefor to be returned to the buyer without interest. (Wis.) *Luther v. Luther Co.*, 977.

12. CORPORATIONS—Fraudulent Issue of Stock—Remedy—Erroneous Decree.—If, in an action by corporation stockholders to set aside as fraudulent an issue and sale of stock by two directors in order to obtain control of the corporation, the complaint alleges, among other breaches of duty by such directors, the taking, by one of them, in his own name of a patent which ought to belong to the corporation, but no issue is raised as to the title to such patent, or relief in regard thereto asked, the admission without objection of evidence relating to such patent is not a voluntary trial of the title thereto, and the entry of a decree requiring such director to transfer the title to such patent to the corporation is error. (Wis.) *Luther v. Luther Co.*, 977.

13. CORPORATIONS—Fraud in Obtaining Stock Subscriptions.—If a person files an application for a patent and appoints attorneys to prosecute it, with authority to alter or amend his specifications, and the application for a patent is granted after the specifications have been amended, and such person, knowing that some amendments have been offered, represents, for the purpose of securing a stock subscription, that a patent according to his original specifications has been granted, such representations are a fraud in law, and avoid the stock subscription thus secured, although he did not know that his representations were false, believed them to be true and did not make them with intent to deceive. (Nev.) *Foulks Accelerating Air Motor Co. v. Thies*, 684.

See Guaranty, 7; Insurance, 1, 2.

Note.

Corporations, subrogation in favor of officers and stockholders of, 504, 505.

CORPSE.

See Dead Bodies.

COSTS.

COSTS.—If a bank has offered a reward for the arrest and conviction of a person, and on being sued by one claimant therefor, has paid the amount of the reward into court and procured the other claimants to be interpleaded, such reward must thereafter be deemed the property of the claimants who may ultimately recover, and it is error to adjudge costs in favor of such bank out of the fund deposited in court. (Wis.), *Kinn. v. First Nat. Bank*, 1012.

COTENANCY.

See Tenants in Common.

Note.

Cotenants, subrogation in favor of one and against another, 532.

COURTS

1. **JURISDICTION to Determine a Question Involves the Power to Determine It by the Aid of Competent Evidence**, because this is the only means by which a judicial determination can be had. (Cal.) *People v. Chew Lan Ong*, 88.

2. **JURISDICTION, When Exclusive.**—When a court, state or national, once takes into its possession a specified thing, no court, except one having a supervising control or superior jurisdiction in the premises, has the right to interfere with and change that possession. (Me.) *Crosby v. Spear*, 424.

See Constitutional Law, 8, 11.

CRIMINAL LAW.*Accomplices.*

1. **CRIMINAL LAW—Accomplice.**—A deputy sheriff who does not participate in the criminal act, nor suggest or plan it, and who, at the suggestion of the real perpetrator, consents to join in the offense, but instead keeps the sheriff fully informed as to what is transpiring, is neither a co-conspirator nor an accomplice. (Nev.) *State v. Douglas*, 688.

2. **WITNESSES—Accomplice.**—Under the statute an accomplice is not incompetent as a witness, but the weight to be given to his testimony is a question for the jury, and a conviction cannot be had upon his uncorroborated testimony. (Nev.) *State v. Douglas*, 686.

Constitutional Law.

3. **CONSTITUTIONAL LAW.**—A Statute Authorizing the Court to Determine the Degree of Crime on a plea of guilty of murder is constitutional. (Cal.) *People v. Chew Lan Ong*, 88.

4. **CONSTITUTIONAL LAW—Jurisdiction, Failure to Specify the Mode of Exercising.**—A statute authorizing the court to determine the degree of crime on a plea of guilty of murder is not unconstitutional because it fails to specify the manner in which the court is to reach its determination. Where power is conferred on a court of general jurisdiction to determine a question, and no specified mode for that determination is pointed out, the jurisdiction conferred implies authority in the court to call to its assistance in determining the question the same aid usually employed by it in reaching a judicial determination in other cases. (Cal.) *People v. Chew Lan Ong*, 88.

Warrant of Execution.

5. **CRIMINAL LAW.**—An Erroneous Insertion in a Warrant of Execution of a direction that the warden of the state prison execute the defendant does not render the warrant void, where the law provides the sentence of the court shall be executed by him. (Cal.) *People v. Chew Lan Ong*, 88.

6. **CRIMINAL LAW.**—A Warrant of Execution Becomes Functio Officio after the lapse of the time at which it was directed to be executed, and an order therein is not afterward material. (Cal.) *People v. Chew Lan Ong*, 88.

CROPS.

1. **GROWING CROPS** are Transferred by a Conveyance of the Land, unless expressly reserved. (Minn.) *Kammrath v. Kidd*, 603.

2. **GROWING CROPS**, Parol Evidence to Show Reservation of by the Grantor.—Parol evidence is not admissible to show that an agreement that the grantor might retain the growing crops was a part of the consideration of the conveyance, and hence that such crops should be exempt from its operation. (Minn.) *Kammrath v. Kidd*, 603.

Note.

Custom, respecting receipt of baggage by carriers of passengers, 373.
respecting termination of liability of carriers of passengers for baggage, 375.

DAIRIES.

See Municipal Corporations.

DAMAGES.

See Death; Druggists.

Note.

Damages, measure of, conflict of laws respecting place where contract is to be performed controls, 387.

measure of in actions against innkeepers for loss of guest's goods, 600.

measure of in actions for delay in delivering baggage, 386.

measure of in actions for loss of or injury to baggage, 385.

DEAD BODIES.

1. **DEAD BODIES**—Property in.—The law recognizes property in a human corpse, but such property is subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. (Pa. St.) *Pettigrew v. Pettigrew*, 795.

2. **DEAD BODIES**—Right of Burial.—There is no universal rule as to the burial of the dead applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association. (Pa. St.) *Pettigrew v. Pettigrew*, 795.

3. **DEAD BODIES**—The Paramount Right of Burial of a dead body is in the surviving husband or widow, and if the parties were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wish of the survivor. (Pa. St.) *Pettigrew v. Pettigrew*, 795.

4. **DEAD BODIES**—Right of Burial.—If there is no surviving husband or wife, the right of burial of a dead body is in the next of kin in the order of their relation to the decedent as children of proper age, parents, brothers and sisters, or more distant kin, med-

fied as it may be by circumstances of special intimacy or association with the decedent. (Pa. St.) *Pettigrew v. Pettigrew*, 795.

5. **DEAD BODIES—Method and Right of Burial.**—How far the desires of a decedent as to his method of burial should prevail against those of a surviving husband or wife is an open question, but as against remoter kindred such wishes, especially if strongly and recently expressed, should usually prevail. (Pa. St.) *Pettigrew v. Pettigrew*, 795.

6. **DEAD BODIES—Right of Reinterment.**—With regard to reinterment of a dead body in a different place, the presumption against the right of removal grows stronger with the remoteness of connection with the decedent and reserving always the right of the court to require reasonable cause for such removal and reinterment. (Pa. St.) *Pettigrew v. Pettigrew*, 795.

7. **DEAD BODIES—Right of Removal and Reinterment.**—If a decedent leaving a widow and one child surviving, is buried in a lot belonging to his father's family, with the widow's consent, at least to such temporary burial, and upon the subsequent death of such child it is buried in a lot owned by the widow in another cemetery, the widow has a right to remove the body of her husband to the lot purchased by her, in accord with the expressed wish of such child, especially when there is not room in the lot where the husband was buried for the burial of the widow and child, unless they were put in the same grave with the husband, and the hostile feelings of his family make it doubtful if this privilege would be granted. (Pa. St.) *Pettigrew v. Pettigrew*, 795.

DEATH.

1. **DEATH, Nonresident Alien may Recover Compensation for.**—Under a statute authorizing the next of kin to recover compensation for the death of a human being due to the negligence of another, an action may be maintained for the benefit of a nonresident alien. (Minn.) *Renlund v. Commodore Min. Co.*, 534.

2. **NEGLIGENCE—Death of Child by Wrongful Act—Measure of Damages.**—If it is sought to recover for the death of a child five years old caused by negligence in another, the measure of damages is fair compensation for the destruction of the power of the deceased to earn money, and in fixing such damage the jury should take into consideration the age of the deceased and the probable duration of his life, but not his earning capacity. (Ky.) *Smith v. Middleton*, 308.

DEDICATION.

1. **DEDICATION OF STREETS by Plat.**—An intention on the part of the owner of land to make a dedication to the public by his plat of the streets and alleys is shown when spaces upon such plat claimed as streets are given names thereon as such, and places claimed as alleys appear on the plat as strips between the lots in the different blocks platted. (Ill.) *Village of Lee v. Harris*, 176.

2. **DEDICATION OF STREETS.**—A survey and plat are sufficient to constitute a dedication of streets and alleys, if it is evident from the face of the plat that it was the intention of the owner of the land to set apart certain grounds or strips of land shown on such plat for a public use. (Ill.) *Village of Lee v. Harris*, 176.

3. **DEDICATION—Vacation.**—An attempted vacation of a portion of a plat containing a dedication of land to a public use is

ineffectual if all of the owners of lots sold with reference thereto do not join in the proceeding. (Ill.) *Village of Lee v. Harris*, 176.

DEEDS.

1. **DEEDS—Notice of Trust.**—A warranty deed conveying the fee for a nominal consideration and reciting that it is made in pursuance of a resolution of the board of directors of the corporation grantor, is not notice of any kind that such conveyance is made in trust for such corporation. (Ill.) *Home Savings etc. Bk. v. Peoria Agricultural etc. Soc.*, 132.

2. **CONVEYANCE, Delivery, Evidence to Show Intended Date of.**—When a conveyance is placed in the hands of a third person, to be afterward delivered by him, evidence is admissible to prove that he was instructed not to deliver it until a date specified, though most of the consideration was paid before that time, for the purpose of proving that the conveyance did not become operative until that time, and hence did not include growing crops which previously matured. (Minn.) *Kammrath v. Kidd*, 603.

See Mortgages, 1.

Note.

Definition of an account stated, 288.

of baggage, 347, 348.

of gifts causa mortis, 891.

of merger of estates, 153.

of subrogation, 476.

DESCENT AND DISTRIBUTION.

See Public Lands, 6-9.

DISPENSARY.

See Intoxicating Liquors.

DIVORCE.

Agreement for Divorce.

1. **HUSBAND AND WIFE—Agreement for Divorce—Public Policy.**—An agreement entered into between husband and wife calculated or intended to facilitate the securing of a divorce a vinculo matrimonii, is contrary to the policy of the law and void. (Utah) *Palmer v. Palmer*, 820.

2. **HUSBAND AND WIFE—Contract for Divorce.**—Courts will refuse to enforce any contract, as against public policy, which is intended to promote the dissolution of the marriage status. (Utah) *Palmer v. Palmer*, 820.

3. **HUSBAND AND WIFE—Agreement for Divorce—Widow's Right of Inheritance.**—A contract to facilitate the procuring of a divorce, secured by the husband from his wife through unfair advantage and unwarranted coercion on his part, whereby she agrees to take an inadequate and fractional part of their property, is void, as against public policy, and does not bar her of her right of inheritance in the property of such husband on his death. (Utah) *Palmer v. Palmer*, 820.

4. **HUSBAND AND WIFE—Contract for Divorce.**—A contract between husband and wife reciting that irreconcilable differences have arisen between them, and that in consequence a permanent

separation is desirable, that a divorce proceeding is in contemplation and will be instituted by one or the other for the legal dissolution of the marriage tie, and then, after reciting the property the wife is to have, declares that they agree so far as the law permits them to do, to a full and final separation and dissolution of the marriage relation, is not merely a contract for a separation, but is one for the purpose of facilitating the securing of a divorce, and is therefore void. (Utah) *Palmer v. Palmer*, 820.

Alimony.

5. **DIVORCE AND ALIMONY—Attorneys' Fees in Independent Proceedings.**—A wife who has secured a writ of ne exeat in a suit against her husband for alimony and maintenance cannot, on his suing out a writ of habeas corpus to obtain his release from custody, and prosecuting to the supreme court a writ of error in such habeas corpus proceeding, obtain there an order that he pay her alimony pendente lite, and attorneys' fees for representing her interest in the supreme court on such writ of error. (Fla.) *Bronk v. State*, 119.

6. **ALIMONY—Ne Exeat.**—The writ of ne exeat was commonly used in cases of equitable demand, and it is applicable in cases of alimony under certain conditions. Though not specially authorized in proceedings for alimony, yet if a proper case should be presented for the writ under the general principles of law or other provisions of our statutes, it should be awarded. (Fla.) *Bronk v. State*, 119.

7. **NE EXEAT—Issuing Before a Decree for Alimony.**—The English courts of chancery never issued writs of ne exeat to secure the payment of alimony until after a decree therefor in the ecclesiastical courts, and then only for the amount of such decree. (Fla.) *Bronk v. State*, 119.

8. **ALIMONY—Ne Exeat, When may Issue Before Decree for.**—Where a court of chancery has been given jurisdiction of suits for divorce and for alimony and maintenance, and is vested with authority to make such orders as may be necessary to secure to the wife such maintenance, it may issue a writ of ne exeat before any decree or order fixing the amount of alimony or maintenance has been made in all cases where it seems to the chancellor just to issue it, and necessity therefor exists. (Fla.) *Bronk v. State*, 119.

9. **CONSTITUTIONAL LAW—Imprisonment for Debt.—Alimony or Maintenance** from a husband to his wife is not a debt within the meaning of the constitutional inhibition against imprisonment for debt. (Fla.) *Bronk v. State*, 119.

DOMICILE.

1. **DOMICILE OR RESIDENCE.—To Bring About a Change of Residence,** an intention to change is not sufficient, but the change must be actually made, which can only be by abandoning the old and permanently locating in the new place of residence. (Ill.) *People v. Moir*, 205.

2. **DOMICILE OR RESIDENCE—When not Changed.**—Though a person intends to change his residence from A to B in the near future, yet if his going from the former to the latter place is because of his sudden illness and in order that it may be better treated, and such illness proves fatal in a few days, no change of residence is effected, and he must be regarded as a resident of A at the time of his decease. (Ill.) *People v. Moir*, 205.

3. DOMICILE—Presumption of Continuance of.—When a residence is once established, the presumption is that it continues, and the burden of proof is on the party who claims that it has been changed. (Ill.) *People v. Moir*, 205.

4. DOMICILE OR RESIDENCE—Evidence of Change of.—Where the declarations of a party are admitted in evidence to show a change of residence, they are not considered as a high class of evidence and are entitled to little weight when his acts are not consistent with them. (Ill.) *People v. Moir*, 205.

Note.

Dower, merger of in an estate in fee, 156.

DRUGGISTS.

MASTER AND SERVANT—Negligence—Punitive Damages.—The act of a drug clerk in selling and furnishing a deadly drug, when a comparatively harmless one is asked for, is gross negligence for which the master is liable in punitive damages. (Ky.) *Smith v. Middleton*, 308.

EJECTMENT.

When Lies.

1. EJECTMENT to Recover Easement.—An easement cannot be the subject matter of an action of ejectment. (Ill.) *Village of Lee v. Harris*, 176.

2. EJECTMENT for Street or Alley.—A city or village may maintain ejectment to regain possession of any part of a street or alley which is unlawfully withheld from it whether it has the legal title thereto or not. (Ill.) *Village of Lee v. Harris*, 176.

3. EJECTMENT by City—Possession of Street.—The right acquired by a city from travel upon and use of land as a street for the requisite period, involves the right to the exclusive possession thereof, and the right to recover such possession by an action of ejectment. (Ill.) *Village of Lee v. Harris*, 176.

Res Judicata.

4. RES JUDICATA—Ejectment.—At common law ejectment was a mere possessory action between fictitious parties, and the judgment therein did not determine the estate or interest of the parties in the property, nor conclusively determine the right of possession. Therefore it was not a bar to a subsequent action for the possession of the same property. (Or.) *Hoover v. King*, 754.

5. RES JUDICATA—A Judgment in Ejectment is by the Statutes of Oregon Conclusive of the Title to the land when such title is tried and determined, and such determination appears on the face of the judgment. (Or.) *Hoover v. King*, 754.

6. RES JUDICATA—A Judgment in Ejectment is not Conclusive of the Title to the Property Under the Statutes of Oregon when all that appears by the record is that the jury found for the defendant, and the complaint was dismissed and the cost awarded to him. (Or.) *Hoover v. King*, 754.

ELECTION OF REMEDIES.

ELECTION OF REMEDIES, Right of.—One who has a lien on personal property, and also a right to recover damages from a person for removing it from the state and rendering it impossible of

identification has a choice of remedies, and the defendant cannot complain, because the plaintiff pursues that to recover damages. (Or.) *Bergman v. Inman*, 771.

EMINENT DOMAIN.

1. **CONSTITUTIONAL LAW—Eminent Domain.**—A statute granting to the owner of timber lands the right to condemn a right of way over private property for logging roads and lumbering purposes is in violation of a constitutional provision prohibiting the taking of private property for a private use, and void. (Wash.) *Healy Lumber Co. v. Morris*, 964.

2. **EMINENT DOMAIN—Public Use—Judicial Question.**—A constitutional provision that the question in condemnation proceedings whether the use to which the property is to be put is public or not shall be a judicial question releases the courts from giving any weight to the fact that the legislature has pronounced a certain use a public use. The determination of that question is solely with the courts. (Wash.) *Healy Lumber Co. v. Morris*, 964.

3. **EMINENT DOMAIN—Public Use—Public Benefit.**—A public use, to authorize the exercise of the right of eminent domain, must be either a use by the public or by some agency, which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or the general prosperity of the state. (Wash.) *Healy Lumber Co. v. Morris*, 964.

4. **EMINENT DOMAIN—Way of Necessity.**—Constitutional authority to acquire a private way of necessity over land does not authorize a land owner to condemn a right of way over the land of a stranger for a logging road and lumbering purposes. (Wash.) *Healy Lumber Co. v. Morris*, 964.

5. **EMINENT DOMAIN—Private Property cannot be Taken for Private Use, in any case or under any condition, with or without compensation.** (Va.) *Fallsburg Power etc. Co. v. Alexander*, 855.

6. **EMINENT DOMAIN—Public Use.**—Whenever the public use of property requires it, private rights therein must yield to the sovereign power to take it for the public use, and when so taken, it is the character of the use for which it is taken, and not the means or agencies employed which determines whether it is legally taken under the legitimate exercise of the right of eminent domain, but in all cases the use for which it is proposed to take private property in the exercise of this right, must be a public use, or for a public purpose. (Va.) *Fallsburg Power etc. Co. v. Alexander*, 855.

7. **EMINENT DOMAIN—Public Use.**—To justify the exercise of the right of eminent domain, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or corporation in whom the title to the property, when condemned, will be vested, and such a public use as cannot be defeated by such private owner, but which continues to be guarded and controlled by the general public through the legislature; such public use must be clearly a needful one for the public, which cannot be given up without obvious general loss and inconvenience, and it must be impossible, or very difficult, at least, to secure the same public use and purpose otherwise than by authorizing the condemnation of the property. (Va.) *Fallsburg Power etc. Co. v. Alexander*, 855.

8. **EMINENT DOMAIN—Private Use—Internal Improvement.**—It is not within the constitutional authority of the legislature to
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confer upon an individual or corporation the right of eminent domain to acquire a site or location for a plant to manufacture or generate water power, electrical power, or other power, light and heat, and utilize, transmit and distribute such power, light or heat, to any place or places, for the individual's or corporation's own use, or for the use of other individuals or corporations. The interest or use of the public in such improvement, if any, is too vague, indefinite and uncertain to justify the exercise of the right of eminent domain, and besides, such use may at any time be denied or withdrawn by the corporation or individual controlling it. (Va.) Fallsburg Power etc. Co. v. Alexander, 855.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

1. **EQUITY.**—A Suit will not be Sustained to Avoid a Multiplicity of Actions where it does not appear but one action will determine all questions of title between any two claimants or sets of claimants. (Me.) Burroughs v. Cutter, 392.

2. **EQUITY PRACTICE**—Conflicting Liens on Trust Property.—If, when a bill is filed to enjoin a trustee from selling the trust property, it appears that such property, since the creation of the trust, has been divided into lots, and portions of it sold to purchasers who have erected buildings thereon, and against which there are recorded mechanics' liens and other impediments to a fair sale, the court should retain the case and have the trust executed under its supervision, to the end that the rights and priorities of the several lien creditors may be ascertained and established. (Va.) Hudson v. Barham, 849.

Note.

Equity, partnership for illegal purposes, equity will not compel accounting of the proceeds of, 326, 327.

ESTATES.

1. **MERGER OF ESTATES at Law.**—At law if a legal and equitable estate coincide in the same person, the equitable estate is immediately merged and annihilated. (Ill.) Forthman v. Deters, 145.

2. **MERGER OF ESTATES in Equity.**—If a legal and an equitable estate coincide in the same person, the question whether a merger takes place in equity depends upon the intention of the parties, and the surrounding circumstances. Equity, however, will prevent a merger only for the purpose of promoting substantial justice, and it will not prevent it, when prevention would give effect to a fraud or wrong. (Ill.) Forthman v. Deters, 145.

3. **MERGER of Legal and Equitable Estate.**—If the purchaser of encumbered land agrees to pay the mortgage thereon as part of the consideration, his subsequent purchase of the notes and mortgage merges the equitable and legal estate. (Ill.) Forthman v. Deters, 145.

ESTATES OF DECEDENTS.

See Executors and Administrators; Wills.

ESTOPPEL.

1. **ESTOPPEL—Equitable—Essentials.**—Before an equitable estoppel can exist, it must appear that a party has, by his conduct, willfully made false representations of material facts for the purpose of inducing another to act upon them, and that such other, not knowing that the representations were false, and trusting to their truthfulness, has so altered his position that he would suffer a loss if the false conduct were repudiated. (Ill.) *Supreme Tent Knights of Maccabees v. Stensland*, 137.

2. **ESTOPPEL BY DELAY or Laches.**—One having a lien on logs and knowing that another has taken possession of them and rendered them impossible of identification, contrary to the provisions of a statute, is not estopped from maintaining an action under such statute, if commenced within the time allowed by the statute of limitations, by his long delay in commencing the action and his failure to institute some proceeding to enforce his lien. (Or.) *Bergman v. Inman*, 771.

3. **ESTOPPEL—Ignorance.**—A person cannot be charged with fraud or held to be estopped where he is ignorant of the truth and does no act of any nature. (Ky.) *Reid's Administrator v. Benge*, 834.

See *Municipal Corporations*, 24; *Wills*, 14-17.

EVIDENCE.*Miscellaneous.*

1. **EVIDENCE, Parol to Vary Contract.**—If a Vendor writes to his vendee, "I beg to confirm sale to you of the following mahogany," and the vendee in reply to the letter states that the "same is correct as to quantities, terms, etc., as specified," the letters do not contain the contract of sale, but refer to a contract already made. Parol evidence is therefore admissible to show what that contract was. (Md.) *Courtney v. William Knabe & Co. Mfg. Co.*, 456.

2. **EVIDENCE, SECONDARY, When Inadmissible.**—The best obtainable evidence should be adduced to prove every disputed fact, the presumption being if inferior evidence is offered that the higher evidence would be adverse. (Or.) *Scott v. Astoria E. R. Co.*, 710.

3. **EVIDENCE—Burden of Proof.**—The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises. By the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial to make or meet a prima facie case. (Ill.) *Supreme Tent Knights of Maccabees v. Stensland*, 137.

4. **EVIDENCE.**—The Burden of Proof as applied to the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and never shifts, and unless he meets this obligation upon the whole case he fails. (Ill.) *Supreme Tent Knights of Maccabees v. Stensland*, 137.

Signal Service Record.

5. **EVIDENCE.**—A Book Kept by a Person Employed in the Signal Service of the United States, whose duty it is to record

truthfully the facts therein stated, is admissible in evidence to prove such acts. (Or.) *Scott v. Astoria R. R. Co.*, 710.

6. **EVIDENCE—Signal Service Record, Testimony of Contents of, when Admissible.**—If it appears that a witness has before him the records of the signal service for a specified station, and that they contain so many entries that an examination of each would occasion great loss of time to the court, the witness may be permitted to testify that he has examined them, and what they show the rainfall to have been to a date specified, and that it was less than the average daily rainfall. Nor is it material that such records were not kept by him. (Or.) *Scott v. Astoria R. R. Co.*, 710.

Telephone Communications.

7. **EVIDENCE—Telephone Communications.**—When material to the issues, communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face, but the identity of the person sought to be charged with a liability by means of a telephone communication must be established by some testimony, either direct or circumstantial. (Wash.) *Young v. Seattle Transfer Co.*, 942.

8. **EVIDENCE—Telephone Communications—Failure of Proof.**—A person whose sole cause of action is his reliance and action taken upon a telephonic communication, has the burden of proof to establish the identity of the person sought to be charged as the person conversing with him at the other end of the telephone line, and in the absence of his establishing such identity, his case must fall for failure of proof. (Wash.) *Young v. Seattle Transfer Co.*, 942.

Expert Testimony.

9. **WITNESS—Expert Who has No Personal Knowledge.**—A graduate who has taken a course of civil engineering, including the science of railroad construction, and has practiced civil engineering fourteen years, though he has never been actually engaged in railroad building, may be permitted to testify that he is acquainted with the approved methods of civil engineers in relation to the construction of railroads and embankments and what are the standard slopes applicable to all kinds of known earth, and to detail the degrees of inclination recommended by the majority of such engineers, and to give names of authors whose works on civil engineering coincide with the opinion of the witness. (Or.) *Scott v. Astoria R. R. Co.*, 710.

10. **WITNESS.—An Expert** is a person who is so qualified either by actual experience or by such careful study as to enable him to form a definite opinion of his own respecting any division of science, branch of art, or department of trade about which persons having no particular training or special study are incapable of forming accurate opinions or deducing correct conclusions. (Or.) *Scott v. Astoria R. R. Co.*, 710.

11. **EVIDENCE—Reference by Witness to Works on Civil Engineering.**—If it be conceded that works on civil engineering are not admissible in evidence, still a witness who is a civil engineer may, as an expert, give his opinion and state that it is in harmony with certain standard works on civil engineering which he mentions, giving the names of their author. (Or.) *Scott v. Astoria R. R. Co.*, 710.

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Evidence, baggage, checks for, effect of as, 390, 391.

baggage, declaration of carrier's agents respecting, 391.

gifts *causa mortis*, what competent and sufficient to establish, 915-918.

EXECUTIONS.

1. **EXECUTIONS—Legal Title Subject to.**—A person vested with the legal title to land to plat and convey it to purchasers, though he executes a written declaration of trust to his grantors, which is not recorded, has a title subject to levy and sale under execution upon judgment against him obtained in good faith without notice of the alleged trust. (Ill.) *Home Savings etc. Bk. v. Peoria Agricultural Soc.*, 132.

2. **EXECUTION SALE, Redemption Therefrom—Authority of the Sheriff.**—The sheriff is made the agent of the purchaser at an execution sale for the purpose of receiving the payment of money necessary to effect redemption therefrom. (Cal.) *Hooker v. Burr*, 17.

3. **EXECUTION SALE, Redemption from by a Check.**—If a sheriff receives as redemption from an execution sale the check of a third person acting as agent of the redemptioner, and such check is paid when presented, though this is long after the time for redemption has passed, the conditional payment effected by the check becomes absolute, and relates to the date of its delivery. Especially is this true when the redemptioner offered to pay in money, but substituted the check at the request of the sheriff. (Cal.) *Hooker v. Burr*, 17.

4. **EXECUTION SALE, Redemption, Change in Statute Regarding the Amount to be Paid.**—Though after the execution of a mortgage or the creation of a debt, the statute fixing the amount necessary to be paid to redeem from an execution sale is amended, such amendment operates upon any sale subsequently made under execution for the enforcement of the mortgage or debt. The obligation of the contract of the mortgagee or other creditor is not thereby impaired, and the purchaser at the sale cannot complain if the amount required for redemption is not changed after his purchase. (Cal.) *Hooker v. Burr*, 17.

See Criminal Law, 5, 6.

Note.

Execution Sales, subrogation in favor of purchasers at, 528.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS—Right to Administer.**—The widow of a decedent has no absolute right to a grant of letters of administration on his estate. (Pa. St.) *Warner's Estate*, 84.

2. **EXECUTORS AND ADMINISTRATORS.**—If differences exist between the widow and sons of a decedent by a former marriage, disinterested, fit person, natural or artificial, should be appointed administrator when the parties themselves cannot agree upon an administrator. (Pa. St.) *Warner's Estate*, 804.

3. **ESTATES OF DECEDENTS—Administrator, Right of Nonresident to Nominate.**—Under a statute requiring administration to be granted to the surviving husband or wife or next of kin of the deceased, or to some person nominated by her or them, but declaring that a nonresident of the state cannot be appointed ad-

ministrator, the nonresidence of the surviving husband or wife or next of kin does not disqualify him or her from nominating an administrator. (Ill.) *Strong v. Dignan*, 225.

4. **ESTATES OF DECEDENTS, Claims Against, What are not.**—One claiming the ownership of moneys under a gift to her by her father, since deceased, cannot be regarded as presenting or having a claim against his estate within the meaning of the statutes of the state requiring satisfactory evidence other than the testimony of the claimant to establish the claim. (Or.) *Waite v. Grubbe*, 764.

5. **ESTATES OF DECEDENTS—Suits Against—Practice.**—Courts will not encumber suits for the administration of the assets of decedent's estates with collateral issues, affecting the adjustment of equities between persons as to whom and many of the creditors there is no sort of privity, who are not necessary parties and whose object is delay. (Va.) *Robinett v. Mitchell*, 928.

6. **EXECUTORS AND ADMINISTRATORS—Sales.**—Rule of Caveat Emptor applies to a purchaser at an administrator's sale of a homestead settler's rights. (Wash.) *Towner v. Rodegeb*, 936.

7. **EXECUTOR'S POWER OF SALE for the Benefit of a Specified Person** cannot be exercised by him after the executor's death. Though property is devised to a minor, provided she reaches the age of twenty-one years or leaves issue, and the executor is given power to dispose of the whole of the estate for the support, clothing and education of such minor, yet if the executor dies without executing the power, it does not pass to the minor or her guardian, so as to become subject to a probate sale, and a sale made by such guardian under the order of court is void. (Me.) *Burrongs v. Cutter*, 392.

See Adoption, 6; Appeal and Error, 1; Constitutional Law, 8; Limitation of Actions, 4; Public Lands, 6-9.

EXEMPLARY DAMAGES.

See Druggists.

EXPERT TESTIMONY.

See Evidence, 9-11.

EXPLOSIVES.

See Negligence.

FALSE PRETENSES.

FALSE PRETENSES Venue in.—If a person in one state, by means of false statement as to his financial standing, inclosed with an order for goods mailed to a person in another state, causes such person, who relies upon his statement, to deliver the goods to a carrier for shipment to the person thus ordering them, who receives them at their destination in the former state, he may be properly tried, and convicted in that state for obtaining goods under false pretenses. (Pa. St.) *Commonwealth v. Schmunk*, 801.

FELLOW-SERVANT.

See Master and Servant, 8.

Notes.

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FRANCHISES.

See Municipal Corporations, 2, 3.

FRAUD.

1. **FRAUD—Representations—Knowledge of Truth or Falsity of.** One who, without knowledge of the truth or falsity of a material representation made with intent that another shall act thereon which he does, is guilty of fraud, in legal contemplation if the representation turns out to be false, as much as if he knew it was untrue when he made it. (Nev.) *Foulks Accelerating Air Motor Co. v. Thies*, 684.

2. **FRAUD—False Representations.**—If a person makes a material representation in relation to a matter susceptible of knowledge, in such manner as to impart positive knowledge of its truth, with intent that another shall rely upon such representation, this is sufficient to establish against him a legal fraud, if the other does rely upon it and it proves untrue. (Nev.) *Foulk Accelerating Air Motor Co. v. Thies*, 684.

See Sales, 2.

FRAUDS, STATUTE OF.

See Vendor and Vendee, 6.

FRAUDULENT CONVEYANCE.*In General.*

1. **FRAUDULENT CONVEYANCE.**—If There is a Running Account between buyer and seller, the buyer making payments from time to time, but having a debit balance continuously against him, the seller is a subsisting creditor in respect to fraudulent conveyances by the buyer. (Md.) *Spuck v. Logan & Uhl*, 427.

2. **FRAUDULENT CONVEYANCE—Subsequent Creditors.**—If a conveyance is merely colorable, and a secret trust and confidence exists for the benefit of the grantor, it is subject to attack by subsequent as well as prior creditors. (Md.) *Spuck v. Logan & Uhl*, 427.

3. **FRAUDULENT CONVEYANCE.**—A Conveyance Intended to Defraud One Creditor may be avoided by another standing in like relation. (Md.) *Spuck v. Logan & Uhl*, 427.

4. **FRAUDULENT CONVEYANCE—Judgment, Claims not Reduced to.**—The fact that a creditor has not reduced his claim to judgment does not prevent a conveyance from being fraudulent as to him, but only affects his remedy; when he establishes his claim by judgment, his right to attack the conveyance relates to the time of the transfer, in the absence of intervening rights. (Md.) *Spuck v. Logan & Uhl*, 427.

5. **FRAUDULENT CONVEYANCE—Purging by Paying Consideration.**—If there is fraud in fact on the part of both grantor and grantee, the conveyance is not validated by the grantee subsequently paying full consideration. (Md.) *Spuck v. Logan & Uhl*, 427.

6. **FRAUDULENT CONVEYANCES.**—A Conveyance cannot be Fraudulent as Against Creditors Unless it can legally defraud them by delaying or preventing the collection of their claims. (Minn.) *Keith v. Albrecht*, 566.

7. **FRAUDULENT CONVEYANCE—Setting Aside—Attorney's Fee.**—A creditor who succeeds in having a conveyance made by the debtor set aside as fraudulent and declared to operate as an assign-

ment for the benefit of all of the creditors, is entitled to the allowance of an attorney's fee out of the property. (Ky.) *Davis v. Feltman Co.*, 289.

Homesteads.

8. **HOMESTEADS—Right to Dispose of as Against General Creditors.**—The owner of a homestead may make such disposition of his exempt property by deed, mortgage or other transfer, as to him may seem right, and his creditors cannot be heard to complain or interfere therewith. (Ky.) *Davis v. Feltman Co.*, 289.

9. **HOMESTEADS, Fraudulent Conveyance of.**—A Homestead Exemption is not Lost by a conveyance to a third person which is set aside at the instance of creditors. (Ky.) *Davis v. Feltman Co.*, 289.

10. **HOMESTEAD—Fraudulent Conveyances.**—As to a homestead there can be no conveyance which is fraudulent as to the grantor's creditors, for they have no legal claims upon it. (Minn.) *Keith v. Albrecht*, 566.

Note.

Fraudulent Conveyances, subrogation in favor of grantees in, 503.

FREEDOM OF SPEECH

See Libel and Slander.

GAMBLING.

See Nuisance; Partnership.

GIFTS.

In General.

1. **GIFTS.**—To Consummate Gifts Inter Vivos, there must be an absolute delivery of the subject matter thereof by the donors, with an intention to part with their interest in and dominion over the property sought to be transferred. (Wis.) *Opitz v. Karel*, 1004.

2. **GIFTS—Delivery.**—The essential requirement in cases of gifts is that such a delivery shall be made as the nature of the subject sought to be bestowed reasonably admits of. (Wis.) *Opitz v. Karel*, 1004.

3. **GIFTS.**—Delivery of an Instrument making an appropriation of a fund is a symbolical delivery of the fund, and the gift becomes thereby executed and completed, vesting title in the person to whom such delivery is made. (Wis.) *Opitz v. Karel*, 1004.

4. **GIFTS.**—There are Two Essentials to a Valid Gift—the intent on the part of the donor to bestow on the donee the thing given, and a delivery accompanied by an acceptance of the gift on the part of the donee, express or implied. (Or.) *Waite v. Grubbe*, 764.

5. **GIFT of Hidden or Buried Money, When Complete.**—If one who has hidden his money by burying it in different places, being seriously ill and in the belief that his illness will terminate fatally, goes with his daughter to the immediate vicinity of the hiding places, and points them out, and there tells her that he gives her all such money, but advises her to leave it where it is unless he should sell the place, stipulating that if he should get well and want some of the money, she would let him have it, the gift from him to her is complete and is not rendered inoperative by this stipulation, nor

by her leaving the money in its hiding places until long after his death. (Or.) *Waite v. Grubbe*, 764.

6. **GIFTS, Delivery Necessary to.**—A delivery to support a gift need not be manual or by actual tradition from hand to hand. It may be constructive or symbolical, but must be, as a general rule, as complete and perfect as the nature of the property and the attendant circumstances and conditions will permit. (Or.) *Waite v. Grubbe*, 764.

7. **GIFT, Delivery of Hidden Money, When Sufficient.**—If a father, barely able to walk, goes with his daughter to his garden where he has hidden money in different places, and points them out and describes them to her, and tells her that he gives her such money, but advises her to leave it remain hidden where it is, unless he sells the place, and stipulates that she will give him some of the money if he gets well, and needs it, the delivery is as complete as the circumstances permit, and is sufficient to support the gift, though she does not remove any of the money until after his death. (Or.) *Waite v. Grubbe*, 764.

8. **GIFT, Evidence of as Between Parent and Child.**—A delivery by a father to his child in pursuance of an intended gift may be established by less positive and unequivocal proof than is required where the fact is at issue between strangers. (Or.) *Waite v. Grubbe*, 764.

Causa Mortis.

9. **GIFTS CAUSA MORTIS—Essentials.**—Attributes of a gift causa mortis are that it must be of personal property and made in the last illness of the donor while the apprehension of death is imminent, and subject to the implied condition that if he recovers, or if the donee die first, the gift shall be void and possession of the property must be delivered at the time of the gift to the donee, or to some one for him, and the gift must be accepted by the donee. (Va.) *Johnson v. Colley*, 884.

10. **GIFTS CAUSA MORTIS—Revocation or Defeat.**—The title to every gift causa mortis must vest in the donee at the time of the gift, but the donor may revoke the gift during his life, or it may be defeated by operation of law if the donor recovers from the illness which induced the gift or survives the donee. If it is not revoked, or defeated by operation of law, it becomes absolute at the donor's death, but not until then. (Va.) *Johnson v. Colley*, 884.

11. **GIFTS CAUSA MORTIS—Condition.**—A gift causa mortis, otherwise valid, is not vitiated because accompanied by the words, "If I die, or anything happens to me." (Va.) *Johnson v. Colley*, 884.

12. **GIFTS CAUSA MORTIS—Delivery to Third Person.**—If one, in view of impending dissolution, clearly and intelligently manifests an intention to make a present gift of personal property to another, and, in consummation of his intention makes such delivery to a third person for the use of the intended donee as he is then capable of making, considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not as agent of the donor. (Va.) *Johnson v. Colley*, 884.

See Insurance, 21-23.

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GUARANTY.

1. GUARANTY—Continuing—Limit of Indebtedness—Sales on Credit.—A contract of guaranty executed by directors and stockholders in a corporation reciting that they desire the obligee to continue to sell goods to their corporation, and guarantee "payment upon demand of all moneys, debts, obligations, and demands, of whatever nature and character, now due, or which may thereafter become due," from such corporation to the obligee, is not limited to the indebtedness then existing, but covers that and all sales thereafter made to the corporation by the obligee, on credit in the due course of business. (Ill.) *Mamerow v. National Lead Co.*, 196.

2. GUARANTY—Continuing—Must be Reasonable as to Time and Amount.—If a contract of guaranty is continuing or unlimited, as to period of time or amount, such time and amount must be reasonable under the circumstances of the particular case. (Ill.) *Mamerow v. National Lead Co.*, 196.

3. GUARANTY—Continuing—Revocation.—A contract of guaranty entered into to induce the obligee to continue to sell goods to the obligor and guaranteeing payment of all debts now due, or which may thereafter become due from the latter to the former, may be revoked or withdrawn at any time upon notice to the obligee, and the obligor's liability will then cover only such indebtedness on sales as are made previous to such notice. (Ill.) *Mamerow v. National Lead Co.*, 196.

4. GUARANTY—Default of Principal—Notice.—If a contract of guaranty is a collateral continuing one, the guarantor is entitled to reasonable notice of the default of the principal debtor, but failure of the obligee to give such notice can be availed of only to the extent of actual loss or damage suffered by the guarantor therefrom. (Ill.) *Mamerow v. National Lead Co.*, 196.

5. GUARANTY—Default of Principal—Burden of Proof.—If a guarantor seeks to relieve himself from liability upon the ground that notice of the default of the principal debtor was not given him in a reasonable time, the burden of proof rests upon him to show failure to give notice and consequent injury by the loss of the whole or a part of the debt for which he stood as surety. Such failure to give notice resulting in damage is matter of defense. (Ill.) *Mamerow v. National Lead Co.*, 196.

6. GUARANTY—Notice of Default of Principal Debtor need not be given by the obligee in a contract of guaranty to the obligor when the latter has notice from an independent source, or where it is his duty under the law to take notice. (Ill.) *Mamerow v. National Lead Co.*, 196.

7. GUARANTY—Directors of Corporation as Guarantors When Chargeable with Notice.—Directors of a corporation as guarantors

of all indebtedness which thereafter might become due from their corporation to the obligee in the contract of guaranty are chargeable with notice of the financial condition of their corporation, the extent of the indebtedness under their contract, and of the default of the corporation. (Ill.) *Mamerow v. National Lead Co.*, 196.

GUARDIAN AND WARD.

GUARDIAN AND WARD—Guardians' Sales must be Limited to the Title or Interest of Their Wards.—Hence, if land devised to a minor, her heirs, or assigns, provided she reaches the age of twenty-one years or leaves issue, is sold by her guardian under the license of the probate court, the title of the purchaser is destroyed by her death without issue before reaching the age specified. (Me.) *Burroughs v. Cutter*, 392.

See Principal and Surety.

Note.

Guardians' Bonds, subrogation in favor of sureties on, 508.

HABEAS CORPUS.

1. **HABEAS CORPUS**.—An Error in the Judgment Under Which a Prisoner is Held does not entitle him to be discharged on habeas corpus, unless it is such as makes the judgment void. If it is merely erroneous, as where a court having jurisdiction has given a wrong judgment, the party aggrieved can obtain relief only by writ of error or other process of review. (Fla.) *Bronk v. State*, 119.

2. **HABEAS CORPUS**.—Inquiry into the Merits Upon.—A party in custody under a writ of ne exeat to secure alimony is not entitled to be discharged on habeas corpus on the ground that the proofs taken show that the complainant is not entitled to alimony. This is a proper matter for decision in the original suit, and cannot be inquired into on habeas corpus. (Fla.) *Bronk v. State*, 119.

3. **HABEAS CORPUS**.—Collateral Inquiry.—If a prisoner is in custody under a writ of ne exeat issued in a suit in which it is alleged that he is a resident of the state, this allegation presents one of the issues to be determined in the action, and he cannot obtain his release on habeas corpus on the ground that such allegation is not true. The adjudication involved in the issuing of the writ and the refusal to discharge it, though only in limine and subject, upon further investigation in the same proceeding, to be differently adjudged, cannot be inquired into or reviewed on habeas corpus. (Fla.) *Bronk v. State*, 119.

4. **HABEAS CORPUS**.—Release from Custody Under a Writ of Ne Exeat cannot be obtained on habeas corpus on the ground that the writ could not issue in the case or under the circumstances under which it was issued, because this contention is in the nature of a collateral attack upon the order of a court of general jurisdiction. (Fla.) *Bronk v. State*, 119.

5. **HABEAS CORPUS**.—Under an Allegation that the Court Acted Without Jurisdiction in Issuing Process under which the prisoner is held, courts, on habeas corpus, will go far enough to see whether in reality this be true, and also whether or not the action of the court is illegal to the extent of rendering its decision entirely void, and not merely irregular. (Fla.) *Bronk v. State*, 119.

HOMESTEAD.

1. A **HOMESTEAD** may be Claimed in Land of Which the Party is in Possession Under a Contract of Purchase or any other equitable

title as well as if he held the legal title. (Minn.) *Keith v. Albrecht*, 566.

2. HOMESTEAD, Setting Aside Flats as.—The fact that the premises claimed as a homestead consist of a lot and a building thereon divided into three flats, each intended to be used, and used, by a separate family, does prevent the whole from being selected or set apart as a homestead, where the owner himself occupied one of such flats as a home. (Cal.) *Estate of Levy*, 92.

3. HOMESTEAD.—Using a Building Partly, or Even Chiefly, for Business Purposes or Renting Part of It is not inconsistent with the right of homestead, provided it is the bona fide residence of the family of the owner. (Cal.) *Estate of Levy*, 92.

4. HOMESTEAD, What may be Selected as.—Property suitable for residence purposes at the time of its selection by the court and of such a character that it could have been selected during the life of the husband, may be selected and set apart by the court after his death as a homestead for his widow. (Cal.) *Estate of Levy*, 92.

5. HOMESTEAD, Probate, Value of.—There is no Limitation of Value in the case of a probate homestead. The court may set aside such property regardless of value as, in view of the value and condition of the estate may seem just and proper. Where the only premises suitable for a homestead are indivisible and no homestead can be given to the family unless the whole of such premises is given, the fact that they are valued at seven thousand five hundred dollars and constitute nearly one-half of the estate does not impair the homestead right in the absence of a statutory limitation as to its value. (Cal.) *Estate of Levy*, 92.

6. HOMESTEAD—Vendor's Lien.—If the whole of a tract is subject to a vendor's lien, and part of it is a homestead, the owner has a right to have the part which is not a homestead first applied to the satisfaction of such lien, and a voluntary conveyance of the whole tract to his wife is not a fraud as against his creditors, if the part not exempt as a homestead is not of sufficient value to satisfy such lien. (Minn.) *Keith v. Albrecht*, 566.

7. HOMESTEAD.—A Mortgage of a Homestead Which is Adjudged to be an Act of Bankruptcy is nevertheless enforceable against creditors. (Ky.) *Davis v. Feltman Co.*, 289.

8. HOMESTEADS—Loss of Family.—If a person has acquired the right to a homestead exemption by the occupancy of land with his family, the loss of his family by death and marriage does not defeat such right. (Ky.) *Davis v. Feltman Co.*, 289.

9. HOMESTEAD—Existence of Two at the Same Time.—A party cannot have two homesteads at the same time. This rule applies to a widow who, having a homestead, marries and removes with her husband to his. (Ill.) *Kloss v. Wylezalek*, 220.

10. HOMESTEAD—Widow's Abandonment of After Her Second Marriage.—If a widow marries and removes with her husband to his homestead, she thereby irrevocably abandons her previous homestead, though when she so removes she has an intention of returning thereto if she cannot get along with her husband. Her subsequent abandonment of her husband and his home cannot revive her right to claim her former interest. (Ill.) *Kloss v. Wylezalek*, 220.

11. HOMESTEAD ABANDONMENT.—One Ceasing to Occupy His Homestead, with an Intention to Return or not, depending on future

conditions and circumstances, loses his homestead right. (Ill.) *Kloss v. Wylezalek*, 220.

12. **HOMESTEAD**—Abandonment of, Effect upon Children's Rights.—The abandonment of a homestead by a mother who is a widow terminates her children's homestead rights in the same property. (Ill.) *Kloss v. Wylezalek*, 220.

See Executors and Administrators, 6; Fraudulent Conveyances, 8-10; Public Lands, 6-9.

Note.

Homesteads, subrogation, right to of persons discharging claims against, 489.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE**—Antenuptial Agreements—Presumption.—If a man possessed of a competence, by an antenuptial agreement cuts off the woman he is about to and does marry, without anything for her support, from his estate after his death, it must be presumed that he designedly concealed from her the value of his estate at the time the agreement was executed, and she is not bound thereby in the absence of other proof. (Pa. St.) *Warner's Estate*, 804.

2. **HUSBAND**, Support of, by Wife.—If from Her Separate property a wife supports her husband during his last sickness, upon a promise by his grandfather to make a provision for her out of his estate, the agreement may be made the basis of a claim against the estate of the grandfather upon his death. (Ind. App.) *Robinson v. Foust*, 269.

3. **MARRIED WOMAN**—Reformation of Conveyance Executed by.—A mortgage executed by a married woman and her husband in the form prescribed by statute may be reformed in equity so as to include real property intended to be embraced therein, but omitted therefrom by mistake. (Fla.) *Herring v. Fitta*, 108.

See Divorce; Marriage; Witnesses.

IMPRISONMENT FOR DEBT.

See Divorce, 9.

INDEPENDENT CONTRACTOR.

See Master and Servant, 9-11.

INDICTMENT.

See Larceny, 2.

INHERITANCE TAX.

See Taxation, 4, 5.

INJUNCTIONS.

Trespass upon Realty.

1. **INJUNCTIONS** Against Trespass on Real Property are sparingly granted, and when granted are based on the theory of irreparable injury resulting from the peculiar character of the property affected, from the frequency of the acts complained of amounting to a continuing trespass, or from the insolvency of the tort-feasor,

o that an action at law for the recovery of damages would be inadequate. (Or.) *Moore v. Halliday*, 724.

2. **INJUNCTION, Against What Trespasses will not be Granted.** A complaint stating that defendant at divers times, too numerous to mention, opened the inclosure surrounding plaintiff's land, cut and removed hay and grain therefrom, and threatens to continue such acts, and claims the right so to do, and that defendant is impecunious and unable to respond in damages, does not disclose a cause sufficient to warrant the issuing of an injunction against the repetition of such trespass. (Or.) *Moore v. Halliday*, 724.

3. **INJUNCTION Against Trespass on Real Property.**—The Insolvency of the Defendant will not justify the issuing of an injunction against trespasses on real property where the acts complained of do not constitute irreparable injuries. (Or.) *Moore v. Halliday*, 724.

Percolating Waters.

4. **INJUNCTIONS Involving Rights to Percolating Waters** will be refused if the complainant has stood by while the development was made for public use and has suffered it to proceed at large expenditure to successful operation, having reasonable cause to believe it would affect his own water supply. (Cal.) *Katz v. Walkinshaw*, 35.

5. **AN INJUNCTION Against the Use of Percolating Waters** Will be Denied if the complainant makes no use of the water on his own land or elsewhere. (Cal.) *Katz v. Walkinshaw*, 35.

6. **PRELIMINARY INJUNCTIONS Involving Rights to Percolating Waters** must be granted, if at all, only upon the clearest showing that there is immediate danger of irreparable and substantial injury and that the diversion complained of is the real cause. (Cal.) *Katz v. Walkinshaw*, 35.

Practice.

7. **INJUNCTIONS—Motion to Dissolve—Practice.**—On a motion to dissolve an injunction, statements of fact contained in a sworn answer must, in the absence of evidence, be taken to be true. (Va.) *Hudson v. Barham*, 849.

8. **INJUNCTIONS—Refusal to Grant—Appeal—Remedy.**—No appeal lies from an order refusing an injunction, the remedy in such case being an application to the supreme court to grant the injunction refused. (Va.) *Hudson v. Barham*, 849.

See Nuisance, 3; Trade Unions, 2; Waste.

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 to prevent the erection of structures, 743, 744.
 to prevent the grazing of animals, 751.
 to prevent the harvesting or removing of crops, 750, 751.
 to prevent the laying of pipes, 736.
 to prevent the laying out or using of property as public streets, 744.
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Injunction Bonds, subrogation in favor of sureties on, 507.

INNKEEPERS.

1. **INNKEEPERS, Who are.**—The proprietor of an establishment who advertises and represents to his guests that he is keeping a hotel or inn, by means of signs upon the outside of the building, posts notices in the rooms as an innkeeper, and advertises that there is a café in connection with his sleeping apartments, cannot avoid his duties and responsibilities as innkeeper by showing that the café in the same building is owned and operated by other persons and that he has no hand in its management. (Minn.) *Johnson v. Chadbourn Finance Co.*, 571.

2. **INNKEEPERS are Prima Facie Liable for Goods Lost by Fire**, but may discharge themselves from such liability by showing that the loss happened from an irresistible force or an unavoidable accident, such as by the fire originating upon premises over which they had no control and without fault or negligence on their part. (Minn.) *Johnson v. Chadbourn Finance Co.*, 571.

3. **INNKEEPERS—Burden of Proof.**—Where goods of a guest are lost by fire while in the inn, the burden of proof is not on him

to show that the innkeeper was negligent. (Minn.) *Johnson v. Chadbourn Finance Co.*, 571.

Note.

- Innkeepers**, actions against for loss of goods, nature of, 600.
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Innkeepers, relation of innkeeper and guest, when commences, 583, 584.

restaurant-keepers, difference between liability of and that of innkeepers, 601.

INSOLVENCY.

See Assignment for Creditors.

INSTRUCTIONS.

See Trial.

INSURANCE.

Foreign Corporations.

1. FOREIGN CORPORATIONS—Insurance Companies—Service of Process.—If a foreign insurance company consents, upon coming into the state to do business, that service of process on the state insurance commissioner shall be valid service on such company, such consent extends to any action relating to any business done by the company while in the state, although it withdraws therefrom prior to the bringing of the action. (Ky.) *Germania Ins. Co. v. Ashby*, 295.

1a. FOREIGN CORPORATIONS—Insurance Companies—Service of Process.—If a foreign insurance company consents, upon coming into the state to do business, that service of process upon the state insurance commissioner shall be valid service upon such company, such consent to service is not limited to the time when the company is soliciting business within the state, but extends to all business done while there, and so long as a policy issued by it remains in force, or loss thereunder remains unsatisfied, such consent to service is binding on the company. (Ky.) *Germania Ins. Co. v. Ashby*, 295.

Fire Insurance.

2. INSURANCE—Sole Ownership.—Deed of Trust on insured personal property is not an estate in or title to property, within the meaning of a provision in the policy that, if the interest of the insured be other than an unconditional or sole ownership, the policy shall be void. Such trust deed constitutes a mere lien upon the property, which may be discharged at any time by the payment of the amount secured thereby. (Va.) *Union Assur. Soc. v. Nalls*, 923.

2a. INSURANCE—Undisclosed Encumbrance.—If an insurance company elects to issue its policy without any application, or without any representation by the insured as to the title to the property to be insured, it cannot complain after loss has ensued, that the interest of the insured was not correctly stated, or that an existing encumbrance was not disclosed, although the policy provides that if the subject of insurance is personal property, the policy shall become void, if the property be or become encumbered by a chattel mortgage. (Va.) *Union Assur. Soc. v. Nalls*, 923.

3. INSURANCE—Mistake as to Title.—If a person builds upon the right of way of a railroad company upon condition that the company shall not be liable for the loss of the building by fire, the builder still has an insurable interest in the building, and an insurance company which has issued a policy thereon, and has paid for its loss, cannot recover the money paid, upon the ground that the insured misrepresented his title, that the insurer was in igno-

rance of such condition, and that it paid the insurance under a mistake of fact. (Ky.) *Greenwich Ins. Co. v. Louisville etc. R. R. Co.*, 513.

4. **INSURANCE—Notice to Agent is Notice to Insurer—State of Title.**—Notice to the insurance agent that the insured had only a bond for title is notice to the insurer of the state of the title, and estops it from setting up that the insured falsely stated an ownership in fee. (Ky.) *Germania Ins. Co. v. Ashby*, 295.

5. **INSURANCE—Knowledge of Agent—Iron-safe Clause.**—An agreement by the insured under a clause in his policy to keep an iron safe and to keep his books therein is not binding, when the agent soliciting the insurance knows that there is no such safe kept on the premises, and there is no consideration shown for such agreement. (Ky.) *Germania Ins. Co. v. Ashby*, 295.

6. **INSURANCE—Valued Policies.**—Under Kentucky statutes all insurance policies covering real estate are valued policies, and the value placed in the policy on which premium is paid is the value to be paid in case of loss notwithstanding a clause in the policy to the contrary. (Ky.) *Germania Ins. Co. v. Ashby*, 295.

7. **INSURANCE—Condition Against Liability for Loss.**—If a railroad company grants to another permission to build on its right of way on condition that it shall not be liable for loss by fire caused by its locomotives, such condition is valid, and neither the owner of the building nor an insurance company which has paid for its loss by fire can recover from such railroad company, in the absence of wanton or willful negligence on its part. (Ky.) *Greenwich Ins. Co. v. Louisville etc. R. R. Co.*, 313.

8. **INSURANCE—Proof of Loss.**—Denial that "sufficient" proofs of loss were furnished is not a denial that the insured furnished proof of loss. (Ky.) *Germania Ins. Co. v. Ashby*, 295.

9. **INSURANCE—Waiver of Proof of Loss.**—Denial of liability for loss under a policy of insurance is a waiver of proof of loss. (Ky.) *Germania Ins. Co. v. Ashby*, 295.

Appraisement of Loss.

10. **FIRE INSURANCE—Misconduct of Appraiser.**—When the amount of a loss is submitted to appraisement, an appraiser is not the agent of the party nominating him, so that he can, without the co-operation or connivance of that party, deprive him of the fruits of his insurance by inaction or bad faith. (Md.) *Connecticut Fire Ins. Co. v. Cohen*, 445.

11. **FIRE INSURANCE—Misconduct of Appraiser.**—The fact that an appraisement of the amount of loss is defeated by the appraiser nominated by the insured, does not necessarily bar his right to sue on the policy; it is sufficient to such right that the failure of the appraisement was without fault on the part of the insured, and for that purpose it is unnecessary to ascertain that the insurer was the cause of the failure. (Md.) *Connecticut Fire Ins. Co. v. Cohen*, 445.

Life and Accident Insurance.

See Benefit Society.

12. **INSURANCE—Insurable Interest.**—A woman has an insurable interest in the life of the man whom she is under contract to marry. (Wis.) *Opitz v. Karel*, 1004.

13. INSURANCE, LIFE—Action to Recover—Judgment.—If, the donee of a life insurance policy brings an action against the personal representative of the insured named as beneficiary to recover the fund, and there is nothing to show that such representative is guilty of bad faith in defending the action, a personal judgment against him for interest, costs, and disbursements in the action is error. These must be paid out of the estate. (Wis.) *Opitz v. Karel*, 1004.

14. INSURANCE, LIFE—Proof of Death—Reasonable Time.—If a life insurance policy requires proof of death to be furnished within two months thereof, in default of which all claims under the policy shall be forfeited, such requirement is a condition subsequent, and is complied with by a submission of proof of death within a reasonable time after knowledge thereof, and of the existence of the policy, under all the circumstances of the particular case. (Utah) *Munz v. Standard Life etc. Ins. Co.*, 830.

15. INSURANCE, Life—Notice of Accident and Proof of Death. Although a life insurance policy provides that the insurer must be given notice of the accident to, and proof of the death of, the insured within a specified time thereafter, or the policy will be forfeited, yet a beneficiary who is in ignorance of such death, and the existence of the policy complies with such conditions, if within a reasonable time after obtaining knowledge of such death and the existence of the policy, he gives the insurer notice of the accident and proof of the death. (Utah) *Munz v. Standard Life etc. Ins. Co.*, 830.

16. INSURANCE, Life—Burden of Proof.—If the insurer insists that a life insurance policy was avoided by a breach of its conditions, the burden of proof to establish that proposition is always upon the insurer and never shifts. (Ill.) *Supreme Tent Knights of Maccabees v. Stensland*, 137.

17. INSURANCE, Life—Contradiction of Proof of Death—Equitable Estoppel.—If the widow and beneficiary, with no intention to defraud or mislead, signs and swears to a proof of the death of the insured containing a statement of the cause thereof, she is not, from this fact alone, equitably estopped from contradicting on the trial such statement as to the cause of death. (Ill.) *Supreme Tent Knights of Maccabees v. Stensland*, 137.

18. INSURANCE—Expert Evidence as to Cause of Death.—A physician who has witnessed a number of cases of hanging, or who is informed on the subject of strangulation from reading medical works, is competent to give his opinion as a witness, from the facts in evidence, as to whether the death of an insured person was caused by strangulation. (Ill.) *Supreme Tent Knights of Maccabees v. Stensland*, 137.

19. INSURANCE, Life—Contradiction of Proof of Cause of Death.—Sworn statements in the proof of the cause of death of an insured may be contradicted on the trial, unless the usual elements of equitable estoppel are present, without first showing that such statements were made by mistake or produced by fraud. (Ill.) *Supreme Tent Knights of Maccabees v. Stensland*, 137.

Gift and Transfer of Policy.

20. INSURANCE, LIFE—Waiver of Objection to Transfer.—If an insurance company has paid the proceeds of a life policy into court for the lawful owner, it has waived any objection it might have to any transfer of the policy by the insured in his lifetime, and

such objection is not available to the personal representative of the deceased or other person interested in his estate. (Wis.) *Opitz v. Karel*, 1004.

21. INSURANCE, Life—Gift of Policy.—If a life insurance policy, payable to the personal representatives of the insured, merely provides that if assigned, the assignment must be in writing, and that the company shall not be required to notice such assignment until the original or a duplicate thereof is filed in the home office, the company assuming no responsibility for its validity, such policy may be the subject of a parol gift inter vivos, without notice to the insurance company and to the exclusion of the beneficiaries named in the policy. (Wis.) *Opitz v. Karel*, 1004.

22. INSURANCE, Life—Gift of Policy.—If an insured has power to transfer the policy on his life under the law and the terms of the contract, he may dispose of it by gift, and when such transfer meets the requirements of the law relating to gifts the title to the fund at its maturity is vested in the donee. (Wis.) *Opitz v. Karel*, 1004.

23. INSURANCE, Life—Gift of Policy.—When a gift of a life insurance policy is consummated, the donee's rights and interests become absolute, and all possibility of a devolution of benefits under the policy to the personal representatives of the insured named in the policy as beneficiaries is at an end. (Wis.) *Opitz v. Karel*, 1004.

Note.

Insurance, subrogation in favor of insurers, 504.

INTOXICATING LIQUORS.

1. CONSTITUTIONAL LAW—Sale of Intoxicating Liquor.—The regulation of the sale of intoxicating liquor is wholly within the police power of the state to be exercised in such manner as it deems proper, as such sale is not one of the privileges or immunities of citizenship guaranteed by constitutional provisions. (Va.) *Council of Farmville v. Walker*, 870.

2. INTOXICATING LIQUORS—Sale of—Delegation of Police Power to Municipality.—The state may delegate its police power to regulate the sale of intoxicating liquors to a municipality, and may authorize it to establish a dispensary for the sale thereof, although in so doing it may render necessary the expenditure of money and ultimately the imposition of a tax. (Va.) *Council of Farmville v. Walker*, 870.

3. INTOXICATING LIQUORS, Sale of.—Public money may be lawfully expended in the regulation and control of the sale of intoxicating liquors. (Va.) *Council of Farmville v. Walker*, 870.

Note.

Intoxicating Liquors, regulating the sale of is within the police power of the states, 878.

JOINT TORT-FEASORS.

See Principal and Agent.

JUDGMENT.

In General.

1. **JUDGMENT, Merger, Effect of.**—Where a precedent liability is made the basis of a final money judgment the rights of the parties are merged therein. Hence, such judgment may be discharged by proceedings in bankruptcy, though the cause of action out of which it arose was not subject to such discharge. (Minn.) *McKittrick v. Cahoon*, 606.

2. **JUDGMENT Against Deceased Persons.**—A judgment of a court of general jurisdiction rendered against a defendant after service of process, but before judgment, is not void but voidable only. It is valid until set aside in a direct proceeding for that purpose and cannot be collaterally attacked. (Va.) *Robinett v. Mitchell*, 928.

3. **JUDGMENTS—Affirmance in Part.**—In an action by a city to recover independently of each other distinct parcels of land, being portions of different streets and alleys, the judgment may be affirmed in so far as it is correct, and reversed in other respects. (Ill.) *Village of Lee v. Harris*, 176.

4. **JUDGMENTS—Indefinite.**—If all appropriators of water are before the court asking that their respective rights be determined, and such rights are capable of ascertainment, a decree, based upon indefinite findings, which does not determine the essential rights of all the parties, and leaves a material part of the controversy undetermined, cannot be upheld on appeal. (Nev.) *Walsh v. Wallace*, 692.

5. **VOIDABLE JUDGMENTS Until Set Aside** in a proper proceeding for the purpose, possess all the attributes of valid judgments and cannot be collaterally attacked. (Va.) *Robinett v. Mitchell*, 928.

Res Judicata.

See Ejectment, 4-6.

6. **RES JUDICATA—Judgment Foreclosing a Lien, When Evidence in an Action for Removing the Property from the State and Rendering It Impossible of Identification.**—If, during the pendency of a suit to foreclose an alleged lien on personal property consisting of logs, they are removed from the state and manufactured into lumber by one not a party to the suit, and judgment is subsequently entered for the plaintiff, he may afterward maintain an action in the state to which the property has been removed to recover the damages sustained by him by the violation of a statute of the state where the suit was pending in effecting such removal and rendering the property impossible of identification, and such judgment is admissible against the defendant in such action to establish the existence of such lien and to show that the plaintiff was damaged by such removal. (Or.) *Bergman v. Inman*, 771.

7. **JUDGMENTS—Res Judicata—Joint Tort-feasors.**—If a city and a property owner are sued jointly for injury resulting from an improper use of a street, and judgment is rendered in favor of such owner on his plea of the statute of limitations, and against the city, and the city then brings an action against such owner to recover the amount it has been compelled to pay under the judgment, the property owner is not estopped from showing therein that the injury happened through no fault of his, nor is the question of his ultimate liability *res judicata* by reason of the judgment against the city. (Va.) *City of Richmond v. Sitterding*, 879.

8. **JUDGMENTS—Res Judicata.**—A judgment, to be evidence against a party in another suit upon a different cause of action, must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases, and must have been determined upon its merits in the first action. (Va.) *City of Richmond v. Sitterding*, 379.

9. **RES JUDICATA.**—Where there are Two Issues in a Case upon Either of Which the Judgment may Rest, one going to the merits and the other not, its disposition will generally be considered as resting on the latter, the merits remaining adjudicated, unless the judgment appears to have been on the merits. (Or.) *Hoover v. King*, 754.

10. **RES JUDICATA.**—A Judgment Dismissing the Complaint in an Action at Law is unknown to the laws of Oregon, and does not necessarily determine any of the issues involved. It is at most a mere judgment of nonsuit. (Or.) *Hoover v. King*, 754.

11. **RES JUDICATA.**—The Recovery by Defendant of His Costs does not constitute a bar or estoppel, unless there appears to have been a judgment on the merits of the question in dispute between the parties to an action of ejectment. (Or.) *Hoover v. King*, 754.

12. **RES JUDICATA.**—Parol Evidence is Admissible to show what was involved in the issues made in a trespass suit and what actually came into question upon the trial for the purpose of proving that the title or the boundaries was the question tried and determined therein. (Ill.) *Herschbach v. Cohen*, 233.

13. **RES JUDICATA.**—A Judgment in Favor of the Defendant in an Action of Trespass quare clausum fregit wherein the defense liberum tenementum was pleaded is conclusive against plaintiff's title in a subsequent action of ejectment, if, in the first action, the question tried was the title of the property or its boundaries. (Ill.) *Herschbach v. Cohen*, 233.

14. **RES JUDICATA.**—The Term "Parties" Includes those who are directly interested in the subject matter of the suit, knew of its pendency, and had the right to control and direct or defend it. (Md.) *Courtney v. William Knabe & Co. Mfg. Co.*, 456.

15. **RES JUDICATA.**—If in Replevin the Pleas of non cepit and property in another are interposed, a judgment for the defendant which does not order a return of the property, does not estop the parties in a subsequent suit from questioning the title of such defendant. (Md.) *Courtney v. William Knabe & Co. Mfg. Co.*, 456.

16. **RES JUDICATA.**—A Judgment Denying the Right to Foreclose a Mortgage against a corporation on the ground that its execution was not authorized or ratified in the manner prescribed by statute is not an adjudication that the plaintiff is not entitled to enforce the promissory note to secure which the mortgage purports to be given. Hence, an action may subsequently be maintained on such note. (Cal.) *Curtin v. Salmon River etc. Min. Co.*, 75.

Collateral Attack.

17. **COLLATERAL ATTACK, What is.**—Where a Court, in accordance with an agreement and settlement between the parties, decrees that a trust be closed and terminated, a suit by one of them to have so much of the judgment vacated as declares the trust terminated, is a collateral attack. (Ind. App.) *Spencer v. Spencer*, 260.

18. COLLATERAL ATTACK, What is.—When a Statutory Method is pursued for the purpose of avoiding or correcting a judgment, the attack upon the judgment is direct; but when the same result is sought in some manner not provided by law, the attack is collateral. (Ind. App.) *Spencer v. Spencer*, 260.

19. COLLATERAL ATTACK, When may be Made.—In case of a collateral attack, it must be made to appear that the judgment was rendered without jurisdiction, and is void. (Ind. App.) *Spencer v. Spencer*, 260.

20. COLLATERAL ATTACK upon Erroneous Judgment.—If a judgment is not void, it is not subject to collateral attack, however erroneous it may be. (Ind. App.) *Spencer v. Spencer*, 260.

See Setoff and Counterclaim.

JUDICIAL SALE.

See Executions; Executors and Administrators, 6, 7; Guardian and Ward.

Note.

Judicial Sales, constitutional law, statutes changing the amount required to redeem from, 26-31.

void, subrogation in favor of purchasers at, 528, 529.

JURISDICTION.

See Courts.

JURY TRIAL.

See Contempt, 12; Trial.

LARCENY.

1. LARCENY, Whether Joint or Several Crime.—The Stealing of the Property of Different Persons at the same time and place, and by the same act, may be prosecuted, at the pleasure of the state, as one offense or several distinct offenses. (Nev.) *State v. Douglas*, 688.

2. LARCENY.—An Indictment charging the defendant, at the same time and place, with having stolen the property of different persons, charges but one larceny, one act or offense, and is sufficient, and not open to attack as being duplicitous, requiring the state to elect on which count it will prosecute. (Nev.) *State v. Douglas*, 688.

LIBEL AND SLANDER.

1. THE LIBERTY of the Press Means that anyone can publish anything he pleases, but he is liable for the abuse of this liberty; if he does this by scandalizing the courts of his country, he is liable to be punished for contempt. (Mo.) *State v. Shepherd*, 624.

2. LIBERTY OF THE PRESS.—Newspapers have no Greater Privilege than the ordinary citizen; they have the right to publish the truth, but no right to publish falsehood to the injury of others. (Mo.) *State v. Shepherd*, 624.

3. FREEDOM OF SPEECH.—Criticism and Defamation distinguished. (Mo.) *State v. Shepherd*, 624.

4. FREEDOM OF SPEECH.—Everyone may Speak, Write, or publish what he will, but is responsible for the abuse of the priv-

illeg; courts cannot prevent a man telling an untruth about another, but their power is limited to punishing him if he does so. (Mo.) *State v. Shephard*, 624.

LIBERTY OF PRESS.

See Libel and Slander.

LIENS.

See Equity; Mortgages; Judgments, 6.

LIMITATION OF ACTIONS.

In General.

1. **LIMITATION OF ACTIONS—Construction of Statute.**—The words "when a cause of action has arisen," as used in a statute of limitations, should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked, or, in other words, when the plaintiff has the right to sue upon the particular cause of action, without regard to the place where it had its origin. (Nev.) *Lewis v. Hyams*, 677.

2. **LIMITATION OF ACTIONS—Concealment, What is not.**—Neither the ignorance of a person of his right to bring an action, nor the mere silence of the person liable to the action, prevents the running of the statute of limitations. (Ind. App.) *State v. Walters*, 244.

3. **LIMITATION OF ACTION Against a Recorder for Negligence.**—If a recorder registers a mortgage so that the record does not constitute notice, neither he nor the mortgagee becoming aware of the error until after the execution of a second mortgage, a cause of action accrues against him at the time of the erroneous registration. (Ind. App.) *State v. Walters*, 244.

4. **LIMITATION OF ACTIONS—Estates of Decedents.**—A decree for an account of debts against the estate of a deceased person in a suit brought by one creditor stops the running of the statute of limitations against the claims of all creditors whose demands are asserted in that suit. (Va.) *Robinett v. Mitchell*, 928.

Constitutional Law.

5. **CONSTITUTIONAL LAW—Statute of Limitations.**—A statute providing that persons claiming under tax deeds who have paid all taxes for the period of twenty years after the recording of such deeds, and have held such adverse, continuous, exclusive and peaceable possession during that time as comports with the ordinary management of wild lands shall not be subject to any action to recover such lands by any person who during such time has not paid any of such taxes or done any other act indicative of ownership, is constitutional. (Me.) *Soper v. Lawrence Brothers Co.*, 397.

6. **CONSTITUTIONAL LAW—Statute of Limitations Having a Retroactive Operation.**—Statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect. (Me.) *Soper v. Lawrence Brothers Co.*, 397.

Conflict of Laws.

7. **CONFLICT OF LAWS—Limitation of Actions.**—If a partnership note is executed in one state by a partner resident therein,

while another partner is a resident of another state, a right of action, in default of payment, as against the latter, accrues in the state of his residence, and if the right of action becomes barred in such state by the statute of limitations, such bar is effective and conclusive against the holder of the note in a third state. (Nev.) *Lewis v. Hyams*, 677.

8. **CONFLICT OF LAWS—Statute of Limitations.**—If the maker and payee of a note reside out of the state when the note becomes due, and the cause of action accrues in another state while the maker continues to reside in another state, until, by the laws thereof, an action on the note is barred by limitation, such action is also barred in a state whose statute provides that "when a cause of action has arisen in any other state, and by the laws thereof, an action there cannot be maintained by reason of lapse of time, no action shall be maintained in this state. (Nev.) *Lewis v. Hyams*, 677.

9. **CONFLICT OF LAWS—Limitations of Actions.**—Under the statute of a state providing that when an action arising in another state is barred therein by limitation, no action thereon shall be brought in this state except by a citizen thereof who has held the cause of action from the time it accrued, a citizen of such state who holds a note on which a right of action has been so barred, but who has not held it from the time the cause of action accrued, is precluded from maintaining an action thereon. (Nev.) *Lewis v. Hyams*, 677.

10. **LIMITATIONS, STATUTE OF, in Actions for Doing Acts Forbidden by the Statutes of Another State.**—In an action for removing logs from another state, and rendering their identification impossible, contrary to the provisions of its statutes, the cause of action is necessarily based on the acts done within that state, and the statute of limitations commences to run at such removal, and is not suspended by any act done in the state wherein the action was brought. (Or.) *Bergman v. Inman*, 771.

Pleading.

11. **PLEADING DEFENSES—Statute of Limitations.**—The statute of limitations is not an unconscionable defense, and its allowance by amended pleading is not to be discriminated against. (Wash.) *Thomas v. Price*, 961.

12. **PLEADINGS—Amendment—Statute of Limitations.**—It is not error to permit at the trial an amendment pleading the statute of limitations, if the defendant is not surprised thereby, and makes no application for a continuance of the case. (Wash.) *Thomas v. Price*, 961.

13. **LIMITATIONS, STATUTE OF, Pleading, when It Applies to a Part Only of a Cause of Action.**—If the statute of limitations is pleaded to a whole cause of action, and it appears on the trial that the plea is good as to some only of the items for which plaintiff seeks to recover, such plea is not bad because interposed to the whole cause of action. (Or.) *Bergman v. Inman*, 771.

See Adverse Possession; Subrogation, 3; Wills, 14-17.

LIQUORS.

See Intoxicating Liquors.

LIS PENDENS.

1. **LIS PENDENS.**—A Purchaser of Personal Property During Litigation Respecting the Title or the Validity of a Lien Thereon takes the property subject to the rights of the plaintiff as settled by the final decree or judgment of the court. (Or.) *Bergman v. Inman*, 771.

2. **LIS PENDENS.**—The Removal of Personal Property from the State Pending a Suit to Foreclose an Alleged Lien Thereon does not render the judgment in such state incompetent evidence in an action in the state to which the property was removed to prove the existence of the lien at the time of removal. (Or.) *Bergman v. Inman*, 771.

MALICE.

MALICE, in a Legal Sense, means a wrongful act done intentionally, without just cause or excuse, or, in other words, the willful violation of a known right. (Ill.) *London Guarantee etc. Co. v. Horn*, 185.

MARRIAGE.

1. **MARRIAGE**—Validity of Presumed.—If both parties are married in the honest belief, founded on an apparently good reason, that they are capable of entering into the marriage contract, when in fact one of them is not, and they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law presumes a common-law marriage. (Ill.) *Land v. Land*, 171.

2. **MARRIAGE**—When Valid.—If both parties are married in good faith, in ignorance of the fact that the wife's decree of divorce, recently granted, has not been recorded, the marriage is valid where the parties continue to cohabit as husband and wife after the decree of divorce has been entered and recorded. (Ill.) *Land v. Land*, 171.

3. **HUSBAND AND WIFE**—Agreement to Dissolve Marriage.—Either husband or wife, or both, may violate the terms and obligations of the marriage contract, but neither nor both combined can rescind or modify it except as provided by law. (Utah) *Palmer v. Palmer*, 820.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.*Constitutional Law.*

1. **CONSTITUTIONAL LAW**—Statutes Denying Right of Setoff as Against Employers.—A statute denying to employers the right of setoff or of counterclaim in actions brought by their employees to recover for wages, but exempting from its provisions the business of farmers or farm laborers and servants, is unconstitutional in discriminating against employers who are not farmers. The provision respecting them cannot be disregarded for the purpose of sustaining the statute. (Ill.) *Kellyville Coal Co. v. Harrier*, 240.

2. **CONSTITUTIONAL LAW**—Rights of Laborers.—A constitutional right to the free use of his hands is the workman's property, and the right of thus acquiring property is his inherent, indefeasible right to exercise which he must have the unrestricted privilege of working for such employer, and at such wages as he chooses. This is a right of which the legislature cannot deprive him—one which

while another partner is a resident of another state, a right of action, in default of payment, as against the latter, accrues in the state of his residence, and if the right of action becomes barred in such state by the statute of limitations, such bar is effective and conclusive against the holder of the note in a third state. (Nev.) *Lewis v. Hyams*, 677.

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the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect. (Pa. St.) *Erdman v. Mitchell*, 783.

Discharge of Servant.

3. **MASTER AND SERVANT—Liability for Procuring Discharge of Servant.**—If an employer's guaranty contract provides for its cancellation only upon notice, a threat by the guarantor to immediately cancel such contract unless the employer discharges a certain employé at once, is a threat to do a legal wrong, which renders the guarantor liable to the servant in case he is thus discharged from his employment. (Ill.) *London Guarantee etc. Co. v. Horn*, 185.

4. **MASTER AND SERVANT—Liability for Procuring Discharge of Servant.**—If a third person induces an employer to discharge his employé, who is working under a contract, terminable at will, but which may continue indefinitely, except for such interference, and the only motive moving such third person is a desire to injure the employé and to benefit himself at the latter's expense by compelling him to surrender an alleged cause of action not depending upon and not connected with the continuance of such employment, and for the satisfaction of which such third party is liable, in whole or in part, he is liable to the employé for thus procuring his discharge. (Ill.) *London Guarantee etc. Co. v. Horn*, 185.

Negligence of Servant.

See *Druggists*.

5. **MASTER AND SERVANT—Negligence—Evidence.**—If it is sought to charge a master with his servant's negligence in a particular instance, evidence that the latter was careful, sober, and painstaking generally is not admissible, in the absence of evidence to the contrary. (Ky.) *Smith v. Middleton*, 308.

6. **MASTER AND SERVANT—Liability for Gross Negligence.**—A master, whether a private individual or a corporation, is liable in punitive damages for the gross negligence of a servant committed in the line of his employment. (Ky.) *Smith v. Middleton*, 308.

Vice-principal and Fellow-servant.

7. **MASTER AND SERVANT—Vice-principal or Fellow-servant, When a Question for the Jury.**—Whether a skip-boss was, at the time of an accident due to his negligence, acting as a vice-principal or a fellow-servant is a question for the jury, if there is evidence tending to show that it was his custom to assume general charge of the men and direct their movements in a general way while in the shift, including the method and manner of going out of the mine. (Minn.) *Renland v. Commodore Min. Co.*, 534.

Independent Contractor.

8. **INDEPENDENT CONTRACTOR.**—A general contractor and bricklayer employed to do all the brick work on a house, who employs and pays for all labor necessary to the fulfillment of his contract, and exercises entire supervision over that part of the work and over his employés, is a general and independent contractor, although the owner of the house is a carpenter and has the carpenter work done by his own employés. (Va.) *Richmond v. Sitterding*, 879.

9. **NEGLIGENCE OF INDEPENDENT CONTRACTOR—Liability of Owner.**—If a property owner employs a careful, skillful and

competent builder or contractor to erect a building for him, and surrenders possession of the premises for that purpose, he is not liable for an injury occurring to a stranger by the negligence or default of such contractor or his immediate employes engaged in doing the work. (Va.) *Richmond v. Sitterding*, 879.

10. NEGLIGENCE OF INDEPENDENT CONTRACTOR—Liability of Owner—Dangerous Work.—The building of a house on a lot abutting upon a public street is not inherently and necessarily dangerous, nor does danger and hazard necessarily attend its erection, so as to make the prosecution of the work unlawful, and the lot owner personally liable for the negligence of an independent contractor employed to do the work. (Va.) *Richmond v. Sitterding*, 879.

MECHANIC'S LIEN.

See Mortgages, 2.

MERCANTILE AGENCY.

See Sales, 2.

MERGER.

See Estates; Judgment, 1.

Note.

- Merger of an estate at will in an estate for years, 153.**
 - of an estate for years in an estate for life, 153.
 - of an estate in dower in an estate in fee, 156.
 - of a life estate in an equitable title, 156.
 - of a life estate in a remainder or reversion, 153, 154.
 - of a life estate in a remainder, when does not take place, 154, 155.
 - of a mortgage in the fee, 160.
 - of a mortgage in the fee, does not take place contrary to the intention or interest of the parties, 162.
 - of a mortgage, when does not take place, 161.
 - of equal estates, 153.
 - of equitable estates, 158.
 - of estates, conditions essential to, 153.
 - of estates, defined, 153.
 - of estates, does not take place in equity contrary to the intention or interests of the parties, 158, 159.
 - of estates, relief from, in equity, 158.
 - of estates, rule in equity, respecting, 158, 159.
 - of estates, rule of law respecting, 153.
 - of estates, when not favored in equity, 158.
 - of legal and trust estates, 157.
 - of mortgage and the legal estate, where there are intervening encumbrances, 168, 169.
 - of mortgage, by a purchase at an execution or judicial sale, 166.
 - of mortgage, by the purchase of the equity of redemption, 163-166.
 - of mortgage, in the legal estate, cannot take place after the assignment of the mortgage, 167.
 - of mortgages, by the assignment of several to the same person, 168.
 - of one estate of years, in another, 153.

MILK INSPECTION.

See Municipal Corporations.

MINES AND MINERALS.*In General.*

1. **MINES AND MINING—Location by Government Officer.**—The United States statute prohibiting officers, clerks and employes in the general land office from purchasing or acquiring public lands, includes deputy United States mineral surveyors while such officers, and the locating of a mining claim by such an officer is void, and he can convey no rights therein. (Utah) Lavagnino v. Uhlig, 808.

2. **MINES AND MINING—Adverse Claims—Presumption.**—Under a statute providing that it shall be "assumed" that there is no adverse claim to mineral for which application has been filed, unless filed within sixty days, during which notice of such application is required to be published, it must be conclusively presumed that one who fails to file an adverse claim within such prescribed time has no such claim. (Utah) Lavagnino v. Uhlig, 808.

3. **MINES AND MINING—Object of Adverse Proceedings.**—A statute providing that an adverse claimant to a mining claim may institute proceedings to determine the right of possession to the claim, does not authorize a determination of the rights of the contestants to a patent, but only the right of possession of the disputed claim. (Utah) Lavagnino v. Uhlig, 808.

4. **MINES AND MINING—Adverse Proceedings.**—Plaintiff in an action to determine the right of possession of a disputed mining claim, who fails to show any right to the claim, becomes a stranger to the title and cannot avail himself of the rights of a third party, who has failed to file an adverse claim within the time prescribed by statute. (Utah) Lavagnino v. Uhlig, 808.

Statute of Limitations.

5. **MINES AND MINING—Nature of Claim—Limitations.**—Mining claims are real property. They pass by deed and are subject to the operation of the statute of limitations. (Utah) Lavagnino v. Uhlig, 808.

6. **MINES AND MINING—Statute of Limitations.**—A person who fails to institute an action to recover possession of a mining claim within seven years after adverse possession by another is barred from maintaining such action by the statute of limitations. (Utah) Lavagnino v. Uhlig, 808.

Note.

Mistake of law or of fact, subrogation on account of, 517, 518.

MORTGAGES.

1. **A CONVEYANCE Absolute in Form, but Intended to Secure the Payment of Debts Due to the Grantee** is a mortgage, and, subject thereto, the title of the grantor is affected by the lien of a judgment subsequently entered against him. (Cal.) Hooker v. Burr, 17.

2. **LIENS—Rights of Holder of Mortgage Lien as Against Mechanic's Lien.**—If a mechanic's lien is recorded against property on which there is a prior deed of trust, the trust creditor has the bene-

fit of his lien upon the land only to the extent of its value, exclusive of the buildings, or structures placed thereon since his lien was created, and the value of the land is to be ascertained by the court, either by itself or through a commissioner at the time that the liens are enforced. The prior encumbrancer, as to the sum so fixed, is to be preferred on the distribution of the proceeds of the sale, but this amount is all he can obtain until the mechanic's lien is satisfied. (Va.) *Hudson v. Berham*, 849.

3. NOTICE to Mortgagee by Recitals in His Mortgage.—Where a mortgage of two parcels of land recites that they are subject to another mortgage, giving its date and the name of the mortgagee, but one of such parcels has by mistake been omitted from the mortgage referred to, the second mortgagee cannot resist the reformation of the first mortgage so as to include the omitted parcel. (Fla.) *Herring v. Fitz*, 108.

See Corporations, 5; Estates; Homestead, 7; Husband and Wife, 3; Judgment, 16; Railroads, 1; Waste.

Note.

Mortgages, conveyance by mortgagee, when operates as an assignment of the debt, 160.

conveyance to the mortgagee, when does not discharge the debt, 161.

merger of, in the legal estate, 160-170.

on after-acquired property. See Railways.

MUNICIPAL CORPORATIONS.

In General.

1. MUNICIPAL CORPORATIONS.—The Charter of the city of St. Louis, adopted by the voters therein pursuant to the constitution of the state, has all the force and effect of a charter which emanates from the general assembly. (Mo.) *St. Louis v. Fischer*, 614.

2. MUNICIPAL CORPORATIONS—Railroad Switches in Street—Private Use.—A city council has no delegated power to grant a franchise which will burden the streets of a municipality with a switch-track to be operated by a steam railway exclusively for the convenience and private use of a private corporation to the detriment of the citizens residing on such street and damage to their property abutting thereon. (Utah) *Cereghino v. Oregon Short Line R. R. Co.*, 843.

3. MUNICIPAL CORPORATIONS—Power to Grant Street Franchises.—If the statute provides that the power of a city council to grant franchises to railway companies to maintain tracks in a street can be exercised only by ordinance, resolution, or by-law duly passed and enacted, a resolution conferring such right, to be valid and effective, must be passed in accordance with all the formalities provided by law. (Utah) *Cereghino v. Oregon Short Line R. R. Co.*, 843.

4. MUNICIPAL CORPORATIONS—Liability for Acts of Officers.—If a damaging act or the neglect of a city officer arises in the execution of a duty which is for the exclusive benefit of the city, it is liable, but if such duty, in whole or in part, is one imposed upon the city as a public instrumentality of the state, it is not liable. (Wash.) *Simpson v. Whatcom*, 951.

5. MUNICIPAL CORPORATIONS—Liability Under Void Ordinance.—A municipal corporation is not liable for the acts of its officers in arresting and prosecuting a person under a void ordinance

undertaking to impose a license fee for the benefit of the city and enacted under apparent authority of a statute. In such case, the damage arises in the performance of a duty imposed upon the city as a public instrumentality of the state. (Wash.) *Simpson v. Whatcomb*, 951.

Purchase and Use of Outside Lands.

6. MUNICIPAL CORPORATIONS—Power to Purchase and Use Outside Lands.—A city having express authority to improve its streets and to purchase such real estate as is reasonably necessary or convenient for the city's use, has power to purchase real estate outside its corporate limits convenient for use in obtaining a supply of crushed rock to be used upon the city streets. (Wis.) *Schneider v. Menasha*, 996.

7. MUNICIPAL CORPORATIONS—Power Outside of Limits.—Under general charter powers a city may do business outside its boundaries so far as is reasonably necessary to carry out the express powers granted to it. (Wis.) *Schneider v. Menasha*, 996.

8. MUNICIPAL CORPORATIONS—Purchase of Outside Lands—Business Purposes—Governmental Power.—A municipal corporation may take and hold land convenient and accessible for its business use and purposes, although such land lies outside its corporate limits, and its charter confers no express authority to own land outside its limits. But the city cannot exercise its sovereignty over it, though it can exercise all the rights and powers pertaining to ownership. (Wis.) *Schneider v. Menasha*, 996.

9. MUNICIPAL CORPORATIONS—Powers.—A municipality has no right to exercise sovereign or governmental authority over property owned by it and acquired for business purposes outside its corporate limits. (Wis.) *Schneider v. Menasha*, 996.

10. MUNICIPAL CORPORATIONS—Power to Purchase Outside Lands—Remoteness of Property.—In determining whether corporate authority has been exceeded in purchasing outside lands for business purposes by reason of the distance from the city limits the act in question reaches, that question must be solved by an appeal to reason, keeping in mind that municipalities in business matters are governed by very much the same rules as private corporations, and are to be given a wide range without being held guilty of an abuse of power. If, however, the agents of the city go so far from its boundary to obtain land for its use, that the element of convenience is no longer apparent, there is such an abuse of authority as to render the act void. (Wis.) *Schneider v. Menasha*, 996.

Dairy and Milk Regulations.

11. CONSTITUTIONAL LAW—Delegation of Police Power.—The police power of the state may be delegated to a municipal corporation to enable it to enact reasonable ordinances to secure to its inhabitants pure and unadulterated milk. (Va.) *Norfolk v. Flynn*, 918.

12. MUNICIPAL CORPORATIONS—Milk Inspection Ordinances. A municipal ordinance requiring the inspection of all milk sold within the city limits, and providing that vendors thereof shall pay a license fee, is not extraterritorial in its effect, nor void as affecting persons beyond the city limits, when it only touches those who come within the limits of the city to dispose of their milk. (Va.) *Norfolk v. Flynn*, 918.

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A municipal ordinance requiring the payment of a license fee by milk vendors to pay the salary and expenses of a milk inspector, is not in conflict with a statute forbidding a municipality to impose any tax, fine, or penalty on persons selling their own farm or domestic products in the city. Charges thus imposed are in no sense a tax, fine or penalty, but a legitimate fee charged for services rendered. (Va.) *Norfolk v. Flynn*, 918.

14. POLICE POWER—Dairies, Right of City to Prohibit.—Where express authority is conferred upon a city to prohibit, remove, and regulate cow-stables and dairies "within prescribed limits," it may make the prohibited area coextensive with the city limits. (Mo.) *St. Louis v. Fischer*, 614.

15. POLICE POWER—Dairies, Regulating Their Location.—An ordinance declaring that no dairy or cow-stable shall be established or maintained within the limits of the city without permission from the municipal assembly by ordinance, is not invalid as empowering the assembly to discriminate against one man and favor another, or as contravening the fourteenth amendment. (Mo.) *St. Louis v. Fischer*, 614.

16. POLICE POWER—Dairies.—If an Ordinance Forbids dairies. to be established without permission from the municipal assembly, the fact that prior to the enactment of the ordinance premises had been used, but subsequently were abandoned, as a dairy, does not authorize a person to establish a new dairy thereon without permission. (Mo.) *St. Louis v. Fischer*, 614.

Streets.

17. MUNICIPAL CORPORATIONS.—Bicycles and Their Use upon the streets of a city are proper subjects for police regulation in the interest of the public safety and welfare. (Wash.) *Simpson v. Whatcom*, 951.

18. INDEMNITY—Action Over to Recover—Evidence of Non-liability.—In an action by a city against a land owner to recover damages it has been compelled to pay for his assumed negligent use of a street, the defendant is entitled to show that he was under no obligation to keep the street in a safe condition, and that it was not through his default that the accident happened and the injury resulted. (Va.) *Richmond v. Sitterding*, 870.

19. MUNICIPAL CORPORATIONS—Extension of Street by User. The extension of a street by a municipality may be effected by the actual prolongation of the street by its travel and use by the public for the requisite period and its acceptance as thus used by the city. (Ill.) *Village of Lee v. Harris*, 176.

20. MUNICIPAL CORPORATIONS—Acceptance of Streets.—Acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless an intention to limit the acceptance is shown. (Ill.) *Village of Lee v. Harris*, 176.

21. MUNICIPAL CORPORATIONS—Acceptance of Streets.—Immediate opening and use by the public of all the streets in ground laid out and platted into lots, for their entire length, or an immediate formal acceptance by some competent public authority, is not necessary to give effect to the dedication of the land to the public use as a street, by the making of a town plat and the selling of lots with reference thereto. (Ill.) *Village of Lee v. Harris*, 176.

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A municipal ordinance requiring the payment of a license fee by milk vendors to pay the salary and expenses of a milk inspector is not in conflict with a statute forbidding a municipality to impose any tax, fine, or penalty on persons selling their own farm or domestic products in the city. Charges thus imposed are in no sense a tax, fine or penalty, but a legitimate fee charged for services rendered. (Va.) *North v. Flynn*, 918.

14. POLICE POWER—Dairies, Right of City to Prohibit.—Where express authority is conferred upon a city to prohibit, remove, and regulate cow-stables and dairies "within prescribed limits," it may make the prohibited area coextensive with the city limits. (Mo.) *St. Louis v. Fischer*, 614.

15. POLICE POWER—Dairies, Regulating Their Location.—An ordinance declaring that no dairy or cow-stable shall be established or maintained within the limits of the city without permission from the municipal assembly by ordinance, is not invalid as empowering the assembly to discriminate against one man and favor another, or as contravening the fourteenth amendment. (Mo.) *St. Louis v. Fischer*, 614.

16. POLICE POWER—Dairies.—If an Ordinance Forbids dairies to be established without permission from the municipal assembly, the fact that prior to the enactment of the ordinance premises had been used, but subsequently were abandoned, as a dairy, does not authorize a person to establish a new dairy thereon without permission. (Mo.) *St. Louis v. Fischer*, 614.

Streets.

17. MUNICIPAL CORPORATIONS.—Bicycles and Their Use upon the streets of a city are proper subjects for police regulation in the interest of the public safety and welfare. (Wash.) *Simpson v. Whatcom*, 951.

18. INDEMNITY—Action Over to Recover—Evidence of Non-liability.—In an action by a city against a land owner to recover damages it has been compelled to pay for his assumed negligent use of a street, the defendant is entitled to show that he was under no obligation to keep the street in a safe condition, and that it was not through his default that the accident happened and the injury resulted. (Va.) *Richmond v. Sitterding*, 879.

19. MUNICIPAL CORPORATIONS—Extension of Street by User. The extension of a street by a municipality may be effected by the actual prolongation of the street by its travel and use by the public for the requisite period and its acceptance as thus used by the city. (Ill.) *Village of Lee v. Harris*, 176.

20. MUNICIPAL CORPORATIONS—Acceptance of Streets.—Acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless an intention to limit the acceptance is shown. (Ill.) *Village of Lee v. Harris*, 176.

21. MUNICIPAL CORPORATIONS—Acceptance of Streets.—Immediate opening and use by the public of all the streets in ground laid out and platted into lots, for their entire length, or an immediate formal acceptance by some competent public authority, is not necessary to give effect to the dedication of the land to the public use as a street, by the making of a town plat and the selling of lots with reference thereto. (Ill.) *Village of Lee v. Harris*, 176.

22. MUNICIPAL CORPORATIONS—Opening Streets.—Public authorities are entitled to such reasonable time for opening and improving public streets after the land is dedicated to that purpose as their resources and the public necessity may allow and require. (Ill.) *Village of Lee v. Harris*, 176.

Limitations and Estoppel.

23. MUNICIPAL CORPORATIONS.—Adverse Possession of a Street or a portion thereof by a lot owner, however long continued, does not, by virtue of limitation, bar the right of the public to be restored to possession of the street to its full width, nor is such right precluded by mere nonuser, no matter how long continued. (Ill.) *Village of Lee v. Harris*, 176.

24. MUNICIPAL CORPORATIONS—Possession of Street—Estoppel.—A municipal corporation is estopped to assert its right to the possession of a street which has been allowed to remain in a private person, only when the latter, acting under the belief that the possession of the street has been permanently abandoned by the city, has erected structures or made such valuable improvements that to permit the city to regain possession would cause such private person great pecuniary loss. (Ill.) *Village of Lee v. Harris*, 176.

See Dedication; Ejectment; Judgments, 7; Nuisance, 3.

Note.

Municipal Corporations, discrimination which may be authorized to make with reference to keeping cow-stables, 623.

power of to prohibit and regulate the keeping of cattle and dairies, 622.

MUTUAL BENEFIT SOCIETY.

See Benefit Society.

NE EXEAT.

1. A WRIT OF NE EXEAT is not Void Because Issued Without First Requiring a Bond with Sureties.—The nonobservance of statutory provisions requisite to the issuing of the writ does not render it void. (Fla.) *Bronk v. State*, 119.

2. NE EXEAT, Irregular, When not Void.—An order requiring the defendant to give bond conditioned for the payment of alimony decreed by the court and by the appellate court on appeal, and to abide and perform the decrees of the court before being liberated from the writ of ne exeat, though erroneous as to this requirement, is not void, nor does this error entitle the defendant to be released on habeas corpus, where he has not tendered any bond properly conditioned. (Fla.) *Bronk v. State*, 119.

See Divorce, 6-8; Habeas Corpus, 4.

NEGLIGENCE.

1. NEGLIGENCE—Sale of Explosive—Pleading.—A complaint alleging negligence in that the defendant manufactured, sold and delivered, under the name of champagne cider a dangerous explosive, knowing it to be such, without warning the buyer of its dangerous character, or placing on the bottle containing the substance any-

thing to indicate that it was a dangerous explosive, whereby a third person, without fault or negligence on his part, was injured by an explosion of the substance, is not subject to general demurrer. The only remedy is by motion to make the complaint more definite and certain. (Wash.) *Weiser v. Holzman*, 932.

2. **NEGLIGENCE—Liability to Third Person.**—One who knowingly sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, explosive, or the like, without notice to the purchaser that it is intrinsically dangerous, is liable to any person who is, without fault on his part, injured thereby without regard to any privity of contract. (Wash.) *Weiser v. Holzman*, 932.

See Death; Druggists; Master and Servant; Railroads.

Note.

Negligence, contributory, on part of guests, when relieves innkeepers from liability, 595.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

Note.

Negotiable Instruments, gifts causa mortis of, 908, 909.
subrogation, in favor of indorsers of, 510, 511.

NONRESIDENTS.

See Process.

NUISANCE.

1. **NUISANCE—Gaming-house.**—At common law, a common gaming-house is a nuisance, and persons who are in the occupation and control of such a house are guilty of maintaining a nuisance. (Ky.) *Commonwealth v. Western Union Tel. Co.*, 299.

2. **NUISANCE—Telegraph Company Delivering Racing News.**—The fact that a telegraph company receives and transmits racetrack news to persons engaged in maintaining a nuisance at a place in gambling on races thus reported to them, together with the fact that such company delivers such news, knowing that it is to be used for gambling purposes, does not make the telegraph company guilty of maintaining such nuisance. (Ky.) *Commonwealth v. Western Union Tel. Co.*, 299.

3. **NUISANCE—Injunction by Private Citizen.**—A private citizen whose property abuts upon a street where a switch railroad track is proposed to be constructed without lawful authority and in such a way as to become a public and private nuisance and whose property would be specially damaged thereby, is entitled to an injunction to restrain and prevent such threatened injury. (Utah) *Cereghino v. Oregon Short Line R. R. Co.*, 843.

OFFICERS.

PUBLIC OFFICER—Interest on Funds Deposited with Bank.—If an officer deposits public funds with a bank, and the bank, with knowledge of the ownership of the money, pays interest thereon to the officer individually, the state may recover from the bank the in-

terest so diverted. (Md.) American Bonding Co. v. National Mechanics' Bank, 466.

Note.

Official Bonds, subrogation, in favor of sureties on, 509.

PAROL EVIDENCE.

See Crops, 2; Evidence, 1.

PARTNERSHIP.

1. PARTNERSHIP—Liability of Partners to Each Other.—If a loss sustained by a partnership is imputed to the conduct of one partner more than to that of another, yet, if the former acted bona fide with a view to the benefit of the firm, and without culpable negligence, the loss must be borne equally by all. (Pa. St.) Lyons v. Lyons, 779.

2. PARTNERSHIP—Liability of Partner for Uncollected Debt.—A partner cannot be charged with a debt due the firm at the time of its dissolution, if, at that time, and thereafter, the debtor was insolvent, and it is not shown that such debt could have been collected by legal process, or that there was any request for the institution of a suit for its collection or for the appointment of a receiver. (Pa. St.) Lyons v. Lyons, 779.

3. PARTNERSHIP—Attachment Proceedings Between Partners—Indemnity.—A liquidating partner summoned in attachment proceedings against his copartner cannot be required to pay over any money to his former partner until the attachment is determined or he is given protection by a satisfactory bond of indemnity. (Pa. St.) Lyons v. Lyons, 779.

4. PARTNERSHIP in Breeding, Training, and Racing Horses for purses is legal and may be settled in court after its termination. (Ky.) Central Trust etc. Co. v. Respass, 317.

5. PARTNERSHIP in Racehorses—Credits on Accounting or Settlement.—A surviving partner in a partnership for breeding, training and racing horses for purses is entitled in a settlement of the partnership affairs to credit for money paid out by him after the death of his copartner for training the partnership horses and keeping them in condition to race, and also to credit for money paid for entering such horses in stake races, as all this adds to their selling value. (Ky.) Central Trust etc. Co. v. Respass, 317.

6. PARTNERSHIP in Racehorses—Settlement—Credits for Bets Made.—A surviving partner in a partnership for breeding, training and racing horses is not entitled, on a settlement of the partnership affairs, to credit for money lost and paid by him on a bet on such horses made by him for the firm, under its promise to reimburse him in case of loss. (Ky.) Central Trust etc. Co. v. Respass, 317.

7. PARTNERSHIP for Gambling—Right to an Accounting.—A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership formed and carried on for gambling. (Ky.) Central Trust etc. Co. v. Respass, 317.

8. PARTNERSHIP for Illegal Purpose—Right to an Accounting.—A court of equity will not entertain a bill for an accounting of a

partnership in a business confessedly illegal. (Ky.) Central etc. Co. v. Respass, 317.

Note.

Partnership, conflict of laws, partnership illegal by the law of the forum cannot be enforced, 326.

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to increase the price of food, equity will not aid either partner against the other, 327.

to stifle competition in bidding for public work, 326, 327.

to suppress competition is illegal, and neither party is entitled to redress in the courts, 326, 327.

PERCOLATING WATERS.

See Waters and Watercourses.

PLEADING.

1. PLEADING—Defects in Complaint not Cured by Failure to Demur.—The failure to demur to a complaint does not waive the right to object to it on the ground that it does not state facts sufficient to constitute a cause of action. (Or.) Moore v. Halliday, 724.

2. PLEADING—Amendment Changing Parties, When not Permissible.—A plaintiff suing in his individual capacity cannot amend the complaint so as to sue as executor and thereby recover in that capacity. (Me.) Fleming v. Courtenay, 414.

See Limitation of Actions, 11-13.

PLEDGE.

In General.

1. PLEDGE Made in Contravention of Law, When Void.—If a statute provides the manner in which pledges must be made, and imposes a penalty for a violation of its provisions, and creates a cause of action for damages in favor of the injured party, such penalty is not the exclusive remedy, but the contract of pledge must be treated as invalid. (Minn.) Swedish-American Nat. Bank v. First Nat. Bank, 549.

2. A PLEDGE of Property Situate in a Warehouse must be Restricted to the Identical Property Pledged, and if other property, though of like character, is subsequently substituted for it, the pledge is lost, unless some statute has changed the common-law rule. (Minn.) Swedish-American Nat. Bank v. First Nat. Bank, 549.

Conflict of Laws.

3. PLEDGE—Conflict of Laws.—The Parties to a Contract of Pledge will be Presumed to have had in View the Laws of the State where the property was situated, though the contract to secure which

the pledge was made is governed by the laws of another state. (Minn.) *Swedish-American Nat. Bank v. First Nat. Bank*, 549.

4. **CONFLICT OF LAWS**—Place of Contract of Pledge.—If a banker residing and doing business in Massachusetts, in response to a telegram from a corporation doing business in Minnesota, agrees to make a loan to be secured by grain on deposit in the warehouse of the borrowers in Minnesota and other western states, and thereupon a promissory note is executed and mailed, with the warehouse receipts representing the grain to the lender at Boston, and a draft drawn on him for the amount of the loan, the place of the contract of pledge is not in Massachusetts, though the note by its terms is payable in that state. (Minn.) *Swedish-American Nat. Bank v. First Nat. Bank*, 549.

5. **CONFLICT OF LAWS**.—The Validity of a Pledge of Property Situate in Another State must be determined by its laws, though made by a resident of this state, of which all the parties to the controversy are residents. (Minn.) *Swedish-American Nat. Bank v. First Nat. Bank*, 549.

See Assignment for Creditors, 5.

POLICE POWER.

See Constitutional Law, 5; Municipal Corporations.

PRACTICE.

See Constitutional Law, 8.

PRINCIPAL AND AGENT.

1. **AGENCY**—Tort of Agent—Indemnity from Principal—Pleading.—If plaintiff alleges that defendant appointed him as his agent to take certain goods and transport them to a particular place, which he did without knowing that his act constituted a tort, and acting in good faith on the defendant's representation that such taking was lawful and proper, and that thereafter a third person recovered judgment against him for such act of taking, which judgment he was compelled to pay, together with expenses of litigation, and that defendant refused to reimburse him upon demand, his complaint states a cause of action, and is not subject to general demurrer on the ground that indemnity cannot be recovered between joint tort-feasors. (Utah) *Hoggan v. Cahoon*, 837.

2. **AGENCY**—Tort of Agent—Indemnity from Principal.—If an agent acts in good faith for his principal under the latter's direction, relying upon his representations that the transaction is lawful, and it is not manifestly unlawful, the law implies indemnity from the principal to the agent, for damages of third persons, and if, as the result of acts so performed, the agent is mulcted in damages, the principal must respond to the agent therefor, as well as for the necessary expenses incurred in resisting the claims of third persons who were injured in the transaction. (Utah) *Hoggan v. Cahoon*, 837.

3. **AGENCY**—Tort of Agent—Indemnity—Venue.—If a principal and agent reside in one county and the agent commits a tort in another county by there seizing property of a third person and bringing it into the county of the residence of his principal, under the latter's direction and acting on his representations and in good faith, such agent, in the event of being compelled to pay a judgment

recovered by such third person, is entitled to bring an action to recover indemnity from his principal in the county where both agent and principal reside, and where the main facts of such cause of action arose. (Utah) *Hoggan v. Cahoon*, 837.

PRINCIPAL AND SURETY.

1. SURETIES on Guardians' Bonds—Additional Bonds—Liability.—The execution of one or more new guardian bonds in addition to the old one is merely cumulative, affording additional protection and security to the infant, and the obligations of all the sureties in all the bonds are coequal and coextensive. (Ky.) *Abshire v. Rowe*, 302.

2. SURETIES on Guardians' Bonds—New Bond—Liability for Past Defalcation.—In the absence of a covenant of indemnity in a new and additional guardian's bond, the liability of all the sureties in both the old and new bonds for all past liability for the default of the guardian is coequal, as if they had executed one bond originally. (Ky.) *Abshire v. Rowe*, 302.

3. SURETIES on Guardians' Bonds—Liability in One Action.—If two or more bonds have been executed to a ward by his guardian, it is not necessary to sue the sureties separately upon their respective bonds for the default of the guardian, and they may all be joined in one and the same action. (Ky.) *Abshire v. Rowe*, 302.

See Appeal and Error, 4; Guaranty.

PRIVITY.

See Negligence.

PROBATE PROCEEDINGS.

See Executors and Administrators; Wills.

Note.

Probate Sales, subrogation in favor of purchasers at, 530.

PROCESS.

WITNESSES—Nonresident—Compelling Attendance of.—Neither a superior judge nor any other officer qualified to take depositions has jurisdiction to compel by attachment the attendance of a nonresident, who is outside the jurisdiction, for the purpose of having his deposition taken, although he has been served with subpoena while temporarily within the jurisdiction. (Wash.) *State v. Kennan*, 949.

See Insurance, 1, 2.

PUBLIC LANDS.

In General.

1. STATUTES—Construction.—The United States statute prohibiting officers, clerks, and employes in the general land office from purchasing public lands was not repealed by the statute subsequently adopted declaring public lands containing valuable mineral deposits open to purchase by citizens of the United States and those having declared their intention of becoming such. (Utah) *Lavagnino v. Uhlig*, 808.

2. DECISIONS of Land Department—Binding Effect of.—While the decisions of the United States land department on matters of

law are not binding upon the courts, they should not be overruled except when they are clearly erroneous. (Utah) Lavagnino v. Uhlig, 808.

3. **PUBLIC LANDS, Patent to, Effect of Issuing.**—The issuing of a United States patent for land as agricultural in character is a judgment of the tribunal having jurisdiction that such is the character of the land, which cannot afterward be collaterally attacked. (Cal.) Paterson v. Ogden, 31.

4. **PUBLIC LANDS—Patent, Reservation of Mineral Lands in.**—The words in an agricultural patent "subject to the right of the proprietor of a vein or lode to abstract or remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted" leaves the patentee subject only to the right of the proprietor of a vein or lode the top or apex of which lies outside of the lands patented, but which penetrates into such land in its dip or downward course, to abstract and remove his ore therefrom. It does not give any right to enter and mine on the surface of the patented land. (Cal.) Paterson v. Ogden, 31.

5. **PUBLIC LANDS, Quieting Title to.**—One who has made a homestead entry upon public lands, the title to which remains in the United States, and who has a mere inchoate right which may ripen into title when he complies with the requirements of law in respect to settlement, culture, and proof thereof within the time allowed, cannot maintain a suit to quiet his title against another claimant of the same lands. (Or.) Moore v. Halliday, 724.

Homesteads.

6. **HOMESTEADS—Death of Claimant Before Patent.**—If a homestead claimant upon public lands dies before patent issues, or before the right to demand a patent has accrued, the land does not become a part of his estate, nor subject to administration. Upon his death, all of his rights under the homestead entry cease, and his heirs become entitled to a patent, not as successors to his equitable interests, but because the law gives them a preference as new homesteaders, and allows them the benefit of the residence of their ancestor upon the land. (Wash.) Towner v. Rodegeb, 936.

7. **HOMESTEADS—Death of Homesteader—Rights of Heirs—Administration.**—Whatever rights survive the death of a homestead settler belong to his heirs and not to his estate, and if his heirs fail to exercise such rights, or if there are no heirs capable of exercising them, the land becomes again open for occupancy by any qualified homesteader. The administrator of the deceased homesteader, as such, succeeds to no rights in the homestead, because these are reserved to the heirs, nor is such administrator invested with any right to sell the property and improvements to pay debts simply because there are no heirs. (Wash.) Towner v. Rodegeb, 936.

8. **HOMESTEADS—Liability for Debts—Administration.**—Neither a homestead nor a homesteader's mere right to possession of unsurveyed public lands, together with his improvements thereon, can be made liable for debts contracted before patent issues, either under execution, or in case of his death, by process of administration. (Wash.) Towner v. Rodegeb, 936.

9. **PUBLIC LANDS—Homesteads—Administrator's Right to Sell Improvements and Right of Possession.**—If a homestead settler upon unsurveyed public lands dies without heirs who are citizens of the United States, his administrator cannot sell his improvements

and right of possession of the land for the purpose of paying debts and expenses of administration and vest in the purchaser the right to oust the then occupant of the land. (Wash.) *Towner v. Bodegeb*, 936.

PUBLIC OFFICERS.

See Officers.

QUIETING TITLE.

See Public Lands, 5.

RAILROADS.

1. RAILWAY MORTGAGE of After-acquired Property.—Property acquired by a railroad company adjacent to a depot, which it leases for a store, barber-shop, postoffice, and other purposes foreign to the operation of the road, does not pass under a prior mortgage given by the company covering property thereafter acquired for purposes connected with or appertaining to the railroad. (Ind. App.) *Chicago etc. Ry. Co. v. McGuire*, 249.

2. RAILWAY CORPORATIONS.—The Question of Negligence in the Location of a Railway can never become a question proper for submission to a jury. So many elements are to be considered in locating a railway as factors in its construction and operation that its permanent establishment must necessarily be left to its builders. (Or.) *Scott v. Astoria R. R. Co.*, 710.

3. NEGLIGENCE.—The Question to be Determined by the Jury in an Action Against a Railway Corporation to Recover for Injuries Claimed to be Due to Its Negligence is whether it exercised the degree of care that the law enjoins, which is measured by the extent of danger incident to the building and operating of its road on the line selected, and not by considering whether a safer location might not have been made elsewhere. (Or.) *Scott v. Astoria R. R. Co.*, 710.

See Carriers; Municipal Corporations, 2.

Note.

Railways, mortgage by, of after-acquired property, conflict between, and other liens, 253.

mortgage by, of after-acquired property, does not include lands not used in connection with the road, 255.

mortgage by, of after-acquired property, does not include lands subsequently granted by Congress, 259.

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mortgage by, of after-acquired property, includes subsequently constructed parts of the road, 257.

mortgage by, of after-acquired property, includes terminal facilities subsequently acquired, 255.

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 mortgage by, of after-acquired property, restrictions of, to property necessary for, or appurtenant to the road, 254.
 mortgage by, of after-acquired property, rolling stock subsequently acquired, 259.
 mortgage by, of after-acquired property, whether includes property acquired by consolidation with another road, 258.
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RECORDERS.

See Limitation of Actions, 3.

REDEMPTION.

See Executions.

REFORMATION OF INSTRUMENTS.

See Husband and Wife, 8.

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See Judgment, 15.

Note.

Replevin Bonds, subrogation in favor of sureties on, 508.

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See Contracts, 2.

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See Domicile.

RES JUDICATA.

See Judgments, 6-16.

Note.

Restaurant-keepers, liability of, for goods of guests, is not that of innkeepers, 601.
 liability of, for goods of guests, when maintainable, 601.

REWARDS.

1. **REWARDS**—Definition.—A reward is a recompense or a premium offered by the government or an individual in return for special or extraordinary services to be performed and may be offered in writing or orally, either to a particular person or class of persons, or to any and all persons complying with the terms of the offer. (Wis.) *Kinn v. First Nat. Bank*, 1012.

2. REWARDS—Arrest and Conviction—Right of Claimant.—An offer of a reward for the arrest and conviction of an unknown perpetrator of a crime cannot be taken literally, but the conditions thereof are substantially performed by a person who obtains possession of the facts necessary to secure the arrest and conviction, and gives them to some proper person interested, although he does not himself make the arrest, but this and the prosecution are made by the proper officers. (Wis.) *Kinn v. First Nat. Bank*, 1012.

3. REWARDS—Right of Peace Officer to.—Police and other officers may recover the reward offered when the information furnished or the service performed was extraofficial, but cannot recover for an act within the scope of the duties of their offices. (Wis.) *Kinn v. First Nat. Bank*, 1012.

4. REWARDS—Right of Officer to.—A sheriff or chief of police acting in reliance upon a general offer of a reward for the capture of a criminal is entitled to the reward if he succeeds in making the capture, having no process in his hands, and is not required by law to make such capture without process. (Wis.), *Kinn v. First Nat. Bank*, 1012.

RIPARIAN RIGHTS.

See Waters and Watercourses.

ROBBERY.

ROBBERY.—Snatching or Jerking a Pocketbook from the hand of another so quickly that the latter has no chance to actively resist constitutes a taking by force or violence, and authorizes a conviction of robbery against the taker. (Ky.) *Jones v. Commonwealth*, 380.

SALES.

1. SALE—Delivery and Acceptance.—If There is Evidence tending to show that a purchaser refused to accept lumber because unsatisfactory in quality, and merely permitted it to be put in his yard for the mutual convenience of the parties, an instruction to the jury to find an acceptance, without informing them what facts amount to an acceptance, is faulty. (Md.) *Courtney v. William Knabe & Co. Mfg. Co.*, 456.

2. COMMERCIAL AGENCY.—False Representations to a commercial agency are admissible in evidence to show, in connection with other representations, fraud in the purchase of merchandise on the part of the buyer, of such a character that the seller may avoid the transaction. (Md.) *Courtney v. William Knabe & Co. Mfg. Co.*, 456.

SERVICE OF PROCESS.

See Process.

SETOFF AND COUNTERCLAIM.

1. JUDGMENTS—Setoff—Equity.—The setoff of one judgment against another is not a legal right, but is allowed by courts under their inherent powers in the administration of justice, and is governed by the principles of equity. (Pa. St.) *Leitz v. Hohman*, 791.

2. JUDGMENTS—Setoff of.—If judgments are both founded on contract, *prima facie*, the setoff of one against the other should be allowed, and the same presumption should prevail where one or both judgments may be in tort, but of a kind, such as damage from negligence, which does not involve the element of willful injury,

but if one judgment is in contract, and the other in tort, which implies intent to injure, the presumption is against a setoff, and the person asking for it, especially if the tort-feasor, must show some equity in its favor. (Pa. St.) *Leitz v. Hohman*, 791.

3. **JUDGMENTS—Setoff of.**—If two judgments are in contract, or two judgments are in tort, the element of priority in time is generally of importance on the question of setoff, but each case is to be determined on its own circumstances and merits viewed by the eyes of a chancellor in equity. (Pa. St.) *Leitz v. Hohman*, 791.

4. **JUDGMENTS—Setoff of—Practice on Appeal.**—The decision of a lower court refusing to set off one judgment against another, may be reviewed on appeal, and such an appeal brings up the whole case for consideration on its merits. (Pa. St.) *Leitz v. Hohman*, 791.

5. **JUDGMENTS—Setoff of.**—A judgment for slander cannot be set off against a former judgment in contract, unless there is some equity which demands it. (Pa. St.) *Leitz v. Hohman*, 791.

Note.

Sheriffs, subrogation in favor of, on payment of judgment or execution, 505, 506.

SIGNAL SERVICE RECORDS.

See Evidence, 5, 6.

SLEEPING-CAR COMPANY.

See Carriers, 1.

SPECIAL LEGISLATION.

See Constitutional Law.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE—Willingness to Perform—Burden of Proof.**—A complainant in a proceeding for specific performance must prove that he has been willing and ready to perform, and the burden is upon him to show a full and complete performance, or offer to perform on his part. (Ill.) *Forthman v. Deters*, 145.

2. **SPECIFIC PERFORMANCE of Contract to Convey Land—Purchaser with Notice.**—If a vendor, after entering into a contract to convey land, conveys it to a third person who has knowledge or notice of such prior contract, the latter may be compelled by the first vendee to specifically perform the contract by conveying the land in the same manner as his vendor should have done, for whom he is deemed the trustee. (Ill.) *Forthman v. Deters*, 145.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

• **STATUTES.**

1. **STATUTES—Construction.**—If Congress adopts a statute in apparent conflict with a former statute not in terms expressly repealed, it is presumed that Congress was aware of the existence of the prior act, and intended that it should remain in full force. (Utah) *Lavagnino v. Uhlig*, 808.

2. **STATUTES, Title of, Subject of, Doubts as to Whether It is Sufficiently Expressed.**—A court will not declare that a statute is obnoxious to the constitutional requirement that it shall embrace but one subject, which shall be expressed in its title, if the question is a doubtful one. (Fla.) *Florida etc. Ry. Co. v. Hazel*, 114.

3. **STATUTES, Title of, When Sufficient to Include a Penalty.**—A statute entitled "An act requiring railroad companies to fence their tracks, and providing remedies against them for failure to do so," may include a provision in the way of a penalty, as by creating a liability for double damages and for attorneys' fees (Fla.) *Florida etc. Ry. Co. v. Hazel*, 114.

4. **STATUTES—Repeals by Implication are not Favored.**—In order that a court may declare that one statute repeals another by implication, it must appear that there is a positive repugnancy between the two, or that the last was clearly intended to prescribe the only rule that should govern the cases provided for, or that it revises the subject matter of the former. (Fla.) *Florida etc. Ry. Co. v. Hazel*, 114.

5. **STATUTES, Repeal of by Implication, When does not Take Place.**—A statute requiring railroad companies to fence their tracks and regulating their liability for stock killed, because of their not doing so, is not repealed by a subsequent act to force railroads and other companies to postmarks, brands, color and sex of livestock killed or injured by their engines and cars, and providing for their payment for such stock. (Fla.) *Florida etc. Ry. Co. v. Hazel*, 114.

See Constitutional Law.

STIPULATIONS.

STIPULATIONS—Construction.—A stipulation that within forty days appellant may make application for additional findings, file and serve notice of intention to move for a new trial, and file and serve statement on motion therefor, allows performance of any of the acts mentioned within the forty days, notwithstanding the statute provides that the statement on motion for a new trial must be filed within five days after notice of intention to move therefor. (Nev.) *Walsh v. Wallace*, 692.

STOCK AND STOCKHOLDERS.

See Corporations.

STREET RAILWAYS.

1. **STREET RAILWAY—Time Limit of Transfer.**—If the time within which a transfer may be used expires through the failure of the railway company to run cars frequently enough, that fact does not make the transfer good, and a passenger presenting it may lawfully be ejected from the car if he refuses to pay another fare. (Md.) *Garrison v. United Railways etc. Co.*, 452.

2. **STREET RAILWAYS—Expelling Passenger After He Tenders Fare.**—When a conductor has given a passenger a reasonable oppor-

tunity to pay his fare, which he persistently refuses to do, and has begun to expel him, the expulsion may be completed, although he thereafter tenders his fare. (Md.) *Garrison v. United Railways etc. Co.*, 452.

STREETS.

See Dedication.

SUBROGATION.

1. **SUBROGATION.**—If a Surety Pays the Debt of his principal, his right to subrogate is not restricted to the rights and remedies to which the creditor was entitled against the principal, but extends to his rights and remedies against other persons who were liable for the debt paid. (Md.) *American Bonding Co. v. National Mechanics' Bank*, 466.

2. **SUBROGATION.**—If an Officer Deposits Public Funds with a bank, and the bank, with knowledge of the ownership of the money, pays interest thereon to the officer individually, and the state holds the surety of the officer liable for the diverted interest, the surety is entitled to be subrogated to the rights of the state against the bank, and the custom of banks to make such payments is no defense. (Md.) *American Bonding Co. v. National Mechanics' Bank*, 466.

3. **SUBROGATION—Exemption of Statute of Limitations.**—A surety of a public officer who has paid the state its claim against his principal, is entitled to the benefit of every right, lien and security which existed in favor of the state in reference to the claim, including the state's exemption from the statute of limitations. (Md.) *American Bonding Co. v. National Mechanics' Bank*, 466.

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TAXATION.

1. TAXATION for Private Purpose.—The legislature has no power to compel, or to authorize, a county or other municipality to raise money by taxation to be paid to private persons for a purely private purpose. (Wis.) *State v. Froehlich*, 985.

2. TAXATION for Private Purpose.—The legislature cannot create a public debt or levy a tax, or authorize a municipality to do so, in, order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of the citizen and give it to an individual, the public welfare being in no way connected with the transaction. The object for which money is raised by taxation must be public, and must subserve the common interest and well-being of the community required to contribute. (Wis.) *State v. Froehlich*, 985.

3. TAXATION—Constitutional Law.—A constitutional provision declaring that the legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year, is intended to limit the annual tax to an amount sufficient to defray such expenses, but does not authorize the levy of a tax to pay a purely private claim, nor authorize its payment out of public funds raised by taxation. (Wis.) *State v. Froehlich*, 985.

4. INHERITANCE TAXES—Property Conveyed in Lifetime, when Subject to.—If real property is conveyed with a parol agreement or understanding that the grantor shall retain the right of possession and enjoyment of the whole or some part thereof during his life, it is, after his death, subject to the inheritance tax to the extent of the part so retained. (Ill.) *People v. Moir*, 205.

5. INHERITANCE TAXES on Lands Placed by the Grantor in a Partnership.—If a father and his sons form a partnership and on the same day he conveys real property to them, the income from which is ever afterward during his life carried to the partnership account, such lands, after his death, are subject to the inheritance taxes to the extent of his interest or share in such partnership. (Ill.) *People v. Moir*, 205.

TELEPHONE COMMUNICATION.

See Evidence, 7, 8.

TENANTS IN COMMON.

1. **COTENANTS, Statute, When Applies Between.**—A statute declaring that when lands have been conveyed by the state for the nonpayment of taxes, and the grantee or his successors in interest have paid taxes for twenty years subsequently to the recording of the tax deeds, and have held such exclusive, adverse and continuous possession as comported with the ordinary management of wild lands, no action shall be maintained by any former owner to recover such lands, provided, however, that the statute shall not apply to actions between cotenants, such proviso must be held to apply only as to persons who claim as tenants in common, and not to those who claim as exclusive owners. (Me.) *Soper v. Lawrence Brothers Co.*, 397.

2. **ONE TENANT IN COMMON may Disseise Another.** (Me.) *Soper v. Lawrence Brothers Co.*, 397.

3. **ADVERSE POSSESSION by a Cotenant.**—A Grantee in a Warranty Deed purporting to convey an estate in severalty is not presumed to be a tenant in common, but a tenant in severalty, and if he holds exclusive possession claiming in severalty, his possession is adverse to other persons who are tenants in common with his grantor. (Me.) *Soper v. Lawrence Brothers Co.*, 397.

TITLE OF STATUTE

See Statutes, 2, 3.

TRADE UNIONS.

1. **TRADE UNIONS—Rights and Liabilities.**—Trade unions may cease to work for reasons satisfactory to their members, but if they combine to prevent others from obtaining work, by threats of a strike, or combine to prevent an employer from employing others by threats of a strike, they combine to accomplish an unlawful purpose, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the indefeasible right of labor to acquire property which courts are bound to restrain. If such combination is in accord with the law of trade unions, then that law and the organic law of the people cannot stand together, and the former must fall. (Pa. St.) *Erdman v. Mitchell*, 785.

2. **CONSPIRACY—Trade Unions—Injunction.**—An agreement by a number of persons that they will, by threats of a strike, deprive a mechanic of the right to work for others, merely because he does not choose to join a particular trade union, is a conspiracy to do an unlawful act which may be restrained by injunction. (Pa. St.) *Erdman v. Mitchell*, 783.

3. **CONSPIRACY by Trade Unions.**—A conspiracy is a combination by two or more persons by some concerted action to accomplish an unlawful purpose, and may consist in a combination of two or more trade unions to deprive a mechanic or workman of work by force, threats, or intimidation of any kind. (Pa. St.) *Erdman v. Mitchell*, 783.

TRANSFER TICKETS.

See Street Railways.

TRESPASS.

1. **TRESPASS**—Questions Involved in Actions of.—A plea of *liberum tenementum* is proper in an action of trespass *quare clausum fregit*, and it admits such possession in the plaintiff as would enable him to maintain an action against a wrongdoer, and asserts a freehold in the defendant with a right to the immediate possession as against the plaintiff. (Ill.) *Herschbach v. Cohen*, 233.

2. **TRESPASS**—Pleadings in Action of, When Tender an Issue of Title.—An allegation in a complaint that the defendant destroyed timber growing upon certain lands of the plaintiff amounts to an averment that the plaintiff is the owner of such lands. (Ill.) *Herschbach v. Cohen*, 233.

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TRIAL.

1. **TRIAL**—Instructions.—It is not error to refuse instructions if there is no evidence before the jury making them applicable, even though they contain correct statements of the principles of the law. (Nev.) *State v. Douglas*, 688.

2. **TRIAL**—Instructions not Embodied in the bill of exceptions are no part of the record and cannot be considered on appeal. (Nev.) *State v. Douglas*, 688.

3. **TRIAL**—An Exception to the Charge is Sufficient when it distinctly points out the particular parts to which it is directed, as where counsel, at the conclusion of the charge, quotes from it the language complained of. (Or.) *Scott v. Astoria R. R. Co.*, 710.

4. **JURY TRIAL**—Instructions, Error in One, When not Cured by the Whole Charge.—Though the court in an action against a railway corporation, in its charge as a whole, correctly informs the jury of the degree of care required of the defendant, yet if in one of the instructions it assumes that negligence can be predicated upon the defendant's original location of its road, and this assumption is not maintainable, as a legal proposition, such instruction may mislead the jury, and therefore warrants a reversal. (Or.) *Scott v. Astoria R. R. Co.*, 710.

5. **JURY TRIAL**—In Construing Language Employed by Courts in Jury Trials a liberal policy should be pursued. In construing a single instruction, the entire charge must be viewed, and, unless it appears that the jury were, or might have been, misled, mere verbal inaccuracies are not sufficient to justify a reversal. (Or.) *Scott v. Astoria R. R. Co.*, 710.

TRUSTS.

1. **TRUSTS AND TRUSTEES**—Trust Deeds—Duty of Trustee in Making Sale.—A trustee in a deed of trust is the agent of both parties and must sell the property to the best possible advantage. He may, and ought, of his own motion, to apply to a court of equity to remove impediments to a fair execution of his trust, to remove any cloud to the title, and to adjust accounts, if necessary, in order to

ascertain the actual debt which ought to be raised, by the sale, or the amount of prior encumbrances, and he may delay the sale for such purpose. If he fails to do this, any interested party injured by his default may apply to equity to have such steps taken as should have been taken by the trustee. (Va.) *Hudson v. Barham*, 849.

2. TRUSTS AND TRUSTEES—Sales Under Deeds of Trust—Duty of Trustee.—It is not the duty of a trustee under a deed of trust in every case to invoke the aid of a court of equity before making sale of the trust estate, simply because there are liens thereon. Such duty devolves upon him only when such aid is necessary to remove some impediment to a fair execution of the trust. (Va.) *Hudson v. Barham*, 849.

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UNIONS.

See Trade Unions.

VENDOR AND VENDEE.

1. VENDOR AND PURCHASER—Protection Against Unknown Equities.—A bona fide purchaser of the legal estate is protected against a prior equitable title of which he has no notice. (Ill.) *Home Savings etc. Bank v. Peoria Agricultural and Trotting Soc.*, 132.

2. CONTRACTS Under Seal to Convey Land are presumed to have been made upon a sufficient consideration. (Ill.) *Forthman v. Deters*, 145.

3. CONTRACTS—Implied Assent—Lack of Mutuality.—A contract for the sale of land signed by the vendor, reciting that he has sold the land described therein to the vendee, accepted and adopted by the latter, does not lack mutuality, though not signed by him. (Ill.), *Forthman v. Deters*, 145.

4. CONTRACT to Convey Land—Title Free from Encumbrance. A contract by a widow to convey the land of her deceased husband to give a "good deed free from all encumbrance" imposes upon her the duty of discharging any liability of the land for the payment of claims allowed against the decedent's estate. (Ill.) *Forthman v. Deters*, 145.

5. FRAUD, Concealment of Willingness to Sell Property at a Low Price.—If a vendor makes an oral and nonenforceable contract for the sale of real property which he declares his unwillingness to perform, he is under no obligation to disclose to the vendee the subsequent formation of a purpose to abide by such contract, and is not guilty of fraudulent concealment in entering into a new contract with his vendee for a greater price without disclosing such change of purpose. (Me.) *Morrow v. Moore*, 410.

6. STATUTE OF FRAUDS.—Deed Signed but not Delivered.—An oral contract for the sale of lands is not taken out of the statute of frauds as to the vendor by his signing and acknowledging a conveyance pursuant thereto and placing it in the hands of his attorney, if it remains within the grantor's control. (Me.) *Morrow v. Moore*, 410.

See Crops.

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VENUE.

See False Pretenses; Jurisdiction.

VICE-PRINCIPAL.

See Master and Servant, 8.

WAREHOUSEMEN.

1. **A WAREHOUSEMAN** may not Issue a Receipt for His Own Grain as Security for the payment of his debts, unless expressly authorized to do so by statute. (Minn.) Swedish-American Nat. Bank v. First Nat. Bank, 549.

2. **WAREHOUSE RECEIPTS**, When not Void for Indefiniteness.—A warehouse receipt covering grain 'in our system of elevators,' without designating the particular elevators, is valid as to the kinds of grain specified therein stored in elevators in this state, and is not so uncertain as to be void. (Minn.) Swedish-American Nat. Bank v. First Nat. Bank, 549.

3. **CONFLICT OF LAWS—Warehouse Receipts, Validity of.**—A warehouse receipt issued in Minnesota for grain situate in that and other states must, as to the grain in other states, be controlled by their laws, and validity to it cannot be given by the statute of Minnesota, were it is invalid by the laws of the states where the grain is. (Minn.) Swedish-American Nat. Bank v. First Nat. Bank, 549.

See Pledge, 2-5.

WASTE.

1. **WASTE.**—A Mortgagee Ordinarily Has the Right to Restrain the commission of waste if it impairs his security, and it is impaired by acts which render the security insufficient for the satisfaction of the debt or of doubtful sufficiency. (Or.) Beaver Lumber Co. v. Eccles, 759.

2. **WASTE—Removal of Standing Timber from Mortgaged Premises.**—Where a mortgage is given of timber lands, they being of little or no value after its removal, the mortgagor is guilty of waste if he removes as much as one-tenth thereof in one year, and will, by injunction, be prevented from so doing until the debt is paid. (Or.) Beaver Lumber Co. v. Eccles, 759.

3. **WASTE, When Renders Security of Doubtful Sufficiency.**—Where timber land purchased for forty-seven thousand five hundred dollars is subject to a lien for five thousand dollars, and to a mortgage for thirty thousand dollars, an injunction against the cutting off of timber by the mortgagor of one-tenth per year may properly be awarded, on the ground that it will render the security of doubtful sufficiency. (Or.) Beaver Lumber Co. v. Eccles, 759.

4. **WASTE—Mortgagee Acquires no Right to Commit by Placing Improvements on Property, nor by Giving a Bond of Indemnity.**—The fact that the owner of timber lands, who has mortgaged them, subsequently makes large outlays to remove the timber and man-

ufacture it into lumber does not give him any right to remove such timber, if thereby the security will be rendered of doubtful sufficiency, nor to compel the mortgagee to permit such removal on receiving a bond to pay all damages which may result to him therefrom. (Or.) *Beaver Lumber Co. v. Eccles*, 759.

WATERS AND WATERCOURSES.

In General.

1. **RIPARIAN RIGHTS.**—The Doctrine of Riparian rights does not prevail in Nevada. (Nev.) *Walsh v. Wallace*, 692.

2. **WATER**—Appropriation of.—To constitute a valid appropriation of water there must be an actual diversion thereof, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time. (Nev.) *Walsh v. Wallace*, 692.

3. **WATERS**—Appropriation—Cutting Grass—Grazing Land.—A settlement upon land along a river, having it surveyed, or marking its boundaries and cutting wild grass therefrom, produced by the overflow of such river, and grazing the land, does not constitute an appropriation of any part of the water of the river. (Nev.) *Walsh v. Wallace*, 692.

Percolating Waters.

See Injunctions, 4-6.

4. **WATERS**, Percolating, Limitations upon Right to.—There is no reason why the maxim, "So use your property as not to injure another," should not be applied in a proper case to percolating waters. (Minn.) *Stillwater Water Co. v. Farmer*, 541.

5. **WATERS**, Percolating Right to Waste.—Except for the improvement of his own premises or for his own beneficial use, the owner of land has no right to draw, collect or divert percolating waters thereon, when such acts may destroy or materially injure the spring of another, the waters of which are used by the general public for domestic purposes. The land owner must not divert and waste percolating waters which may be appropriated by his neighbors for the general welfare of the public. (Minn.) *Stillwater Water Co. v. Farmer*, 541.

6. **WATER**, Percolating, Appropriation of.—The principles which in California, before the adoption of its Civil Code, applied to protect appropriation and possessory rights in visible streams will, in general, be applicable to the appropriation of percolating water either for public or private use on distant lands, and will suffice for the protection of such waters against other appropriators; and in ordinary cases of this character the law of prescriptive titles and rights and the statute of limitations will apply. (Cal.) *Katz v. Walkinshaw*, 35.

7. **WATER**, Percolating, Prior Right of Land Owner.—In a controversy between an appropriator of percolating waters for use on distant lands and those who own the land overlying the water-bearing strata, those who have used the water on their land before the attempt to appropriate it have rights paramount to the rights of such appropriator, but the land owner's right extends only to the quantity of water necessary for use on his land, and the appropriator may take the surplus. (Cal.) *Katz v. Walkinshaw*, 35.

8. **WATER**, Difficulty of Apportioning.—The difficulty of apportioning an insufficient supply of water in extreme cases will not deter the court from declaring the rule that it believes to be the

only just one for protecting the rights of land owners in percolating waters. (Cal.) *Katz v. Walkinshaw*, 35.

9. **PERCOLATING WATER, Right of Land Owner to Divert for Use or Sale Elsewhere.**—A land owner in an artesian belt of percolating waters has no right to sink wells on his land and draw off such waters from the land of his neighbors for sale or use elsewhere, if thereby like wells on their lands are made to cease their flow, and their growing trees, vines and other plants are caused to perish. (Cal.) *Katz v. Walkinshaw*, 35.

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WILLS.

In General.

1. **WILL OR ASSIGNMENT.**—A writing that for services rendered the writer leaves Mrs. McC. the balance of an account with a designated savings bank is not a will but an assignment of the moneys represented by the account. (Cal.) *McCloskey v. Tierney*, 33.

2. **A WILL Takes Effect at the Death of the Testator.** (Ill.) *Rudolph v. Rudolph*, 211.

3. **WILLS are Presumed to be Made in View of Statutes then Existing and with the intent that such statutes shall prevail.** (Ill.) *Rudolph v. Rudolph*, 211.

4. **WILLS, Who Participate in.**—Where a devise is to a class, those remaining alive at the death of the testator are ordinarily entitled to take. (Ill.) *Rudolph v. Rudolph*, 211.

5. **WILLS—Devise to Children, when Includes Children of a Deceased Child.**—Though a testator devises his property to his children as a class without naming any of them, and one dies before the testator, leaving children, such children take his share of the estate, if there is a statute providing that whenever a devisee or legatee, being a child or grandchild of the testator, dies before him, and no provision is made for such a contingency, the issue, if any there be of such child or legatee, shall take the estate such devisee or legatee would have done had he survived the testator. (Ill.) *Rudolph v. Rudolph*, 211.

Agreement to Make.

6. **WILLS, Agreements to Make.**—A Party may Obligate Himself to make his will in a particular way or to give specified property to a particular person, so as to bind his estate. (Minn.) *Stellmacher v. Bruder*, 609.

7. **WILLS, Agreements to Make—Scrutiny of by the Courts.**—Courts will be strict in looking into the circumstances of agreements to make wills and require full and satisfactory proof of the fairness and justness of the transaction. (Minn.) *Stellmacher v. Bruder*, 609.

8. **WILLS, Agreements to Make, Remedies for Enforcement of.**—The remedy for the breach of a contract to make a will depends on the circumstances of each particular case. If the contract is an oral one to devise land and is reasonably certain, equity will decree a specific performance if there has been such a part performance as will take a parol agreement to convey land out of the statute of frauds. (Minn.) *Stellmacher v. Bruder*, 609.

9. **WILLS, Agreements to Make, When will not be Enforced.**—If the consideration of a contract to make a will is labor and services which may be estimated and their value liquidated in money, so as to reasonably make the promisee whole, specific performance will not be decreed. (Minn.) *Stellmacher v. Bruder*, 609.

10. **WILLS, Agreements to Make, When will be Specifically Enforced.**—If the consideration to make a will is that the promisee shall assume a peculiar and distinct relation to the promisor and render certain services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed. (Minn.) *Stellmacher v. Bruder*, 609.

11. **WILLS.**—An Agreement to Make a Will will not be Enforced when the consideration consisted of board and services already furnished and rendered, a promise to furnish board, room and washing, and to care for the wants of the promisor for the remainder of his life, because the other party to the agreement may be compensated in money. (Minn.) *Stellmacher v. Bruder*, 609.

Suits to Construe.

12. **WILLS.**—A Suit to Construe a Will cannot be Entertained on the ground that a guardian has sold the estate of his ward who claimed under the will, but the sale is void and the guardian does not know what to do with the money received from the purchasers under his attempted sale. If threatened with conflicting suits, he may bring a bill of interpleader against the conflicting claimants. (Me.) *Burroughs v. Cutter*, 392.

13. **WILLS, Suits to Construe.**—If a suit to construe a will has been maintained and the estates of the devisees sufficiently defined for their guidance and that of the administrator, a subsequent suit cannot be sustained for the determination of questions arising between the heirs or representatives and the grantees of a deceased devisee. (Me.) *Burroughs v. Cutter*, 392.

Delay in Probating.

14. **WILLS—Delay in Probating—Estoppel Against Devisee.**—If a will is not probated for several years after the death of the testator, because of the ignorance of the interested parties of its existence, and an only heir has taken possession of the testator's estate and executed a mortgage thereon, the devisee named in the will

is not estopped to claim and take the land as against such mortgagee. (Ky.) Reid's Administrator v. Bengé, 334.

15. **WILLS—Limitations.**—A will may be probated at any time within ten years after the death of the testator, under the Kentucky statute. (Ky.) Reid's Administrator v. Bengé, 334.

16. **WILLS—Vesting of Estate Under—Delay in Probating.**—The estate of a devisee under a will vests at the time of the testator's death, although the will is not probated until seven years thereafter, and to divest such title there must be either conveyance, prescription or estoppel. (Ky.) Reid's Administrator v. Bengé, 334.

17. **WILLS—Estoppel Against Devisee.**—The act of a testator in not disclosing to some person the place where his will could be found, thus causing a long delay in having it probated after his death, does not create an estoppel against his devisee. (Ky.) Reid's Administrator v. Bengé, 334.

WITNESSES.

1. **WITNESSES—Husband and Wife.**—The rule that neither husband nor wife can testify for or against the other is confined to cases where the testimony, if given, would be by one directly for or against the other, such other being a party to the litigation. (Wis.) State v. West, 1002.

2. **WITNESSES—Husband and Wife—Adultery.**—If a person is separately charged with adultery committed jointly by him with another's wife, the husband of the latter is competent to testify as to his marriage, and generally as regards the alleged offense. (Wis.) State v. West, 1002.

See Evidence; Process.

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